

17-833
TAX TYPE: INCOME TAX
TAX YEAR: 2013
DATE SIGNED: 02/17/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYERS,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 17-833</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2013</p> <p>Judge: Marshall</p>
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Presiding:

Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1
For Respondent: RESPONDENT-1, Income Tax Audit Manager
RESPONDENT-2, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on November 22, 2017 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioners (“Taxpayers”) are appealing an audit of their 2013 individual income tax return by Respondent (“Division”). The Division assessed audit tax in the amount of \$\$\$\$\$, and interest in the amount of \$\$\$\$\$ through May 10, 2017.¹

APPLICABLE LAW

Under Utah Code Ann. §59-10-104(1), tax is imposed on the state taxable income of a resident individual.

The term “state taxable income” is defined in Utah Code Ann. §59-10-103(1)(w), below in pertinent part:

- (i) subject to Section 59-10-1404.5, for a resident individual, means the resident individual’s adjusted gross income after making the:
 - (A) additions and subtractions required by Section 59-10-114; and
 - (B) adjustments required by Section 59-10-115...

¹ Interest continues to accrue on any unpaid balance.

“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.

The factors considered for determination of domicile are addressed in Utah Code Ann. §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 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.

Under Utah Code Ann. §59-1-1417(1), the burden of proof is generally upon the petitioner in proceedings before the commission, as follows:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following in which the burden of proof is on the commission:
 - (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
 - (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and

- (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income;
 - (i) required to be reported; and
 - (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

The Division issued a Notice of Deficiency and Audit Change to Taxpayers on April 10, 2017. The Division changed the Taxpayers' filing status from non/part-year residents to full-year residents. The Division reduced the Utah adjusted gross income on the non/part-year resident return from \$\$\$\$\$ to \$\$\$\$\$, and included the Taxpayer's total adjusted gross income of \$\$\$\$\$. As a result, the Division assessed additional tax in the amount of \$\$\$\$\$. It is the Division's position that the Taxpayers were domiciled in Utah for 2013, and thus all of their income is taxable to Utah.

The Taxpayers maintain they were part-year residents of Utah, having lived in STATE the first half of the year. The Taxpayers graduated from the EDUCATION INSTITUTION in 2010, and after graduation moved to CITY, STATE where they both worked as OCCUPATION. The Taxpayers moved back to Utah in 2013 so that TAXPAYER-1 could attend STUDY school at the EDUCATION INSTITUTION. TAXPAYER-1 paid in-state tuition at the EDUCATION INSTITUTION. TAXPAYER-1's initial request for in-state tuition was denied by the University. He stated that he was told by someone at the EDUCATION INSTITUTION that if he retroactively paid Utah state income tax, he would qualify for in-state tuition. The Taxpayers filed Utah individual income tax returns for the 2011 and 2012 tax years, and paid the resulting tax liability in 2013.

TAXPAYER-1 argued that if he and his wife are considered domiciled in Utah for all of 2013 and required to pay the audit assessment that the taxes they paid for the 2011 and 2012 tax years should be refunded because they were residents of STATE during those years. The Taxpayers provided a number of documents regarding their move to STATE. They provided information on the rental of a moving truck, emails confirming their employment, licenses to teach, emails demonstrating their involvement in church and community activities, photographs of their living accommodations, utility bills, and account statements from their landlord.

TAXPAYER-1 argued that he and his wife were not domiciled in Utah for all of the 2013 tax year under Subsection (4)(a) of Utah Code Ann. §59-10-136 because they were absent from

the state of Utah for 761 consecutive days, and did not return to Utah for more than 30 days in a calendar year. He stated that he returned to Utah for two days in September of 2010, he and his wife returned to Utah for a week at Christmas that year, in 2011 they returned to Utah for 4 days at Easter time, and they returned to Utah for two weeks during the summer of 2012. TAXPAYER-1 stated that they had no dependents attending Utah schools, he was not attending school until the fall of 2013, and that they did not assert Utah was their tax home.

The Taxpayers retained Utah driver licenses while in STATE, and were registered to vote in Utah. TAXPAYER-1 acknowledged they did not register to vote in STATE, but argued the fact that they did not vote in Utah while living in STATE should rebut the presumption Utah Code Ann. §59-10-136(2)(b). In the letter attached to their Petition for Redetermination, Taxpayers indicated that they retained their driver licenses and voter registrations because it was their intent to return to Utah. However, at the hearing, TAXPAYER-1 stated that they had no concrete plans to return to Utah. He noted that he had applied to a number of STUDY schools, and provided copies of his acceptance emails to various schools. TAXPAYER-1 explained that his decision to attend STUDY school at the EDUCATION INSTITUTION was in part because his father had passed away, and if they moved back to Utah, his mother would be able to live with them.

TAXPAYER-1 argued that in reviewing the factors set forth in Administrative Rule R884-24P-52, they weigh in favor of the Taxpayers being part-year residents of Utah. He noted the photographs showing the nature and quality of their living accommodations in STATE; stated that he and his wife were both living in STATE; their business/source of income was in STATE; he stated that their vehicles were registered in STATE, and noted they bought a vehicle in STATE; the Taxpayers attended church in STATE; and they used their STATE addresses on their tax filings. TAXPAYER-1 pointed out that he was originally classified as a non-resident by the EDUCATION INSTITUTION, and it was not until he filed resident returns for the 2011 and 2012 tax years that he was considered a resident for tuition purposes.

The Division had several questions regarding the Taxpayers' 2011 and 2012 Utah individual income tax returns. TAXPAYER-1 explained that he filed the resident returns under the advice of someone at the EDUCATION INSTITUTION so that he could get the benefit of reduced tuition. He stated that the difference in resident and non-resident tuition was \$\$\$\$ to \$\$\$\$ per year. TAXPAYER-1 stated that he believed the 2011 and 2012 returns were correct. However, when the Division's representative asked whether that included the returns as a statement of residency, TAXPAYER-1 felt the Division's representative was trying to "trap" him.

The Division's representative stated that the Taxpayers' 2013 return was audited and the filing status changed. He stated that it is the Division's position that the Taxpayers did not abandon Utah as their domicile when they went to STATE. The Division's representative stated that the Division does not believe the Taxpayer intended to evade any tax liability, and therefore did not assess any penalties on the audit.

The Division's representative argued that Subsection (4) of Utah Code Ann. §59-10-136 should not apply because the Taxpayers claimed they were residents of Utah during 2011 and 2012 by filing resident individual income tax returns.

The Division's representative argued that the Taxpayers are domiciled in Utah under Utah Code Ann. §59-10-136(2)(b), because they were registered to vote in the state of Utah.

The Legislature enacted new domicile legislation that became effective beginning with the 2012 tax year. Utah Code Ann. §59-10-136 addresses when an individual is considered to have domicile in Utah. Subsection (4) of Utah Code Ann. §59-10-136 provides that an individual is not considered to have domicile in the State of Utah if certain qualifications are met.

Subsection (1)(a)(ii) of Utah Code Ann. §59-10-136 provides that if an individual or an individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education, that individual is considered to have domicile in this state. It is undisputed that TAXPAYER-1 was a "resident student" at the EDUCATION INSTITUTION, beginning in the fall 2013. Thus, the Taxpayers are domiciled in Utah during that period. The Taxpayers do not appear to be contesting that they were domiciled in Utah during this period, as they filed part-year resident returns.

Utah Code Ann. §59-10-136(2)(b) creates a rebuttable presumption of domicile if an individual or an individual's spouse is registered to vote in Utah. Subsection (2)(b) provides as follows:

There is a rebuttable presumption that an individual is considered to have domicile in this state if:

- (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 Legislature, by including voter registration as a rebuttable presumption, intended for there to be circumstances where an individual who is registered to vote in Utah is considered to have domicile in Utah, but also for there to be circumstances where an individual who is registered to vote in Utah is not considered to have domicile in Utah. The Legislature has not provided guidance on what is or is not sufficient to rebut the presumption in Utah Code Ann. §59-10-136(2)(b). It is not contested that the Taxpayers were registered to vote in Utah. The Commission

found in Appeal No. 15-720² that not voting in Utah despite being registered to do so is not sufficient to rebut the presumption. The Commission reasoned that had the Legislature intended actual voting in Utah to be the event that triggered domicile in Utah, it easily could have stated so in the statute. Instead, the Legislature chose to make registration, not voting, the test for this rebuttable presumption. In Appeal No. 16-1791, the Commission declined to find that an individual could rebut the Subsection (2)(b) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection (3)(b) of Utah Code Ann. §59-10-136. The Commission reasoned that by doing so, it gives no meaning to the Subsection (2) presumptions. The Taxpayers in this case, have not rebutted the presumption of domicile because they were registered to vote in Utah. However, Subsection (4) of Utah Code Ann. §59-10-136 provides that “[n]otwithstanding Subsections (1) through (3),” an individual is not considered to have domicile in the State of Utah if certain qualifications are met. Thus, even if the Taxpayers meet the voter registration requirements of Subsection (2), they are not considered to be domiciled in Utah if they meet the qualifications of Subsection (4). The Taxpayers meet the qualifications under Subsection (4)(a) as they were absent from the state for more than 761 days, they did not return to Utah for more than 30 days in a calendar year during that time, they had no dependents, were not resident students³, they did not claim the primary residential exemption, and proffered that they did not assert that Utah was their tax home for federal tax purposes.⁴ The Taxpayers are not considered to have domicile in Utah under Subsection (4).

TAXPAYER-1 argued that many of the factors found in Administrative Rule R884-24P-52 support a finding that they were not domiciled in Utah for all of 2013. However, those criteria relate to the domicile law in place prior to the 2012 tax year.⁵ Subsection (3)(b) of Utah Code Ann. §59-10-136 sets forth a list of twelve factors to take into consideration in determining domicile. Under Subsection (3)(a), those factors are only considered if a taxpayer does not meet the requirements of Subsection (1) or (2) to be considered domiciled in Utah. In this case, The Taxpayers meet the requirements of Subsection (1) for part of the year. However, as discussed above, because the Taxpayers meet the qualifications of Subsection (4)(a), discussion of the

² Prior Commission decisions are available online at tax.utah.gov/commission-office/decisions.

³ TAXPAYER-1 was a resident student for fall 2013. Taxpayers are not disputing they were domiciled in Utah for part of 2013. Further a “resident individual” under Utah Code Ann. §59-10-103(1)(q) who is domiciled in Utah is only a “resident individual” during the period of domicile.

⁴ The Division did not refute that the Taxpayers’ proffer that they did not assert Utah as their tax home for federal tax purposes. Neither the Taxpayers’ 2013 federal return or Utah return was provided at the hearing.

⁵ The Commission notes that under the prior law, the Taxpayers likely would have been considered domiciled in Utah for 2011, and in Tennessee for a “special or temporary purpose.”

factors in Subsection (3)(b) is not necessary because the Taxpayers are not considered to have domicile in this state.

As noted above, the Taxpayers meet the qualifications of Subsection (4)(a) of Utah Code Ann. §59-10-136, to not be considered to have domicile in the State of Utah. Subsection (4)(b) provides, “notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a)...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.” The Taxpayers did file individual income tax returns as resident individuals for the 2011 and 2012 tax years in order for TAXPAYER-1 to receive resident tuition at the EDUCATION INSTITUTION, which TAXPAYER-1 stated saved him between \$\$\$\$ and \$\$\$\$ in tuition. However, for 2013, the year under audit, the Taxpayers filed a part-year resident return, and thus have not elected under Subsection (4)(b) to be considered domiciled in Utah for the full year. Subsection (4)(b), unlike Subsection (4)(a) does not set forth a look back period that considers the actions of the Taxpayers during the absence period. Thus, under a plain reading of the statute, it is only the election to file for the period under audit that is to be considered.⁶

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the Taxpayers were part-year residents of Utah, as provided in their originally filed return. 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

⁶ The Commission has concerns about this outcome. The Taxpayers are seemingly gaming the system as a result of the language in Subsection (4)(b) not referencing the look back period in Subsection (4)(a).

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.