

17-780  
TAX TYPE: INCOME TAX  
TAX YEAR: 2013  
DATE SIGNED: 02/21/2018  
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL  
GUIDING DECISION

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BEFORE THE UTAH STATE-1 TAX COMMISSION

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TAXPAYERS,

Petitioners,

v.

AUDITING DIVISION OF THE UTAH  
STATE-1 TAX COMMISSION,

Respondent.

**INITIAL HEARING ORDER**

Appeal No. 17-780

Account No. #####

Tax Type: Income Tax

Tax Year: 2013

Judge: Phan

**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: TAXPAYER-1

TAXPAYER-2

For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATE-1MENT OF THE CASE

This matter came before the Utah STATE-1 Tax Commission on December 5, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) originally filed an appeal contesting Utah audit deficiencies for tax years 2013 and 2014. However, prior to the Initial Hearing, Respondent (“Division”) withdrew its audit for tax year 2014 so that year is no longer at issue in this appeal. The issue before the Commission at the Initial Hearing was the audit deficiency for tax year 2013. The Taxpayers had filed a part-year Utah resident return for tax year 2013. The Division issued the audit for 2013 on the basis that the Taxpayers were both Utah resident individuals for all of 2013. The Notice of Deficiency had been issued by the Division on April 3, 2017. No penalties were assessed with the audit. The audit deficiency and interest calculated to the date the notice was issued is as follows:

Year	Tax	Interest	Penalties	Audit Total Due <sup>1</sup>
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<sup>1</sup> This is the total balance as of the date the Audit Notice was issued. Interest continues to accrue on the unpaid balance until paid in full.

2013                \$\$\$\$\$                \$\$\$\$\$                \$0                \$\$\$\$\$

APPLICABLE LAW

Under Utah Code §59-10-104(1), tax is imposed on the STATE-1 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-1 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-1; or
  - (B) an individual who is not domiciled in this STATE-1 but:
    - (I) maintains a place of abode in this STATE-1; and
    - (II) spends in the aggregate 183 or more days of the taxable year in this STATE-1.

Effective beginning with 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-1 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-1; 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-1.
- (b) The determination of whether an individual is considered to have domicile in this STATE-1 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-1; 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-1 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-1 in accordance with Title 20A, Chapter 2, Voter Registration;  
or
  - (c) the individual or the individual's spouse asserts residency in this STATE-1 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-1 for the portion of the taxable year for which the individual or the individual's spouse is a resident of this STATE-1.
- (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-1, the individual
- is considered to have domicile in this STATE-1 if:
- (i) the individual or the individual's spouse has a permanent home in this STATE-1 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-1, 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-1 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-1;
  - (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-1;
  - (iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this STATE-1 as compared to another STATE-1;
  - (iv) the presence in this STATE-1 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-1 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-1;
  - (viii) whether the individual or the individual's spouse lists an address in this STATE-1 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-1 on a STATE-1 or federal tax return;
  - (x) whether the individual or the individual's spouse asserts residency in this STATE-1 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-1 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-1 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-1 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-1 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-1, 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-1;
    - (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-1 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-1 may elect to be considered to have domicile in this STATE-1 by filing an individual income tax return in this STATE-1 as a resident individual.
- (c) For purposes of Subsection (4)(a), an absence from the STATE-1:
- (i) begins on the later of the date:
    - (A) the individual leaves this STATE-1; or
    - (B) the individual's spouse leaves this STATE-1; and
  - (ii) ends on the date the individual or the individual's spouse returns to this STATE-1 if the individual or the individual's spouse remains in this STATE-1 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-1; 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-1.
  - (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-1; 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-1 in accordance with this section, the individual's spouse is considered to have domicile in this STATE-1.
- (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-1.

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

DISCUSSION

In its audit, the Division is applying the domicile law at Utah Code Sec. 59-10-136 that became effective in Utah beginning with tax year 2012 and substantially changed the prior provisions in the law. The Taxpayers had filed a joint federal return in 2013 and filed a part-year Utah resident return. On their 2013 Utah return, they claimed as Utah source income \$\$\$\$ which was TAXPAYER-2's wage income and paid tax on this amount. The Taxpayers excluded from their Utah return the amount of \$\$\$\$\$, which was TAXPAYER-1's income earned from his employment out of STATE-1.

In this case, it was not disputed that TAXPAYER-1 moved from the residence the Taxpayers owned jointly in Utah in 2012 and rented an apartment in STATE-1. TAXPAYER-1 traveled for work extensively and his clients were primarily in STATE-1 and STATE-2. He had a STATE-2 Driver License at this time and his vehicle was registered in STATE-2. He had never registered to vote in Utah. When he moved to STATE-1, he stayed at an apartment he had rented there in 2012. In fact based on the lease agreement, which he provided, it appears that TAXPAYER-1 had been leasing this STATE-1 residence since 2009. TAXPAYER-1 has resided in STATE-1 since 2012. TAXPAYER-1 provided canceled checks showing lease and utility payments made in STATE-1 and bank statements and other documents mailed to the STATE-1 address. He also provided documentation of car repairs made to his vehicle in STATE-1 and extensive flight information showing that he flew in and out of the CITY, STATE-1 airport; trips that he indicated were for his work. These factors were all undisputed by the Division.

TAXPAYER-2, however, remained in Utah through the end of 2013. She worked part time in Utah and resided at the couple's Utah residence much of the time. At the hearing, TAXPAYER-2 represented that she spent some of her time in STATE-1, although she stated she did not stay at the apartment with TAXPAYER-1, but instead had a different apartment. The Taxpayers were not, however, legally separated. The Taxpayers received the primary residential exemption on their Utah residence for tax year 2013. The Taxpayers did not have minor children during this time and neither were attending a Utah institution of higher education. TAXPAYER-2 states that she never registered to vote in Utah and this factor was not disputed by the Division.

In September 2013, TAXPAYER-2 quit her Utah employment. The Taxpayers provided a copy of their listing agreement that showed they listed their Utah residence for sale in March 2014 and the residence sold in May 2014 for \$\$\$\$\$. TAXPAYER-2 stated that she obtained a STATE-1 Driver License in May 2014 and they purchased a residence in STATE-1 in December 2014.

At the hearing, the Division did not dispute any of these facts. The only documentary evidence the Division provided at the hearing was the 2013 Utah County Tax Notice that showed the Taxpayers had received the primary residential exemption on their residence at ADDRESS, Utah.

It was the Division's position that the Taxpayers were both domiciled in Utah for all of 2013 based on Utah Code Subsection 59-10-136(2)(a) which provides "there is a rebuttable presumption that an individual is considered to have domicile" in Utah if "the individual or the individual's spouse claims a residential exemption" for property tax purposes "for that individual or individual's spouse's primary residence." Under Utah Code Subsection 59-2-103.5(4) individuals are required to notify the County in which their residence is located if they no longer qualify for this exemption as well as declare this on their Utah individual income tax return. The Taxpayers did not take either of these steps and did not provide evidence at the hearing that would rebut the presumption of being a Utah domiciliary under Subsection 59-10-136(2)(a) for all of tax year 2013. This did appear to be TAXPAYER-2's primary residence in 2013 and the law is clear that it applies even to a spouse of an individual, although in this case TAXPAYER-1 is a joint owner of this residence. The Commission has considered this provision in prior cases and has concluded that ignorance of the law is not a factor that would rebut the presumption.<sup>2</sup> Furthermore, the Taxpayers have the burden of proof under Utah Code Sec. 59-1-1417. The Tax Commission must apply Utah Code Sec. 59-10-136 as written and, therefore, the audit as to the tax and interest deficiency should be upheld for tax year 2013.

Jane Phan  
Administrative Law Judge

#### DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the Utah individual income tax audit issued against the Taxpayers as to the tax and interest accrued thereon for tax year 2013. 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

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<sup>2</sup> See *Utah State Tax Commission Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (9/2/2015)*; *Initial Hearing Order, Appeal No. 16-117 (1/18/17)*; *Initial Hearing Order, Appeal No. 16-792 (8/16/17)*; and *Initial Hearing Order, Appeal No. 15-720 (5/6/16)*. These and other Tax Commission decisions are available for review in a redacted format at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

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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-1 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.**