

17-2000

TAX TYPE: INCOME TAX

TAX YEAR: 2011–2016

DATE SIGNED: 12/7/18

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS

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. 17-2000 Account No. ##### Tax Type: Income Tax Tax Years: 2011, 2012, 2013, 2014, 2015 and 2016 Judge: Phan
---	---

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1
 TAXPAYER-2

For Respondent: REPRESENTATIVE FOR RESPONDENT-1, Manager, Income Tax
 Auditing
 REPRESENTATIVE FOR RESPONDENT-2, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 20, 2018 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioners (“Taxpayers”) are appealing Utah individual income tax audit deficiencies for tax years 2011 through 2016. The Division had issued Notices of Deficiency and Estimated Income Tax for all the years at issue on November 24, 2017. The audit tax, penalties and the interest accrued thereon calculated to the notice date for each year are as follows:

Year	Tax	Interest	Penalties	Audit Total Due ¹
2011	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2012	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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.

2013	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2014	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2015	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$
2016	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$

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.

The law changed regarding “domicile” in Utah beginning with tax year 2012, so in this appeal the Tax Commission must apply the prior law to the 2011 tax year and the current law to tax years 2012 through 2016. For tax year 2011 Utah Admin. Rule R865-9I-2 (“Rule 2”) provides guidance concerning the determination of “domicile,” as follows in pertinent part:

- A. Domicile.
 - 1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
 - 2. For purposes of establishing domicile, an individual’s intent will not be determined by the individual’s statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
 - a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
 - b) Domicile applies equally to a permanent home within and without the United States.
 - 3. A domicile, once established, is not lost until there is a concurrence of the following three elements:
 - a) a specific intent to abandon the former domicile;
 - b) the actual physical presence in a new domicile; and
 - c) the intent to remain in the new domicile permanently.
 - 4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

....

C. Determination of resident individual status for military servicepersons.

1. The status of a military service person as a resident individual or a nonresident individual is determined as follows, based on the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 574.

...

2. Subject to federal law, an individual in active military service may change from a resident individual to a nonresident individual or from a nonresident individual to a resident individual if he establishes that he satisfies the condition of A.3.

For the 2011 tax year, Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective evidence that may be determinative of domicile, as follows:²

....

- (5) Factors or objective evidence determinative of domicile include:
- (a) whether or not the individual voted in the place he claims to be domiciled;
 - (b) the length of any continuous residency in the location claimed as domicile;
 - (c) the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;
 - (d) the presence of family members in a given location;
 - (e) the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
 - (f) the physical location of the individual's place of business or sources of income;
 - (g) the use of local bank facilities or foreign bank institutions;
 - (h) the location of registration of vehicles, boats, and RVs;
 - (i) membership in clubs, churches, and other social organizations;
 - (j) the addresses used by the individual on such things as:
 - (i) telephone listings;
 - (ii) mail;
 - (iii) state and federal tax returns;
 - (iv) listings in official government publications or other correspondence;
 - (v) driver's license;
 - (vi) voter registration; and
 - (vii) tax rolls;
 - (k) location of public schools attended by the individual or the individual's dependents;
 - (l) the nature and payment of taxes in other states;

² Rule 52 is referenced in the version of Rule 2 that was in effect for 2011. As a result, Rule 52 is applicable when determining the taxpayers' 2011 domicile, but not 2012 through 2016 domicile.

- (m) declarations of the individual:
 - (i) communicated to third parties;
 - (ii) contained in deeds;
 - (iii) contained in insurance policies;
 - (iv) contained in wills;
 - (v) contained in letters;
 - (vi) contained in registers;
 - (vii) contained in mortgages; and
 - (viii) contained in leases.
 - (n) the exercise of civil or political rights in a given location;
 - (o) any failure to obtain permits and licenses normally required of a resident;
 - (p) the purchase of a burial plot in a particular location;
 - (q) the acquisition of a new residence in a different location.
-

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 2012 through 2016 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 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.

Administrative Rule R865-9I-2 effective for 2012 and subsequent tax years provides additional guidance on the determination of resident individual status for military personnel, as follows in relevant part:

Determination of resident individual status for military persons.

- (a) The status of a military serviceperson as a resident individual or a nonresident individual is determined as follows.
 - (i) A resident individual in active military service does not lose his status as a resident individual if the resident individual's absence from the state is a result of military orders.
 - (ii) A nonresident individual in active military service who is stationed in Utah does not become a resident individual for income tax purposes if the nonresident presence in Utah is due solely to military orders.
- (b) Subject to federal law, an individual in active military service may change from a resident individual to a nonresident individual or from a

nonresident individual to a resident individual if he establishes that he satisfies the conditions of Section 59-10-136.

- (c) A nonresident individual serviceperson is exempt from Utah income tax only on his active service pay. All other Utah source income received by the nonresident individual serviceperson is subject to Utah income tax as provided by Section 59-10-116.

Under federal law, “servicemembers” are afforded certain protections in the Servicemembers Civil Relief Act (“SCRA” or the “Act”), which is found at 50 U.S.C. §§3901 et seq.³ Section 4001 of the SCRA provides guidance concerning the residence or domicile of a servicemember or a servicemember’s spouse for income tax purposes, as follows in pertinent part:

- (a) Residence or domicile.
 - (1) In general. A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.
 - (2) Spouses. A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.
- (b) Military service compensation. Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.
- (c) Income of a military spouse. Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.
-
- (e) Increase of tax liability. A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.

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

3 Prior to the 2015 tax year, the SCRA was cited at 50 U.S.C. App. §§501 et seq.

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 a waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.
 - (d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

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

DISCUSSION

The Taxpayer, TAXPAYER-1 had been a resident of the state of STATE-1 in 2000 when he entered military service. His Home of Record was listed as STATE-1; he had a STATE-1 Driver License and was registered to vote in STATE-1. He has maintained his STATE-1 Driver License and voter registration since that time. He was stationed at BASE-1 from 2000 to 2003. In 2002, he and TAXPAYER-2 married. From 2003 to 2007, he had various other duty stations including BASE-2 in STATE-1, while he was full time active military and TAXPAYER-2 moved with him to the duty stations. In 2007, his active duty term ended and he went to part-time Utah Air National Guard. At this time, the Taxpayers were living and working in Utah. All of their income was from Utah and the Taxpayers filed Utah resident returns in 2008 and 2009. They had purchased a residence in CITY-1, Utah in 2009, and continued to reside in that residence until 2017. TAXPAYER-2 had a Utah Driver License and registered to vote in Utah. The Taxpayers had one child at this time.

In June 2010, TAXPAYER-1 reenlisted for active duty. He indicates that he filed Form DD2058 with the military finance department changing his state of legal residence from Utah back to STATE-1. However, he was unable to obtain a copy of the DD2058 due to the length of time between when it was filed until the audit was complete. It was his contention that he had gone back to his Home of Record State, which was STATE-1, to reenlist to become active duty again, although the Taxpayers never moved back to STATE-1 or established a place of abode in that state during the time period from 2007 to June of 2010. For 2010, the Taxpayers had filed a part-year return, indicating they were Utah residents until June 2010 and then considered themselves residents of STATE-1 after the reenlistment. TAXPAYER-1 states that he had always maintained his STATE-1 Driver License and voter registration.

After reenlisting, TAXPAYER-1's duty station was in Utah with the Air National Guard, so the Taxpayers remained in Utah. In 2010, TAXPAYER-2 started attending UNIVERSITY as a Utah resident. The Taxpayers had a daughter who started public school in Utah in 2013. They had resided in their Utah residence until they sold it in 2017.

Although TAXPAYER-1 was unable to obtain a copy of his Form DD2058, he did provide a copy of a 2017 Military Leave and Earnings Statement from Defense Finance and Accounting. This statement showed his state of residency for tax purposes to be STATE-1. He also provided copies of his form W-2s for each tax year at issue and they all listed the state as STATE-1, so there was no state withholding as STATE-1 does not have state income tax. It is the Commission's understanding that Defense Finance and Accounting will list and withhold for state tax purposes whatever state the service member claims on his or her State of Legal

Residence form. The forms W-2 did show the Taxpayer's address to be a Utah address. TAXPAYER-1 also provided a copy of military orders with the Utah Air National Guard. The Orders were dated June 10, 2010 and indicated he was ordered to full time duty from June 14, 2010 to June 13, 2013. A further Order was issued on November 27, 2013, which indicated full-time duty from June 14, 2013 to March 25, 2016, again with the Utah Air National Guard. Another Order issued February 29, 2016 extended the full-time duty with the Utah Air National Guard until March 25, 2018.

In addition to the Orders regarding his full time service after reenlisting, TAXPAYER-1 did provide a Certificate of Release or Discharge from Active Duty, which showed the duty period from July 23, 2008 to October 9, 2008. He indicated that he was activated briefly for this period of time when he was part time in the Air National Guard. This showed his "Home of Record at Time of Entry" to be Utah. The Taxpayer explained that this had been a contingency order when he was in the Air National Guard and deployed to COUNTRY. He indicated he thought there had just been an error on this document and he argued the Commission should instead look at the Certificate of Release or Discharge from Active Duty for the period of February 9, 2000 to June 17, 2005. This certificate showed his home of record at time of entry to be STATE-1.

After reviewing the law applicable in this matter and the information provided by the parties, it appears that the Taxpayers changed their domicile to Utah when the Taxpayer was part time in the Utah Air National Guard and, therefore, not while in the United States Armed Forces pursuant to provisions of the Service members Civil Relief Act at 50 U.S.C. §§3901 et seq (SCRA). In this case, the Taxpayer had originally entered military service from STATE-1, but when his first period of full time military service ended in 2007 the Taxpayers had made their residence in Utah in 2008 and 2009 and up through June of 2010. At this point they were not in Utah solely in compliance with military orders as required under 50 U.S.C. § Section 4001 for SCRA to apply. The Commission has previously considered how the SCRA applies to National Guard members in *Initial Hearing Order Appeal No. 17-1812* (August 29, 2018). In that decision, the Commission noted that while active duty members of the United States Armed Forces receive automatic SCRA protections, National Guard members do not qualify for SCRA protections until they are ordered to federal-level active duty for federal-level missions under Title 10 or Title 32 of the United States Code (at which time funding comes from the federal government and not a state government). In 2007 through June of 2010, except for the three month period of activation in 2008, TAXPAYER-1 was no longer in full time military service in the United States Armed Forces, but was a Utah Air National Guard Member living and working

in Utah. The Taxpayers had purchased a residence in Utah and TAXPAYER-2 had a Utah Driver License and was registered to vote in this state. She was also attending UNIVERSITY as a resident student beginning in 2010. They also filed Utah resident returns for 2008 through June of 2010. Their domicile had changed to Utah prior to TAXPAYER-1 reenlisting in June 2010.

Because the Taxpayers were domiciled in Utah before TAXPAYER-1 reenlisted, the Commission would need to consider if the Taxpayers changed their domicile from Utah to STATE-1 during the tax years 2011 through 2016. When TAXPAYER-1 reenlisted for full time service in 2010 he states that he did file the Form DD2058 and had stated STATE-1 was his state of legal residency on that form. The Department of Finance does not make its own determination and instead it is up to the service member to claim the correct state for withholding and state tax purposes. What TAXPAYER-1 stated on that form is not controlling and would have been in error because he was domiciled in Utah at that time, despite that he had maintained a STATE-1 Driver License and voter registration. For tax year 2011, whether or not one maintained domicile in Utah was governed under Utah Administrative Rule R865-9I-2(A). Pursuant to that rule, once domicile in Utah was established it was not lost until there was a concurrence of the following three elements: a) a specific intent to abandon the former domicile; b) the actual physical presence in a new domicile; and c) the intent to remain in the new domicile permanently. There was not a showing that the Taxpayers had met these factors to change their domicile from Utah to STATE-1 in 2011.

Beginning in 2012, Utah Code Sec. 59-10-136 defines domicile. Under Subsection 59-10-136(1) an individual is domiciled in Utah if the individual or the individual's spouse is a resident student at a Utah institution of higher education. Taxpayers are also domiciled in Utah if a dependent claimed on the individual's or the individual's spouse's tax return is attending public school in Utah. With TAXPAYER-2 attending UNIVERSITY beginning in 2010 and the Taxpayer's daughter in public school beginning in 2013 through the end of the audit years, the Taxpayers were domiciled in Utah under these provisions for tax years 2012 through 2016.⁴

Failure to timely file and failure to timely pay penalties were assessed with the audit for tax years 2011 through 2014. 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

⁴ The Tax Commission has previously considered issues regarding the legal state of residency as reported on the Form DD2058 and other issues facing Servicemembers and Utah residency for income tax purposes in *Utah State Tax Commission Initial Hearing Orders, Appeal No. 13-1609* (June 17, 2014); *Appeal No. 16-1368* (April 18, 2018); *Appeal No. 17-791* (October 9, 2018); and *Appeal No. 17-1812* (August 29, 2018). These and other Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decisions.

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 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 Commission finds that the Taxpayers were domiciled in Utah for all of 2011 through 2016. The audit deficiency of Utah individual income tax and interest is upheld for all tax years at issue. The Commission finds reasonable cause for waiver of the penalties assessed for tax years 2011 through 2014. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

or emailed to:
taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

Appeal No. 17-2000

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.