

16-787
TAX TYPE: INCOME TAX
TAX YEAR: 2012
DATE SIGNED: 4/10/2017
COMMISSIONERS: J. VALENTINE, R. PERO, R. ROCKWELL
EXCUSED: M. CRAGUN

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 16-787 Account No. ##### Tax Type: Income Tax Tax Year: 2012 Judge: Phan
---	---

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on February 13, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) are appealing a Utah individual income tax audit deficiency under Utah Code §59-1-501 for tax year 2012. Respondent (“Division”) had issued the Notice of Deficiency and Audit Change on April 15, 2016, on the basis that the Taxpayers were full year Utah resident individuals for income tax purposes. It was the Taxpayers’ position that they were part-year Utah residents in 2012 and did not move back to Utah until June of 2012. The Taxpayers had filed a Utah part-year individual income tax return for 2012. The amount due as of the date the Notice of Deficiency was issued is as follows:

	<u>Tax</u>	<u>Interest</u> ¹	<u>Penalties</u>	<u>Total as of Notice Date</u>
2012	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Subsection 59-10-104(1) as follows:

. . . . a tax is imposed on the state taxable income of a resident individual as provided in this section

Resident individual is defined in Utah Code Subsection 59-10-103(1)(q) as follows:

(q)(i) "Resident individual" means:

(A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or

(B) an individual who is not domiciled in this state but: (I) maintains a place of abode in this state; and (II) spends in the aggregate 183 or more days of the taxable year in this state.

Beginning with the 2012 tax year, a new law was adopted regarding the factors to be considered for determining when someone was domiciled in Utah. This provision is at Utah Code §59-10-136, as set forth below:

- (1) (a) An individual is considered to have domicile in this state if:
 - (i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
 - (ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.
- (b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:
 - (i) is the noncustodial parent of a dependent:
 - (A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and
 - (B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and
 - (ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).
- (2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
 - (a) the individual or the individual's spouse claims a residential exemption in

¹ Interest continues to accrue on the unpaid balance until paid in full.

- accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;
- (b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or
 - (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.
- (3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:
- (i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
 - (ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
- (b) The determination of whether an individual is considered to have domicile in this State under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:
- (i) whether the individual or the individual's spouse has a driver license in this state;
 - (ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;
 - (iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;
 - (v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;
 - (vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
 - (vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
 - (viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
 - (ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;

- (x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
 - (xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or
 - (xii) whether the individual is an individual described in Subsection (1)(b).
- (4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
- (i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
 - (ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
 - (A) return to this state for more than 30 days in a calendar year;
 - (B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
 - (C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
 - (E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.
- (b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.
- (c) For purposes of Subsection (4)(a), an absence from the state:
- (i) begins on the later of the date:
 - (A) the individual leaves this state; or
 - (B) the individual's spouse leaves this state; and
 - (ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.
- (d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:
- (i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications

- of Subsection (4)(a) to not be considered to have domicile in this state; and
- (ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.
- (e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.
- (ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:
 - (A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and
 - (B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section [59-1-402](#), and any applicable penalty imposed under Section [59-1-401](#), except for a penalty under Subsection [59-1-401](#)(2), (3), or (5).
- (5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.
- (b) For purposes of this section, an individual is not considered to have a spouse if:
 - (i) the individual is legally separated or divorced from the spouse; or
 - (ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.
- (c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.
- (6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

The applicable statutes generally provide that the taxpayers bear the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . .

DISCUSSION

The Division based its audit on the assertion that the Taxpayers were Utah resident individuals for income tax purposes for all of 2012. The Taxpayers argue that they had moved

from Utah to STATE-1 in 2010 and lived in STATE-1 until June of 2012, when they returned to Utah. It was the Taxpayers' position that they were part-year Utah residents in 2012 and they had filed a Utah return in that manner, on which they claimed income earned after moving to Utah. The issue in this appeal is whether the Taxpayers were "resident individuals" in the state of Utah for the purposes of Utah Code Sec. 59-10-104 for all of 2012, or part year resident individuals. Under Utah Code Sec. 59-10-103, a resident individual is one who is "domiciled" in Utah, or if not "domiciled" in Utah, is one who maintains a place of abode in this state and spends in the aggregate 183 days or more per year in Utah. The Division argues that the Taxpayers were domiciled in Utah during all of 2012.

The Taxpayer explained at the hearing that he had been working for a Utah company and had lost his job in 2008. He was working as an independent contractor for a while in Utah before he had been offered a job in the STATE-1. He was in the business of corporate real estate and he knew that positions typically lasted two to three years with this new employer and after that, he could expect to be relocated to another office. He moved with his wife and one son who was still a minor to STATE-1. He stated they thought about selling their Utah residence when they moved but the market was declining at the time and they thought if they held onto the house, the value would increase. The Taxpayer also acknowledged at the hearing that they had kept the Utah residence because there was a chance they would move back. He stated they did move all of the furniture and household belongings from their Utah residence to a residence they rented in STATE-1. They had adult children living in Utah at this time and the adult children would check on the residence from time to time. At the hearing, the Taxpayer stated that they did not rent their Utah residence out to anyone while they lived in STATE-1, and they themselves did not stay in the residence even during visits back to Utah because there was no furniture in the residence.² Although he did not provide copies of a STATE-1 Driver License or Driver License record, he states that both he and his wife obtained driver licenses in that state. He said their son attended high school in the STATE-1. He also states they registered their vehicles in STATE-1 while they were there, but acknowledged there would have been some vehicles registered in Utah that were driven by their adult children who remained in Utah.

After about two years, as expected, his employer was looking to move him to a different office and CITY-1 looked like a possibility, but then the employer determined that the Taxpayer should open a Utah Office, which the employer did not have at the time. The Taxpayer ended up

² This was contradictory to a statement made previously when the appeal was filed. On the Form TC-738 the Taxpayer had written, "I rented my home at SUBJECT ADDRESS to a family member while living in STATE-1 on a work assignment."

being transferred back to Utah in June of 2012. They had to move all of their furniture and belongings back to Utah, but returned to the same residence they owned in this state.

During the time the Taxpayers lived in STATE-1, they had received the primary residential exemption on their Utah residence. The Taxpayer stated that he was unaware that they received this exemption or of any requirements regarding this exemption. It is unclear whether the Taxpayers registered to vote in STATE-1. The Division provided a Utah voting history for the Taxpayers which showed that TAXPAYER-1 had voted in Utah in the 2008 elections and then again in the November 6, 2012 election. Of course, the Taxpayers had returned to Utah prior to the November 2012 election. The voting history indicated that TAXPAYER-2 did not vote in any elections in Utah.

At the hearing the Taxpayer stated that now that the new law had been brought to his attention through the audit and appeal process, he understands what the law says, he just felt it was unfair to taxpayers in his situation who did not know about the law change.

In this appeal, the Division points to the law change which provides at Utah Code Subsection 59-10-136(2) that “there is a rebuttable presumption that an individual is considered to have domicile in this state if: (a) the individual or the individual’s spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for the individual’s or individual’s spouse’s primary residence . . .”³ Also in 2012, the Utah Individual Income Tax TC-40 Forms & Instructions were revised to reflect this change and the Form TC-40 revised to add a provision, Part 7, where a property owner was to check if they were no longer eligible to claim the residential exemption on their property. If the Taxpayers no longer considered their Utah residence to be their primary residence, they had the affirmative requirement to notify the county that they no longer qualified pursuant to Utah Code Subsection 59-2-103.5(5).

The Tax Commission has previously considered what factors would rebut the presumption set out at Utah Code Subsection 59-10-136(2)(a) in *Utah State Tax Commission, Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (September 21, 2015)*.⁴ In that case, the Commission concluded at page 9:

Utah Code Subsection 59-10-136(2)(a) indicates that although a presumption of domicile, it is a rebuttable one, but does not provide guidance on what factors should be considered to rebut this presumption. Utah Code Subsection 59-10-136(3) provides a list of common domicile factors based on the preponderance of the evidence, including things like where the taxpayer has his or her driver license, registers vehicles and the address used for tax returns among other

³ There is also a rebuttable presumption of residence in Utah if the individual or the individual's spouse is registered to vote in Utah under 59-10-136(2)(b).

⁴ This and other Tax Commission decisions are available for review in a redacted format at: tax.utah.gov/commission-office/decisions.

factors. However, Subsection 136(3)(a) specifically makes it clear these factors are applied only if the requirements of Subsections 136(1) or (2) are not met. In this appeal Subsection 59-10-136(2) has been met because the Taxpayers received the primary residential exemption on their Utah residence. Upon review of Subsections 136(2) and 136(3) it does not follow that the legislature intended that the way to rebut the presumption of Utah domicile set out in Subsection 59-10-136(2)(a) was by showing a preponderance of the factors listed in Subsection 136(3), because it would make Utah Code Subsection 59-10-136(2)(a) as its own separate factor irrelevant. In regards to statutory interpretation the court noted in *Ivory Homes, Ltd, v. Utah State Tax Comm'n*, 2011 UT 54, ¶ 21, ““We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.” However, “our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part of a section be construed in connection with every other part of section so as to produce a *harmonious whole*.”” (Emphasis in Original, Internal Citations Omitted.)

Therefore, having made the fact that a taxpayer receives a primary residential exemption on a Utah residence a rebuttable presumption separate from Subsection 59-10-136(3) indicates the intent was something more stringent than a preponderance of the evidence of the common domicile factors listed in Subsection 136(3). It follows that to rebut the presumption set out at Subsection 136(2)(a) a taxpayer would have to show something other than a preponderance of the domicile factors, for example that the taxpayer had taken the proper steps to notify the County that they no longer qualified for the exemption and the County then in error continued to leave the property in that status, or that there was a tenant in the property and the tenant used it as his or her primary residence, which would allow the property to qualify based on the tenant’s use.

In this case, the Taxpayer did not present information that would rebut the presumption based on receiving the primary residential exemption. At the hearing, the Taxpayer stated the property was not leased to a tenant and was vacant. The Taxpayer also had testified he was unaware of the primary residential exemption, of the change in law or that he should have asked the County to remove the exemption. This is not sufficient information to rebut the presumption under Utah Code Subsection 136(2)(a).

No penalties were assessed with the audit. There is no indication that the Taxpayers had acted to intentionally evade the tax, nor is there a basis for a negligence penalty. The Taxpayer stated he was not aware of the law change and the Division did not refute that assertion. However, ignorance of the law is not a basis to abate tax or to waive interest. As noted at Utah Administrative Rule R861-1A-42, for interest to be waived the taxpayer must prove “that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.” There was no showing of error on the part of the Tax Commission. The audit tax deficiency and interest should be upheld for tax year 2012.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission upholds the audit deficiency of tax and interest for tax year 2012. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

or emailed to:
taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2017.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.