

17-237
TAX TYPE: INCOME TAX
TAX YEAR: 2013, 2014
DATE SIGNED: 9/18/2017
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL
EXCUSED: R. PERO

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 AND TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 17-237 Account No. #### Tax Type: Income Tax Tax Years: 2013 and 2014 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1
For Respondent: RESPONDENT, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on May 9, 2017, for a Telephonic Status Conference. During the conference call, Petitioner (“Taxpayer”) asked that a decision be made based on the documentation and evidence that he had already submitted in this matter, which was substantial. The representative for Respondent (“Division”) agreed. Therefore, this Initial Hearing is being issued based on the submissions in the appeal file. This matter is before the Commission on the appeal filed by the Taxpayers under Utah Code §59-1-501, in which the Taxpayers are contesting Utah individual income tax audit deficiencies for tax years 2013 and 2014. On January 24, 2017, the Division had issued a Notice of Deficiency and Estimated Income Tax for tax year 2013 and a Notice of Deficiency and Audit Change for tax year 2014, on the basis that the Taxpayers were full year Utah resident individuals for income tax purposes. When filing their returns for these years, the Taxpayers had concluded that TAXPAYER-1 was a resident of STATE-1 for all of 2013 and a part-year resident of Utah in

2014. A second issue regarding the deduction of sales tax was resolved between the parties prior to this hearing. The amounts of additional tax, penalties and interest due as of the date the Notices of Deficiency were issued are as follows:

	<u>Tax</u>	<u>Interest¹</u>	<u>Penalties</u>	<u>Total as of Notice Date</u>
2013	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2014	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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:
 - (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

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

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 Commission has been granted the discretion to waive penalties and interest. Utah Code Ann. §59-1-401(14) provides, “Upon making a record of its actions, and upon reasonable

cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.”

The Commission has promulgated Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

...

- (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
- (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
 - (a) Timely Mailing...
 - (b) Wrong Filing Place...
 - (c) Death or Serious Illness...
 - (d) Unavoidable Absence...
 - (e) Disaster Relief...
 - (f) Reliance on Erroneous Tax Commission Information...
 - (g) Tax Commission Office Visit...
 - (h) Unobtainable Records...
 - (i) Reliance on Competent Tax Advisor...
 - (j) First Time Filer...
 - (k) Bank Error...
 - (l) Compliance History...
 - (m) Employee Embezzlement...
 - (n) Recent Tax Law Change...
- (4) Other Considerations for Determining Reasonable Cause.
 - (a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:
 - (i) whether the commission had to take legal means to collect the taxes;
 - (ii) if the error is caught and corrected by the taxpayer;
 - (iii) the length of time between the event cited and the filing date;
 - (iv) typographical or other written errors; and
 - (v) other factors the commission deems appropriate.
 - (b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.
 - (c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.

...

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

DISCUSSION

The Division based its audit on the assertion that both Taxpayers were Utah resident individuals for income tax purposes for all of 2013 and 2014 based on the law in effect for those years. The Taxpayer had provided considerable information and documentation sufficient for the Commission to issue a decision based on the submissions of the parties. Under Utah Code Sec. 59-10-104 a “resident individual” in the State of Utah is subject to Utah individual income tax on all taxable income. “Resident individual” is defined at Utah Code Sec. 59-10-103 as an individual who is “domiciled” in Utah, or if not “domiciled” in Utah, is one who maintains a place of abode in Utah and spends in the aggregate 183 days or more per year in Utah. The Division argues that both Taxpayers were domiciled in Utah during all of the tax years at issue.

The facts were that the Taxpayers had been living in CITY-1, Utah since 2005 and they both considered themselves Utah residents up until 2011. In February 2011, they purchased a second home in CITY-2, STATE-1, and TAXPAYER-1 took steps to change his domicile at that time. He obtained a STATE-1 Driver License and registered to vote in STATE-1 in 2011. He, in fact, voted in STATE-1 in the 2011 and 2012 elections. Based on the information he provided, he was physically present in STATE-1 and resided at the STATE-1 residence more than 185 days in 2011, 2012 and 2013. The Taxpayers did not sell their Utah residence, however, and TAXPAYER-2 kept her Utah voter registration and her Utah Driver License. The Taxpayers did not represent that they had contacted COUNTY that their Utah residence was no longer their primary residence. During these years, the Taxpayers resided at both houses. The Taxpayers indicate in their written submission that TAXPAYER-2 stayed in STATE-1 about the same amount of time as TAXPAYER-1.

The Taxpayers had filed joint federal returns for all years at issue. In 2011, they concluded that they could file joint federal returns and separate state returns using special instructions, which was allowed in 2011 when one spouse was domiciled in another state. They state that they did not know about the law change, so for 2012 and 2013 they filed their returns in the same manner. TAXPAYER-1 did not file a state return because there is no state individual income tax in STATE-1. In 2014, TAXPAYER-1 decided to sell the STATE-1 residence and move back to the Utah residence. Therefore, for 2014 the Taxpayers had filed a part-year resident Utah return.

The Division argues in its Answer to Petition for Redetermination, that both Taxpayers were domiciled in Utah under Utah Code Subsection 59-10-136(5). The Division indicated that TAXPAYER-2 was “clearly a domiciled Utah resident” for all of 2013 and 2014. They point out that she had filed a Utah resident individual income tax return in 2013. It was the Division’s

conclusion, “Regardless of Richard’s physical presence and ties to STATE-1, he is considered a domiciled Utah resident under Utah Code Annotated 59-10-136(5)(a) for all of 2013 and 2014 because he filed Married Filing Joint federal returns with a domiciled Utah resident.”²

Reviewing the information submitted and the applicable law TAXPAYER-2 was domiciled in Utah, regardless of whether or not she spent 183 days or more in Utah each year. Under Utah Code Subsection 59-10-103(q)(i)(B) the 183 day test is an alternative that only applies where the individual is not domiciled in Utah. The information indicated that TAXPAYER-2 was domiciled in Utah under Utah Code Subsection 59-10-136(2)(b) because she was registered to vote in Utah. Additionally, it appeared that the Taxpayers were receiving the primary residence exemption on their Utah property so both would be domiciled in Utah under Subsection 59-10-136(2)(a). Even if they did not receive the primary residence exemption on their Utah property, the Taxpayers were married, not divorced or legally separated during the years at issue, therefore they were considered to be “spouses” for purposes of Utah Code Sec. 59-10-136. Utah Code Subsection 59-10-136(5)(a) provides, “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.” Therefore, TAXPAYER-1 was also domiciled in Utah.

In prior decisions, other taxpayers have argued that they did not have knowledge of the new law and the Tax Commission has concluded that ignorance of the law is not sufficient to abate the tax.³ Because both Taxpayers were domiciled in Utah for all of 2013 and 2014, they were Utah resident individuals for income tax purposes and subject to taxation on all of their income, consistent with the Division’s audit. However, the Division’s audit needs to be corrected for the sales tax deduction.⁴

Failure to timely file and failure to timely pay penalties were assessed with the audit for tax year 2013. It should be noted that in this case TAXPAYER-2 did file a Utah resident return for tax year 2013, thinking that they could file in this manner as they had filed in prior years. Under Utah Code Subsection 59-1-401(14) the Tax Commission may waive penalties for reasonable cause and Utah Admin. Rule R861-1A-42 (3) & (4) provides guidance for waiver of penalties. The Commission has found generally that the determination of domicile is a difficult issue. The Tax Commission has often waived penalties resulting from domicile audits and there is basis in this appeal for waiver of the penalties under the provisions for equitable considerations

² Respondent’s Answer to Petition for Redetermination, pg. 2.

³ See *Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (9/2/2015); Initial Hearing Orders, Appeal No. 15-1154 (2/1/16); Appeal No. 16-117(1/18/17); and Appeal No. 16-792 (8/16/2017)*. Many Tax Commission decisions are published in a redacted format and available for review at tax.utah.gov/commission-office/decisions.

⁴ Respondent agreed to do so in its Answer to Petition for Redetermination, pg. 2.

set out in the rule. There is no basis for waiver of interest. Utah Admin. Rule R861-1A-42(2) provides that interest is waived only if the taxpayer proves that the Tax Commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error. The Taxpayers have not demonstrated Tax Commission error in this matter.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission orders the Division to make the correction to its audits for the sales tax deduction, and finds that both Taxpayers were domiciled in Utah for all of 2013 and 2014. The Commission waives the penalties for tax year 2013. The Utah individual income tax audits for tax years 2013 and 2014 are to be adjusted and the interest recalculated on this basis. 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

Appeal No. 17-237

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.