

17-249
TAX TYPE: INCOME TAX
TAX YEAR: 2013 & 2014
DATE SIGNED: 01/12/2018
COMMISSIONERS: J VALENTINE, M CRAGUN, R PERO, R ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS , Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 17-249 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: REPRESENTATIVE FOR TAXPAYERS, CPA
For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 7, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) are appealing audit deficiencies for tax years 2013 and 2014. The Taxpayers had filed as part-year Utah residents for tax year 2013, but had not filed a Utah return for tax year 2014 on the basis that they were not residents of Utah during that year. The Notices of Deficiency and Audit Change for each year had been issued by Respondent (“Division”) on January 12, 2017. No penalties were assessed with the audits. The audit tax and interest calculated to the date the notices were issued for each year is as follows:

Year	Tax	Interest	Audit Total Due ¹
2013	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2014	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

¹ This is the total balance as of the date the Audit Notices were issued. Interest continues to accrue on any unpaid balance until paid in full.

APPLICABLE LAW

Under Utah Code §59-10-104(1), tax is imposed on the state taxable income of a resident individual. “Resident individual” is defined in Utah Code Ann. §59-10-103(1)(q), as follows:

- (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.

Effective for tax year 2012 the Utah Legislature adopted a law specifying the factors considered for the determination of domicile. This law replaced the prior Tax Commission rule defining domicile and was a significant change in this area. The new law is Utah Code Ann. §59-10-136 and is as set forth below in its entirety:

- (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 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.

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

DISCUSSION

The Taxpayers had been residents of Utah for years prior to 2013. They had Utah Driver Licenses, were registered to vote in Utah and had vehicles registered in Utah. They did not own any real property in Utah or any other state, but had been leasing a residence in Utah. In August 2013, TAXPAYER-1, an OCCUPATION, accepted employment with a school district in STATE. TAXPAYER-2 arranged with his employer to work remotely from his home and so both Taxpayers moved to STATE and rented a residence in that state. TAXPAYER-1 was able to obtain an occupational license in STATE and the Taxpayers lived in STATE from September 1, 2013 to August 31, 2015, after which they moved to COUNTRY until May 2016 and then returned to Utah.

The Taxpayers did not attend the hearing, but had provided answers to the questions and some documentation prior to the hearing and the Taxpayers' representative attended the hearing. From the information proffered, during 2013 and 2014, the Taxpayers did not have children and they themselves were not enrolled as a resident student in a Utah institution of higher education. The Taxpayers, however, were registered to vote in Utah in 2013 and into 2014. TAXPAYER-2 did not cancel his Utah voter registration or register to vote in STATE. He also kept his Utah Driver License and never obtained a license in STATE. TAXPAYER-1 did eventually register to vote in STATE, but this occurred October 27, 2014. Prior to that, she was also registered to vote in Utah. TAXPAYER-1 also obtained a STATE Driver License on October 27, 2014.

The Taxpayers each provided a letter from their employers verifying employment in STATE. For TAXPAYER-1, this letter indicated that she was employed through the end of the 2014-2015 school year. They provided a letter from their ecclesiastical leader in STATE who also indicated that they attended church and their church records were in that state from September 2013 through August 2015. The Taxpayers' representative pointed out that the Taxpayers had not written off their cost of living expenses, which they would have done if they considered themselves to be temporary employees in STATE.

Although it was not disputed by the Division that the Taxpayers had moved from Utah and were working in STATE by the end of August 2013 and did not return to Utah until May 2016, under the provisions of Utah Code §59-10-136 these are not the only factors to be considered in determining domicile. Utah Code §59-10-136(1) provides two factors that would make an individual domiciled in Utah, regardless of any other factors other than the limitations stated in that subsection. Subsection 136(1) does not apply in this appeal. Utah Code §59-10-136(2) provides three factors that each individually would raise a rebuttable presumption that the individual is domiciled in Utah. One of these is relevant in this matter and that is Subsection 136(2)(b) which states there is a rebuttable presumption an individual is domiciled in Utah if "the individual or the individual's spouse is registered to vote in this state . . ." TAXPAYER-2 was registered to vote in Utah during all of 2013 and 2014. It should be noted that the statute does not require that the individual actually vote in Utah. In prior decisions, the factor the Commission noted that would rebut this presumption was if a taxpayer registered to vote in the new state.² TAXPAYER-2 did not register to vote in STATE and based on this subsection, both he and TAXPAYER-1 could be presumed domiciled in Utah. Subsection 136(3) does not apply if

² *Utah State Tax Commission Initial Hearing Order, Appeal No.16-792 (8/16/17)*. These and other Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decisions.

requirements of Subsection (1) or (2) are met. Subsection 136(3) does provide a weighing of a number of factors including whether there was a permanent home in Utah and the location of where income is earned. However, Subsection 136(3) does not apply if the Taxpayers are domiciled in Utah under Subsection 136(2).

There is an exception that may apply and that is the 761 day provision set out at Utah Code §59-10-136(4). The Taxpayers may have been absent from Utah more than 761 days. Subsection 136(4)(a) provides that an individual is not considered to have domicile in this state if the individual is absent from the state for 761 consecutive days and the following criteria are met:

(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.

From the information presented at the hearing, the Taxpayers had been absent from Utah more than 761 days and the circumstances of Subsections 59-10-136(4)(a)(ii)(B),(C), (D) or (E)³ are not present in this case. The issue is Subsection 136(4)(a)(ii)(A) which requires that the Taxpayers not return to Utah for more than 30 days in a calendar year. The Taxpayers had acknowledged in their answer to the Division's request for information that they were in Utah the following days, which equals exactly 30 days:

1/1/2014 – 1/2/2014	2 days	
3/22/2014 – 3/24/2014	3 days	
4/2/2014 – 4/5/2014	4 days	TAXPAYER-2 Only

³ Use of a Utah address as the mailing address on the return is not the same as claiming Utah as the individual's tax home for federal individual income tax purposes. A "tax home" for federal tax purposes is necessary for determining whether the taxpayer can deduct certain expenses. Utah Code Sec. 59-10-136 does clearly distinguish between a "tax home" and a mailing address, as under Utah Code Subsection 59-10-136(3)(b)(ix) a factor that might support domicile is "whether the individual or the individual's spouse lists an address in this state on a state or federal tax return." Under Subsection 59-10-136(4)(a)(ii)(E) the reference is to "tax home for federal individual income tax purposes."

6/29/2014 – 7/13/2014	15 days
11/26/2014 – 12/1/2014	6 days
	<hr/>
	30 days

Because the number of days was exactly 30, the Division had previously requested more information from the Taxpayers to verify the days spent in Utah or elsewhere and the Taxpayers did not present any supporting information. The Division's representative pointed out that TAXPAYER-2 had renewed his Utah Driver License on March 28, 2014, and that was not one of the dates listed as being in Utah. The Division's representative pointed out that around that time, a change in Utah law had been in effect requiring persons to go to Driver License Offices in person and verify identity. March 28 was right between two separate occurrences for which the Taxpayers acknowledged being in Utah. From the information the Taxpayers had listed in their response, they were both in Utah March 22 to March 24, 2014 for TAXPAYER-2's father's birthday and that TAXPAYER-2 was in Utah April 2 to April 5, 2014 for his grandmother's funeral. If TAXPAYER-2 had stayed in Utah between these events, which is when his driver license was renewed, the Taxpayers would be over the 30 days. The Division's representative also points out TAXPAYER-2 had registered his vehicle Utah on a day that also was not indicated he was in Utah in 2014. Although the registration itself could be done by mail or on-line, this may have required an emissions test in Utah.

The Taxpayers were not present to answer questions. It is also unclear if the days indicated in their answers were the days in Utah or included the days they spent driving back and forth. The representative stated that they drove back and forth rather than flew and it was a 14-hour drive. He also stated that the Taxpayers had answered the questions as truthfully as they could, given how much time had passed, but the Taxpayers did not provide credit card statements or other information to verify that they were not in Utah more than the 30 days. The representative's argument was that the state should look at the facts that the Taxpayers were both living and working in STATE and did not have a residence in Utah and those facts should be sufficient to prove they were not domiciled in Utah.

The Taxpayers have the burden of proof under Utah Code Sec. 59-1-1417. They did not establish that they were in Utah 30 days or less in 2014 to meet the requirements of Utah Code Subsection 59-10-136(4) for the 761 day exception. The Taxpayers are presumed to be residents of Utah in 2013 and 2014 because TAXPAYER-2 was registered to vote in Utah all of that time. TAXPAYER-1 did register in STATE late in 2014, but TAXPAYER-2 did not register in STATE or cancel his voter registration in Utah. Although the Taxpayers' representative has argued the factors that should be relevant is where they were living and working, the Tax Commission must

apply Utah Code Sec. 59-10-136. No penalties were assessed with the audit. On that basis, the Tax Commission should deny this appeal.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that the Taxpayers were domiciled in Utah for all of 2013 and 2014 and denies the Taxpayers' appeal. 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 _____, 2018.

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.