16-792
TAX TYPE: INCOME TAX
TAX YEAR: 2012, 2013, 2014
DATE SIGNED: 8-16-2017
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 AND TAXPAYER-2, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 16-792 Account No. ##### Tax Type: Income Tax Tax Year: 2012, 2013 and 2014 Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYER, Representative
TAXPAYER-1
TAXPAYER-2
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 April 24, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners ("Taxpayers") had appealed Utah individual income tax audit deficiencies under Utah Code §59-1-501 for tax years 2012, 2013 and 2014. Respondent ("Division") had issued the Notices of Deficiency and Audit Change on April 14, 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 not Utah resident individuals. The Taxpayers had filed nonresident Utah returns for the years at issue on which they had claimed income they felt was sourced to Utah. No penalties were assessed with the audits. The amounts

of additional tax and interest due as of the date the Notices of Deficiency were issued are as follows:

	Tax	Interest[1]	Penalties	Total as of Notice Date
2012	$$$$$	$$$$$	$0	$$$$$
2013	$$$$$	$$$$$	$0	$$$$$
2014	$$$$$	$$$$$	$0	$$$$$

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 what constituted domicile in the state of Utah. This was a substantial change in law and one that governs all tax years at issue in this appeal. Utah Code §59-10-136 provides as follows:

> (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:

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

(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 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 through 2014. It was the Taxpayers position that they were residents of the FOREIGN COUNTRY and the Taxpayers had filed Utah returns as nonresident individuals with some Utah source income. 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. 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 both Taxpayers were domiciled in Utah during the audit years. At the hearing the Taxpayers argued that the Commission should weigh a totality of all the facts and that the weight would support that the Taxpayer, TAXPAYER-1, was not domiciled in Utah. The Taxpayers also argued that TAXPAYER-2 was only in Utah for special and temporary purposes. The bulk of the income earned at issue was from TAXPAYER-1's employment and his employment was primarily in the FOREIGN COUNTRY. Although a weighing of the totality of a number of factors was a consideration for tax years prior to 2012, the Utah Legislature adopted Utah Code Sec. 59-10-136, effective for tax year 2012, which specifically provides what constitutes being domiciled in Utah during the audit years.

The Division argues that both Taxpayers were domiciled in Utah under Utah Code Subsection 59-10-136(2). Utah Code Subsection 59-10-136(2) provides, "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" or "(b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration . . ." The Division also points to Utah Code Subsection 59-10-136(5) which provides that for spouses who file federal returns with the status of married filing jointly and who are not divorced or legally separated, if one spouse is domiciled in Utah, the other spouse is considered to be domiciled in Utah. Because TAXPAYER-1 & TAXPAYER-2 filed their federal returns with a status of married filing jointly and because they were not legally separated or

divorced during the tax years in question, they are considered to be spouses under Utah's domicile laws and if one is domiciled in Utah the other spouse is also domiciled in Utah.

The Taxpayers explained that they basically left Utah in 1984 and had been living out of Utah since that time. They had been living and working in STATE-1 from 1996 through 2001. In 2001, TAXPAYER-1 had an assignment in Italy. Although they were living and working in FORIEN COUNTRY-2 from 2001 through 2004, in 2001 they did purchase a residence in CITY-1, Utah, which they considered to be a vacation home. They had sold the home they left in STATE-1. TAXPAYER-2's mother resided in Utah and some of the couple's children were attending UNIVERSITY in Utah. They stated that this residence was near to recreational areas. After the assignment in FORIEN COUNTRY-2 they moved back to STATE-1 for a few years, then moved to STATE-2 from 2006 to 2009. Although they had bought and sold residential properties in these states as TAXPAYER-1 changed employment, they did retain their Utah residence from 2001 to the present. In 2009 the Taxpayers moved from STATE-2 to the FOREIGN COUNTRY for TAXPAYER-1's employment. They sold their STATE-2 residence. TAXPAYER-1's employment in the FOREIGN COUNTRY lasted from 2009 through 2016. In 2011 TAXPAYER-2 returned to Utah because her mother was elderly and needed assistance. TAXPAYER-2 moved her mother into the CITY-1, Utah residence and stayed with her to take care of her until her mother died in July of 2012. Later in 2012 the TAXTAPERS' son-in-law was diagnosed with leukemia. Their daughter and son-in-law had four young children and were living out of state. They determined it was better to move this family to Utah, into their CITY-1, Utah residence so their son-in-law could receive medical treatment in this state. This prolonged TAXPAYER-2's stay in Utah, so she could help with her young grandchildren during this situation. Their son-in-law died in September 2013, but TAXPAYER-2 felt that she needed to stay in Utah to help her daughter and the grandchildren through this difficult time. All the time that family members stayed in the Taxpayers' CITY-1 residence, the Taxpayers did not charge them rent and it did not appear that they could be considered tenants.[2]

TAXPAYER-2 registered to vote in Utah and did vote in person in Utah in elections in 2012, 2013 2014 and by mail in 2015. She also obtained a Utah Driver License in April 2012. For the tax years at issue, the Taxpayers received the primary residential property tax exemption on their residence in CITY-1 Utah. At the hearing, it was their position that they were not aware

[2] The Tax Commission did consider what constitutes being a "tenant" for purposes of Utah Code Sec. 59-10-136(6) in *Utah State Tax Commission Initial Hearing Order, Appeal No. 15-1063* (8/26/16). This and other Tax Commission decisions are published and available for review in a redacted format at tax.utah.gov/commission-office/decisions.

that they were even receiving this exemption, nor were they aware of the implications of receiving this exemption under the new tax law that became effective for tax year 2012.

While TAXPAYER-2 was staying in Utah, TAXPAYER-1 did spend some time in Utah as well. However, the Division does not dispute that most of TAXPAYER-1's time was spent in the FOREIGN COUNTRY where he had full time employment, an expensive residence which he leased, a car, and other contacts in that country. When in Utah TAXPAYER-1 did work remotely for his employment in the FOREIGN COUNTRY and he had claimed on his nonresident Utah returns the income he earned while in Utah. The Company he worked for was headquartered in STATE-3, so TAXPAYER-1 did frequently travel back and forth from the FOREIGN COUNTRY to the United States for meetings in STATE-3. He also attended board meetings and meetings with clients in STATE-4, STATE-5 and STATE-6. He had filed nonresident returns in STATE-4, STATE-5 and STATE-6 claiming the income he earned in these individual states.[3] Regarding returns, TAXPAYER-1 also filed returns and paid taxes to the FOREIGN COUNTRY. He received the government healthcare and became part of the government retirement system in the FOREIGN COUNTRY.

TAXPAYER-1 obtained a Utah Driver License in March 2012. He explained that a driver license issued by a state in the United States made it much more convenient to travel within the United States. Utah was the only state at this time where they owned a residence, so he had obtained a Utah Driver License and used his CITY-1, Utah property as the address for his license.

The Division argues that both Taxpayers are domiciled in Utah under the rebuttable presumptions for domicile at Utah Code Subsection 59-10-136(2). Utah Code Subsection 59-10-136(2)(a) provides that the individual is presumed domiciled in Utah if they or their spouse claims the residential exemption. The Taxpayers received the primary residential exemption on their Utah residence. TAXPAYER-2 also was registered to vote in Utah, so under Subsection 59-10-136(2)(b) both TAXPAYER-1 and TAXPAYER-2 are presumed to have domicile in Utah. These are rebuttable presumptions. The Tax Commission has previously considered what factors would rebut this presumption 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:

[3] The Division's representative stated that the Division had given the Taxpayers credit for the taxes paid in these other states.

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

> 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.

The Taxpayers asserted in this hearing that they were unaware of the implications of receiving this exemption or even that they were receiving it on their Utah residence. In 2012 and going forward the 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). In prior decisions other taxpayers have argued that they did not have knowledge of the receipt of this exemption or the implications to domicile for receiving this exemption and the Tax Commission has concluded that ignorance of the law is not sufficient to rebut the presumption of domicile under Utah Code Sec. 59-10-136(2).[5]

Additionally, under Utah Code Subsection 59-10-136(2)(b) both Taxpayers are presumed to have domicile in Utah because TAXPAYER-2 was registered to vote in Utah. The Taxpayers offered nothing to rebut this presumption. Similar to the analysis above regarding the primary residence property tax exemption, a weighing of general factors set out in Utah Code 59-10-136(3) is not sufficient to rebut this presumption. TAXPAYER-2 was both registered in Utah and voted in Utah. She did not show that she had tried to unregister or had registered in another state. TAXPAYER-2 actually lived at their residence in Utah during all of the audit years at issue and the family members who stayed with her during this time period were not tenanats. The Taxpayers have failed to rebut the presumptions set out in Utah Code Subsections 59-10-136(2)(a)&(b) and therefore are found to have domicile in Utah. This makes them Utah resident individuals subject to tax on all of their income, consistent with the Division's audit.

[5] See *Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30* (9/2/2015); and *Initial Hearing Order, Appeal No. 16-117*(1/18/17).

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's audit deficiencies of additional Utah individual income tax and the interest accrued thereon for tax years 2012 through 2014. 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.