12-2133
TAX TYPE: INCOME TAX
TAX YEAR: 2009 and 2010
DATE SIGNED: 8-13-2014
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
DISSENTS: COMMISSIONER D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 AND TAXPAYER-2, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 12-2133 Account No. ##### Tax Type: Income Tax Tax Year: 2009 and 2010 Judge: Nielson-Larios

Presiding:
Aimee Nielson-Larios, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-2 and TAXPAYER-1, in person
For Respondent: RESPONDENT-1, Auditing Division, in person
REPRESENTATIVE FOR RESPONDENT, Utah Assistant Attorney General, in person

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on April 16, 2013 for an Initial Hearing in accordance with Utah Code § 59-1-502.5.

On July 5, 2012, Respondent ("Division") issued Notices of Deficiency and Audit Changes ("Notices") for the 2009 and 2010 tax years, through which the Division disallowed the special need adoption credit ("Credit") of $2,000 for 2009 and $1,000 for 2010. The Notices reflect the following amounts calculated based on the disallowed Credits:

Tax Year	Audit Tax	Interest	Penalties	Total Due
2009	$2,000.00	$$$$$	$$$$$	$$$$$
2010	$1,000.00	$$$$$	$$$$$	$$$$$

Interest was calculated through August 4, 2012 and continues to accrue on any unpaid balances.

Petitioners ("Taxpayers") assert they qualify for the Credits for the three children they adopted from COUNTRY.

APPLICABLE LAW

Utah Code § 59-1-1417 (2013) provides, "In a proceeding before the commission, the burden of proof is on the petitioner [taxpayer] …"

Utah Code § 59-10-1104 (2009-2010) (prior version at § 59-10-133) states in part:

(1) As used in this section, a "child who has a special need" means a child who meets at least one of the following conditions:
  (a) the child is five years of age or older;
  (b) the child:
    (i) is under the age of 18; and
    (ii) has a physical, emotional, or mental disability; or
  (c) the child is a member of a sibling group placed together for adoption.
(2) For taxable years beginning on or after January 1, 2005, a claimant who **adopts in this state** a child who has a special need may claim on the claimant's individual income tax return for the taxable year a refundable tax credit of $1,000 against taxes otherwise due under this chapter for:
  (a) adoptions for which a court issues an order granting the adoption on or after January 1, 2005;
  (b) the taxable year during which a court issues an order granting the adoption; and
  (c) each child who has a special need whom the claimant adopts.

. . . .

(Emphasis added.)

Utah Code § 59-10-1104 (2013) states in part:

(1) As used in this section, a "child who has a special need" means a child who meets at least one of the following conditions:
  (a) the child is five years of age or older;
  (b) the child:
    (i) is under the age of 18; and
    (ii) has a physical, emotional, or mental disability; or
  (c) the child is a member of a sibling group placed together for adoption.
(2) (a) Subject to the other provisions of this section, a claimant who adopts a child who has a special need may claim a refundable tax credit of $1,000:
    (i) for a child who has a special need who the claimant adopts;
    (ii) on the claimant's individual income tax return for the taxable year; and
    (iii) against taxes otherwise due under this chapter.
  (b) A tax credit under this section may not exceed $1,000 per return for a taxable year.
(3) For a claimant to qualify for the tax credit described in Subsection (2) for an adoption:
  (a) the order that grants the adoption shall be issued:
    (i) on or after January 1, 2013; and
    (ii) by:
      (A) a court of competent jurisdiction of this state or another state; or
      (B) a foreign country;
  (b) the claimant shall be a resident of this state on the date the order described in Subsection (3)(a) is issued; and
  (c) for an adoption made by a foreign country, the adoption shall be registered in accordance with Section 78B-6-142.

(4) (a) For an adoption for which a court of competent jurisdiction of this state or another state issues the order described in Subsection (3)(a), a claimant may claim a tax credit for the taxable year for which the adoption order becomes final.

(b) For an adoption for which a foreign country issues the order described in Subsection (3)(a), a claimant may claim a tax credit for the taxable year for which a court of competent jurisdiction in this state orders the state registrar to file the adoption order issued by the foreign country.

. . . .

Utah Code § 59-10-1102(1) (2009-2010) defines claimant as follows:

(a) Except as provided in Subsection (1)(b) or Subsection 59-10-1103(1)(a), "claimant" means a resident or nonresident person.

(b) "Claimant" does not include an estate or trust.

Utah Code § 78B-6-103(2) (2009) defines "adoption" as follows:

"Adoption" means the judicial act which creates the relationship of parent and child where it did not previously exist and which permanently deprives a birth parent of parental rights.

Utah Code § 78B-6-103(2) (2010) defines "adoption" as follows:

"Adoption" means the judicial act that:

(a) creates the relationship of parent and child where it did not previously exist; and

(b) except as provided in Subsection 78B-6-138(2), terminates the parental rights of any other person with respect to the child.

Utah Code § 78B-6-138(2) (2010) states:

The rights and duties of a pre-existing parent . . . who, at the time the child is adopted, is lawfully married to the person adopting the child are not released or terminated under Subsection (1)(b).

Utah Code § 78B-6-142 (2009-2010) (prior version at § 78-30-8.6(1)-(2)) states:

(1) Except as otherwise provided by federal law, **an adoption order rendered to a resident of this state that is made by a foreign country shall be recognized by the courts of this state and enforced as if the order were rendered by a court in this state.**

(2) A person who adopts a child in a foreign country may register the order in this state. A petition for registration of a foreign adoption order may be combined with a petition for a name change. If the court finds that the foreign adoption order meets the requirements of Subsection (1), the court shall order the state registrar to:

(a) file the order pursuant to Section 78B-6-137; and

(b) file a certificate of birth for the child pursuant to Section 26-2-28.

. . . .

(Emphasis added.)

Utah Code § 78B-6-137 (2009-2010) (prior version at § 78-30-9(1)) states:

The court shall examine each person appearing before it in accordance with this chapter, separately, and, if satisfied that the interests of the child will be promoted by the

> adoption, it shall enter **a final decree of adoption** declaring that the child is adopted by the adoptive parent or parents and shall be regarded and treated in all respects as the child of the adoptive parent or parents.
>
> (Emphasis added.)

DISCUSSION

The parties disagree as to whether the Taxpayers adopted "in this state" the three children from COUNTRY. Under § 59-10-1104(2), "a claimant who adopts **in this state** a child who has a special need may claim on the claimant's individual income tax return for the taxable year a refundable tax credit of $1,000 against taxes otherwise due" (emphasis added). At the initial hearing, the parties did not present other issues about the Taxpayers' claiming the Credits.[1]

The Taxpayers presented copies of adoption orders, U.S. citizenship certificates, Utah registration of foreign adoption orders, and Utah birth certificates. The following table of information comes from those documents.

Child's Name	**(CHILD-1)**	**(CHILD-2)**	**(CHILD-3)**
Child's Date of Birth	DATE-1	DATE-2	DATE-3
Country of Court Issuing Adoption Order	COUNTRY	COUNTRY	COUNTRY
Date of COUNTRY Adoption Order	##-##-08	##-##-08	##-##-09
Date COUNTRY Adoption Order Came Into Force	##-##-08	##-##-08	##-##-09*
Effective Date of U.S. Citizenship	##-##-09	##-##-09	##-##-10
Date of Order Registering Adoption in Utah**	##-##-09	##-##-09	##-##-10
Date of Registration per Utah Birth Certificate	##-##-09	##-##-09	##-##-12
Tax Year for Which Credit Was Claimed	2009	2009	2010
*The Judge infers that the order came into force on or about May 1, 2009. The order dated April 21, 2009 stated that there was a 10-day appeal period and that the order was not appealed and came into force. **The orders were issued by the Third District Court, Salt Lake County, Utah.			

At the initial hearing, the Division presented its position first. The Division asserted that the Taxpayers do not qualify for the Credit because the court decrees for the three adoptions were issued by COUNTRY courts. The Division explained the children were in the custody of COUNTRY before both Taxpayers traveled to COUNTRY and adopted them through the COUNTRY courts' decrees.

The Division asserted that based on the plain language of the Utah Code, the Taxpayers do not qualify for the Credit because the Taxpayers did not "adopt[] in this state." The Division asserted the statutory language of § 59-10-1104 (2009-2010) is clear both before and after the 2013 modification by the Utah Legislature; specifically, that for situations before January 1, 2013, the actual adoption must

[1] The parties did not address the timing of when the Taxpayers claimed the Credits. Section 59-10-1104(2)(b) provides that a claimant may claim the Credit for "the taxable year during which a court issues an order granting the adoption." The COUNTRY court issued the adoption orders in 2008 and 2009. The Utah courts signed in 2009 and 2010 the orders registering the adoptions. The Taxpayer claimed the Credits in 2009 and 2010.

occur in Utah. The Division referred to § 78B-6-103(2) for the Utah's definition of adoption. Under § 78B-6-103(2), an adoption is a "judicial act" that "creates the relationship of parent and child where it did not previously exist" and that "terminates the parental rights of any other person with respect to the child." The Division asserted that in the Taxpayers' case, the three adoptions occurred in COUNTRY because the COUNTRY courts created the new parent-child relationships and terminated the prior parental rights.

The Division also explained that it provided the legislative history for the Credit in its Pre-Hearing Memorandum. For the 2013 modification, the Division explained that the Utah Legislature modified the Credit in 2013 through the passage of Utah Senate Bill 31 ("S.B. 31"). The Division also asserted that the Credit as modified in 2013 does not cover the 2009 and 2010 tax years at issue. The Division stated that the modification is only effective as of January 1, 2013. The Division contended that the modification was a substantive change in the Credit, not just a clarification in the interpretation of the Credit. In its Pre-Hearing Memorandum, pages 4-5, ¶ 9, the Division discussed in more detail the 2013 modifications, citing the online legislative record. The legislative history for S.B. 31 is available at http://le.utah.gov/~2013/bills/static/SB0031.html. The Division explained that the Legislature expanded the scope of the Credit to include more adoptions after January 1, 2013, but not before.

The Division explained that the Commission, through its prior decisions, has found the language of § 59-10-1104 to be clear and that under those decisions the Taxpayers cannot qualify for the Credit. The Division cited the following initial hearing decisions: Appeal No. 10-0486, available at http://www.tax.utah.gov/commission/decision/10-0486.intsanqc.pdf; Appeal No. 10-1311, available at http://www.tax.utah.gov/commission/decision/10-1311.intsanqc.pdf; Appeal No. 10-2068, available at http://tax.utah.gov/commission/decision/10-2068.intsanqc.pdf; and Appeal No. 11-2712, available at http://tax.utah.gov/commission/decision/11-2712.int.sanqc.pdf. Appeal No. 12-1694 was not redacted at the time of the initial hearing for the Taxpayers' case; however, it is currently available at http://tax.utah.gov/commission/decision/12-1694.pdf. The Division stated that it would provide the Taxpayers with a copy of the order for Appeal No. 12-1694 as soon as the Division received a copy. The Division stated that other taxpayers in the past have argued that § 59-10-1104 was ambiguous, but the Legislature, through its 2013 modification, did not say that statute was previously unclear. The Division stated that the Legislature instead expanded the scope of the Credit, effective January 1, 2013, to include foreign adoptions. The Judge notes that Commissioner Dixon has dissented from the majority opinion in all of the appeals decisions cited above.

In response to the Division's arguments, the Taxpayers assert that in 2013 the Utah Legislature clarified the Credit through passage of Utah Senate Bill 31 and that those clarifications apply to the 2009 and 2010 tax years. The Taxpayers contend that the Commissioners of the Tax Commission requested a

legislative clarification, not a legislative change. The Taxpayers quoted the following part from the minutes of a Commission meeting held on April 12, 2012:

> **IX. Legislative Issues for Interim Committees**
>
> a. Adoption Credit
>
> Commissioner Cragun discussed Adoption Credit issues raised in recent appeals. He asked if the Commission desires to ask the legislature to review the matter during the interim.
>
> Commissioner Dixon stated she supports asking if the Legislature would like to review and clarify what qualifies under the Special Needs Adoption Credit.
>
> Mr. Conover supports the Commission asking the Legislature for guidance on the Adoption Credit. He also said that the state income tax instructions will be clearer next year on what qualifies and what does not qualify based on the current understanding of the law.
>
> Commissioner Dixon and Commissioner Cragun will discuss the Adoption Credit concerns with the Chairs of the Tax and Revenue Interim Committee.

These minutes are available at http://tax.utah.gov/commission/minute/2012-04-12.pdf. The Taxpayers asserted that the quoted material shows the Utah Legislature revised § 59-10-1104 in 2013 *to clarify* that foreign adoptions qualify for the Credit, both before and after the effective date of the 2013 statutory revision.

The Taxpayer, TAXPAYER-1, also explained that he proofread other, unrelated legislation before it passed. He said he saw changes in that legislation where the legislative body revised the legislation year after year to get the language right. He said, in that situation, the final version of the legislation was the version intended all along and the version that applied to prior years.

To further support their position, the Taxpayers presented Commissioner Dixon's dissents in Appeal No. 10-0486 and Appeal No. 10-1311. For Appeal No. 10-0486, Commissioner Dixon wrote:

> I respectfully dissent from my colleagues. I would find in favor of the Petitioner because I hold the Taxpayer **is** "a claimant who adopt[ed] **in** this state" based on the language found in the Judicial Code, Utah Code Annotated (UCA) **78-30-8.6(1)-(2) Adoption order from foreign country**, which states:
>
> > (1) Except as otherwise provided by federal law, an adoption order rendered to a resident of this state that is made by a foreign country **shall be recognized by the courts of this state and enforced as if the order were rendered by a court in this state.**
>
> . . . .
>
> It is undisputed the Taxpayers were residents of this state when the adoptions of their two children were finalized. Per UCA 78-30-8.6(1) Utah courts must recognize and enforce the Taxpayers' foreign adoption orders registered in this state as if a Utah court rendered the orders. This counters the Division's position that registrations are less than adoptions. Thus the Taxpayer's adoption orders are the same as adoption orders rendered by a Utah court and as such the Taxpayer's adoptions are adoptions in this state. It is undisputed the Taxpayers adopted special needs children, therefore the Tax Commission

> must recognize the Taxpayers as claimants whose adoptions qualify for a refundable tax credit of $$$$$ against taxes otherwise due.
>
> (Emphasis in original.)

For Appeal No. 10-1311, Commissioner Dixon wrote:

> It is an often-cited principle to be cautious when interpreting tax statutes against taxpayers. As the Utah Supreme Court wrote in *County Board of Equalization of Wasatch County v. Utah State Tax Commission*, 944 P.2d 370, 373-74 (Utah 1997):
>
> > It is an established rule in the construction of tax statutes that if any doubt exists as to the meaning of the statute, "our practice is construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent exists." *Salt Lake County v. State Tax Comm'n,* 779 P.2d 1131, 1132 (Utah 1989).
>
> In this case, I would apply that principle.
>
> It is undisputed the taxpayers were residents of this state when the adoption of their child was finalized. It is undisputed the taxpayers adopted a special needs child. Utah Code Annotated section 59-10-1104 (2006) allows a credit for "(a) adoptions for which a court issues an order granting the adoption and (b) the taxable year during which a court issues an order granting the adoption." Both Utah and STATE recognized the family's residency in Utah at the time of the adoption. Therefore the Tax Commission should recognize the taxpayers as claimants whose adoption qualifies for the refundable tax credit against taxes otherwise due.

The Taxpayers agree with the analyses found in both of these dissents.

The Taxpayers presented the following from the 2010 TC-40 Instructions, available at http://www.tax.utah.gov/forms/2010/tc-40inst.pdf:

> **(41) Special Needs Adoption Credit** (UC §59-10-1104)
> You may claim a credit of $1,000 for each special needs child you adopt in Utah. This credit may only be claimed the year the court issues the adoption order.
>
> To claim this credit, the child must meet one of the following conditions: (1) be five years of age or older; (2) be under the age of 18 with a physical, emotional, or mental disability; or (3) be part of a sibling group (two or more persons) placed together for adoption.
>
> There is no form for this credit. Keep all related documents with your records.

The Taxpayers assert they met the requirements found in the instructions quoted above. The Judge notes that the above quotation instructs that the Credit is for a "child you adopt in Utah." For the adequacy of the instructions, the Division asserted that the Tax Commission must decide what it can reasonably include in publications such as the 2010 TC-40 Instructions and that every taxpayer has constructive

notice of the content of statutes. For constructive notice the Division cited *Nelson v. Utah State Tax Commission*, a Utah Supreme Court case.

The Taxpayers also explained that their tax preparer, NAME with ACCOUNTING FIRM, made multiple phone calls to the Tax Commission before claiming the Credit. The Taxpayers said she was told the adoptions would qualify. The Taxpayers said NAME called three times for each year: first, when the Taxpayers were preparing for the adoptions; second, later before the adoptions; and third, before claiming the Credits. The Taxpayers said NAME made notes but no longer has them. The Taxpayers said for one of the calls a Tax Commission employee needed time to research the issue and when he called back he explained that if the child is special needs for purposes of the federal government, the child is special needs for Utah as well. The Taxpayers assert there was nothing in § 59-10-1104 or in the documents available to the public that showed their adoptions would not qualify for the Credit. The Taxpayers asserted that reasonable taxpayers relying on the information available to the public would come to the same conclusion, specifically, that adoptions such as the Taxpayers' would qualify. The Taxpayers expressed hope that the Tax Commission would clarify its TC-40 Instructions for the 2013 tax year. In response to the alleged conversations with the Tax Commission employees, the Division stated that the advice of Tax Commission employees does not bind the Tax Commission and that, instead, the Commission's rules and regulations bind the Tax Commission.

The Taxpayers also explained that under COUNTRY law, TAXPAYER-1 was too old to adopt the children. TAXPAYER-1 explained that he signed an affidavit in COUNTRY that he would adopt the children when back in the United States. He explained that his wife, TAXPAYER-2, adopted the children in COUNTRY, but his adoption of the children occurred in the United States. The Taxpayers explained that the children's biological parents' rights terminated in COUNTRY. The Taxpayers explained that the children were not U.S. citizens until TAXPAYER-1 became their legal parent and that the children's citizenships were granted after they were in the United States. The Taxpayers stated that the children were in Utah when TAXPAYER-1 adopted them. Consistent with this explanation, the Taxpayers showed that TAXPAYER-2 adopted the children through the COUNTRY court orders dated DATE, 2008 and DATE, 2009; that Utah judges approved orders registering the adoptions in Utah on DATE, 2009 and DATE, 2010; and that the effective dates of the children's U.S. citizenships were DATE, 2009 and DATE, 2010. The Judge in this appeal reviewed the orders of registration issued by the Utah courts. In those orders, the Utah judges found TAXPAYER-1 and TAXPAYER-2 to have adopted the children based on the Utah judges' reviews of the COUNTRY adoption orders and the Taxpayers' verified petitions. The Utah judges ordered "the Registrar for the State of Utah [to] prepare . . . birth certificate[s] for the minor child[ren] changing the child[ren]'s name[s] to [the new names]."

A. The Utah Legislature's 2013 Amendment to § 59-10-1104 Modified the Credit to Include Adoptions that Occur in Foreign Countries and in Other States On or After January 1, 2013; However, the Amendment Does Not Apply to the 2009 and 2010 Tax Years.

The plain language of the statutes shows that the 2013 amendment applies starting on January 1, 2013. Specifically, § 59-10-1104(3) (2013) states in part: "For a claimant to qualify for the tax credit . . . for an adoption: (a) the order that grants the adoption shall be issued: (i) **on or after January 1, 2013** . . ." (emphasis added). Furthermore, lines 19-20 and 70-71 of the enrolled copy of S.B. 31, available at http://le.utah.gov/~2013/bills/sbillenr/SB0031.pdf, state, "This bill has retrospective operation for a taxable year beginning on or after January 1, 2013."

Based on a review of the public information available from the Utah Legislature about the 2013 amendment, it appears that the Utah Legislature was aware of the Commission's interpretation of Utah Code § 59-10-1104 (2009-2010) limiting the Credit to children adopted in Utah. It seems the Legislature intended the 2013 amendment to expand the Credit for qualifying special needs children adopted by Utah residents to include children adopted in other states or countries. The legislative hearings, amendments, revisions, fiscal note, and floor debates are available on the Utah Legislative website at http://le.utah.gov/~2013/bills/static/SB0031.html. The Commission takes administrative notice that S.B. 31 did have a fiscal note that indicated a cost to the state of $241,000 per year based on an estimate that an additional 241 taxpayers would claim the Credit per year because of this amendment. *See* http://le.utah.gov/lfa/fnotes/2013/SB0031.fn.pdf. Therefore, the clear legislative intent of S.B. 31 was to expand the number of taxpayers who could qualify for the Credit. In addition to expanding the Credit, the Legislature also added the limitation that a taxpayer could qualify for only one Credit per tax return. In summary, the plain language of the statute and the other legislative history available for S.B. 31 show the 2013 amendment does not apply before January 1, 2013. The minutes from a Commission meeting held on April 12, 2012 are not part of the legislative history and do not alter the conclusion above.

B. For Purposes of § 59-10-1104 (2009-2010), the Taxpayers Adopted the Children in COUNTRY and Not "In This State."

The Taxpayers do not qualify for the Credit for the adoptions of the three children because those adoptions occurred in COUNTRY. Under Utah law, § 78B-6-103(2) defines "adoption" as a judicial act that creates the new parent-child relationship and "permanently deprives a birth parent of parental rights" (§ 78B-6-103(2) (2009)) or "terminates the parental rights of any other person with respect to the child" (§ 78B-6-103(2) (2010)). In COUNTRY, the courts created the parent-child relationships between the Taxpayers and children and the courts terminated the parental rights of the birth parents. This conclusion is consistent with the initial hearing order for Appeal No. 10-2068 (redacted), in which the Commission's majority stated, in part:

> The plain language of Utah Code § 59-10-1104(2) is not ambiguous. The statute allows the Credit for an adoption "in this state." The adoption in question occurred in COUNTRY and was given effect for Utah purposes under our law, as required by § 78-30-8.6. Situations similar to foreign adoptions often occur. With other states, there is a constitutional requirement that Utah give other states' laws "full faith and credit." Thus, a marriage in STATE 1 is effective in Utah. However, that does not mean the marriage occurred "in this state." For this appeal, the adoption was an adoption in COUNTRY. While § 78-30-8.6 requires Utah courts to recognize and enforce the COUNTRY order as if it were rendered by a court in this state, this direction falls short of directing that the COUNTRY adoption should be treated as a Utah adoption for tax purposes.
>
> Tax credits are to be narrowly construed. To the extent the legislative history is instructive, it is noteworthy that the Credit was originally limited to adoptions of children from the permanent custody of the Utah DCFS and was later expanded to include adoptions of other children not in Utah custody. Based on this legislative history, a reasonable interpretation is that the Legislature recognized there were Utah children with special needs who were not in Utah custody and the Legislature wanted these children adopted, too. However, there is no legislative history suggesting that the Utah Legislature intended to provide assistance to parents who adopted children of COUNTRY, of any other foreign country, or of any other state of the United States, even if the parents were or would become Utah residents. Thus, a narrow interpretation of the Credit, limiting it to adoptions occurring in Utah, still puts in full effect the apparent legislative intent of encouraging the adoption of Utah children with special needs.

In the above appeal, the Commission's majority opinion disallowed the Credit to a taxpayer when that taxpayer adopted a child from a foreign country; the majority found the adoption occurred in the foreign country and not in Utah so the "in this state" requirement was not met. Likewise in the case at hand, the Taxpayer's adoptions occurred in COUNTRY and not "in this state."

The Taxpayers did not later adopt the children a second time through the Utah courts' orders registering the adoptions in Utah. In those cases, the Utah judges did not order the creation or terminate of any parental rights. Instead, the Utah judges found the Taxpayers to be the adoptive parents based on the COUNTRY adoption orders, and the Utah judges only ordered the Registrar for the State of Utah to prepare birth certificates, changing the children's names to the new names. This conclusion about orders registering adoptions is consistent with the initial hearing order for Appeal No. 11-2712 (redacted), in which the Commission's majority stated, in part:

> The registration of an adoption order from a foreign country is not an adoption for Utah individual income tax purposes. Adoption is defined in § 78B-6-103(2). When that definition for adoption, found in § 78B-6-103(2), is applied to an adoption from a foreign country, the conclusion is that "the judicial act which creates the relationship of parent and child where it did not previously exist and which permanently deprives a birth parent of parental rights" occurred in the foreign country when that country issued the adoption order.
>
> Taxpayers do not adopt in this state for purposes of the Credit when they petition and receive orders of registration of foreign adoptions. In such cases, Utah courts do not create relationships of parent and child where they did not previously exist or

> permanently deprive birth parents of parental rights. Instead, these relationship changes previously occurred, through the foreign adoption orders alone.
>
> . . . .

In summary, the Taxpayers have not shown they "adopt[ed] in this state" for purposes of the Credit. The Commission's majority already considered Commissioner Dixon's dissents for Appeal No. 10-0486 and Appeal No. 10-1311 when the majority reached its decisions.

C. The Taxpayers Have Not Shown TAXPAYER-1 Adopted the Children "In This State" for Purposes of § 59-10-1104.

The Taxpayers did not show TAXPAYER-1 adopted the children in Utah. As explained previously in this order, under § 78B-6-103(2) (2009-2010), an "adoption" is a judicial act that creates new parent-child relationships and terminates old ones. The Taxpayers did not show that a judicial act by a Utah court created the new relationship between TAXPAYER-1 and the children or terminated a prior parent-child relationship the children had. The Taxpayers presented the Utah court's orders registering the adoptions in Utah. However, the Utah judges issuing these orders did not create new parent-child relationships between TAXPAYER-1 and the children. Instead, the Utah judges found that such relationships existed based on the Utah judges' review of the COUNTRY adoption orders and Taxpayers' verified petitions. Consistent with this, the Utah judges did not order the creation or termination of any parent-child relationships; instead, they limited their orders to requiring the Registrar for the State of Utah to prepare Utah birth certificates for the children changing the children's names to their new names.

D. The Taxpayers Do Not Qualify for the Credit Based on the 2010 TC-40 Instructions.

The Taxpayers have not met all of the requirements found in the 2010 TC-40 Instructions for the Credit. The instructions state, "You may claim a credit of $1,000 for each special needs child you **adopt in Utah**" (emphasis added). The Taxpayers have not shown that they adopted the children in Utah. The 2010 TC-40 Instructions for the Credit are correct; they are consistent with § 59-10-1104(2), which limits the Credit to "a claimant who **adopts in this state**." Because the Taxpayers adopted in COUNTRY, they did not adopt in Utah and they do not qualify for the Credit.

E. The Tax Preparer's Alleged Conversations with Tax Commission Employees Do Not Qualify the Taxpayers for the Credit or Justify a Waiver of the Audit Interest Assessed.

The Taxpayers testified about alleged conversations between their tax preparer and Tax Commission employees. In general, conversations with Tax Commission employees do not bind the Tax Commission. Similarly, a taxpayer cannot receive a waiver of correctly assessed audit tax based on misinformation from a Tax Commission employee because the Utah Code does not authorize the

Commission to waive correctly assessed tax based on such misinformation. However, misinformation from a Tax Commission employee can potentially justify a waiver the interest assessed.

The Judge considered whether the Taxpayers' testimony about the conversations with Tax Commission employees was sufficient for a waiver of the interest. Under Utah Code § 59-1-401(13), the Commission has discretion to waive interest based "upon reasonable cause shown." Under Utah Administrative Code R861-1A-42(2), "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." Under Utah Administrative Code R861-1A-28(2)(b), "No decision of the commission will be based solely on hearsay evidence." In the initial hearing order for Appeal 11-2712, available at http://tax.utah.gov/commission/decision/11-2712.int.sanqc.pdf, the Commission waived interest because the taxpayer showed a Tax Commission employee gave erroneous information about the Credit. In that case, the taxpayer testified about her own conversations with a particular Tax Commission employee and she submitted an email from that employee to her. The Taxpayers' case similarly concerns the same Credit; however, it differs in the evidence presented. In the Taxpayers' case, the Taxpayers only testified about what their tax preparer and unidentified Tax Commission employees possibly said to each other. This testimony is hearsay evidence. Because the Taxpayers did not present any non-hearsay evidence about the alleged conversations, R8961-1A-28(2)(b) prevents the Commission from granting a waiver of interest.

In conclusion, the Judge recommends the Commission sustain in full the Division's 2009-2010 audit assessments.

Aimee Nielson-Larios
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission sustains in full the Division's audit assessments for the 2009 and 2010 tax years. 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 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

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

DATED this _____day of _____, 2014.

R. Bruce Johnson
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from the order within thirty (30) days from the date of this order may result in a late payment penalty.

COMMISSIONER DIXON DISSENTS

I respectfully dissent from my colleagues. I would find in favor of the Taxpayer.[2] This is consistent with my position in five previous orders on foreign special needs adoptions.

I stand by the reasoning in my previous dissents, and incorporate, by reference the reasoning of those dissents[3] into this dissent (beginning at page 15 and continuing on page 16), but write further to address a legal argument made by the same majority of commissioners in commission order xx-xxxx, which has been appealed to court.[4] In that order, I dissented from the majority's conclusions of law.

In commission order xx-xxxx, the majority wrote:

> As the Utah Supreme Court has noted in *Jensen v. IHC Hospitals Inc.*, 944 P.2d 327, 226 (1997), "When we are faced with two statutes that purport to **cover the same subject**, we seek to determine the legislature's intent as to which applies. In doing this, we follow the general rules of statutory construction, which provide both that 'the best evidence of legislative intent is the plain language of the statute (Citations Omitted),' and that '**a**

[2]In response to a footnote in the majority opinion, I hold the Taxpayers correctly claimed the credits and met the requirements outlined in the 2010 TC-40 instructions.

[3]This includes 10-0486, 10-2068 10-1311, 11-2712, and 12-1694. A redacted version of my dissent in12-1694 is included with this dissent. The other dissents can be found at http://www.tax.utah.gov/commission-office/decisions; however, xx-xxxx has not been redacted as it has been appealed to court.

[4]If this commission order is appealed to a formal, it is possible the ultimate decision in this matter will be rendered by the court.

> **more specific statute governs instead of a more general statute** (Citations Omitted).'" In this situation the specific code section is §59-10-1104 which provides the tax credit. It is not in the same or related chapters in Title 78B, which provide for the adoption process and procedures. There is no specific reference in the tax credit provision to definitions or processes in the adoption provisions.

In my dissent in xx-xxxx, I wrote that the Commission does have two statutes that must be considered § 78B-6-142 and § 59-10-1104; however, the governing statute in this matter is UCA § 78B-6-142, not UCA § 59-10-1104 as the majority concluded.

First, the two statutes do not cover the same subject; one covers special needs adoptions and one covers foreign adoptions. Second, when both statutes are read together the issue is whether the foreign adoption should be considered an adoption in this state for the purposes of § 59-10-1104. Therefore we must look to the more specific statute addressing how foreign adoptions are to be treated which is § 78B-6-142. Section 78B-6-142 reads:

> "an adoption order rendered to a resident of this state that is made by a foreign country shall be recognized by the courts of this state and enforced **as if** the order were rendered by a court in this state."
>
> **(Emphasis added.)**

Under § 78B-6-103(2) (2009) "Adoption" is defined as follows:

> "Adoption" means the judicial act which creates the relation of parent and child where it did not previously exist and which permanently deprives a birth parent of parental rights."

"As if" in § 78B-6-142 is to be interpreted that the Court is to recognize the foreign adoption order **as if** the Utah Court was the one performing the judicial act which creates the relation of parent and child where it did not previously exist and which permanently deprives a birth parent of parental rights. The law requires that the adoption of a child from a foreign country by a resident of the State and the foreign adoption order rendered by that foreign country be looked upon no different, treated no different, and held no different and given no different standing than that of an adoption order rendered to an equally situated Utah resident going through the Utah court system for an adoption.

If the two-word phrase "as if" in UCA § 78B-6-142 is ignored, the analysis is incomplete. "As if" means the Utah Court and all Utah agencies are to do more than just recognize and give effect to another jurisdiction's decree—which is the majority's "full faith and credit" argument and position; it means the foreign adoption order is to be treated and given effect as a Utah decree.

The adoption order from a foreign country in which a parent-child relationship was created where one previously did not exist is to be recognized and therefore treated as an adoption order rendered by a court of the State of Utah which created a parent-child relationship where one did not previously exist, and therefore an adoption in this state for the purposes of § 59-10-1104. This recognition mirrors the act of adoption itself where an adoptive parent looks on and treats an adoptive child no differently, but as if that child was their own birth child.

If a Utah court is to recognize and enforce the foreign adoption order as if a Utah court issued the adoption order creating the parent child relationship where it did not previously exist, then the Utah State Tax Commission should similarly regard the adoption order, and grant the adoption credit.

For the reasons noted above, I hold SB 31 was a clarification that Utah residents that adopt a special needs child from a foreign country are eligible for the special needs adoption credit; SB 31 was a clarification, not an expansion. Because I hold this to be true, there is no need for any further analysis of the Majority opinion.[5]

Finally, I hold at the very least, the majority should waive the interest. By Tax Commission administrative rule R861-1A-28(1)(b) the Commission can consider hearsay evidence; however, no decision of the Commission can be based solely on hearsay evidence. The Commission has in other commission orders involving this same statute on special needs adoptions, waived interest based on information that a tax commission employee gave advice to the taxpayer. While in those situations there was evidence of emails with the commission employees, I believe the majority could take administrative notice and acknowledge that tax commission employees have provided advice in regards to this credit, which did not follow the subsequent rulings of the majority.

D'Arcy Dixon Pignanelli
Commissioner

Commissioner Dixon's Dissent for Order 12-1694 issued April 11, 2013 is incorporated into her dissent for this Order 12-2133, and is as follows starting on page 16.

[5]I do not believe the clarification was needed; however, there may have been a concern that the majority opinion was not recognizing the reading of the law and the intent of the legislation. Legislation is rarely made more retroactive than six months or a year – certainly not four or more years. And after so many years, particularly after the Great Recession, it is logical and reasonable that the fiscal impact of any legislation would need to be considered.

There are three main supporting reasons why the Order should be in favor of the Taxpayer. These three supporting reasons are as follows:

1. The intent of the Utah State Legislature
2. The required Utah residency of adopting parent(s)
3. The required recognition of adoption orders by courts in the State

Supporting Reason One (#1): The Intent of the Utah State Legislature[6]

I take administrative notice of the presentation of ***SB 125 Amendments to Individual Income Tax Credit for Special Needs Adoptions (Hellewell)*** in 2005 on the floor of the Utah State Senate, of which the audio is available on the public legislative website. Sen. Hellewell, as the sponsor of SB 125 states[7]:

> "Here in this State we do have a lot of adoptions; there's a lot of these that are special needs adoptions and these are very important adoptions because it is hard to get parents to take these special needs kids, who might have a lot of problems. In the past, the law said you could get a tax credit for adopting kids with special needs as long as those kids came from DCFS[8]. **This bill says you can also have that tax credit if you adopt these special needs kids from somebody else like LDS social services or private adoption or whatever.** This is very important because it will allow more special needs kids to be adopted. **We did have an amendment made in committee because somebody had a concern that maybe somebody from out of state would adopt a child here in the State of Utah and then be able to claim that tax credit, so we amended the bill in committee to say the adoption has to, well, it says, 'requires that the adoption occur in the state for a taxpayer to be eligible for the tax credit.[9]'"**

At no time in the Senate debate was it stated or inferred that special needs adoptions does not include foreign adoptions or adoptions from outside the state, or that private adoptions does not include foreign adoptions or adoptions from outside the state. Nor was there any discussion on potential costs to the State of either of these types of special needs adoptions.

The only discussion on the Senate floor in terms of costs to the State was in regards to a policy

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[6] I hold the account of the legislative history as related in tax commission order 10-2068 is incomplete.

[7] As transcribed by Commissioner Dixon

[8] DCFS is understood to mean the Division of Child and Family Services in the Utah Department of Human Services

[9] The Senator's reading was not exact to the amendment language on lines 13a and 13b of the bill which reads "*Requires that an adoption occur in this state for a taxpayer to be eligible for a tax credit."* To be consistent with the amendment on lines 13a and 13b, line 41 was amended and line 41a added to read, "a taxpayer who adopts *IN THIS STATE* a child who has a special need may claim…"

See http://le.utah.gov/~2005/bills/sbillamd/sb0125.htm.

question raised by Sen. Bramble as to whether step-parents should be able to claim the tax credit.[10] Upon adoption of Sen. Bramble's floor amendment allowing adopting step-parents to claim the tax credit, the sponsor of SB 125 (2005) Sen. Hellewell said, ***"any special needs adoption can be done and would receive the credit."*** And on final passage of SB125, Sen. Hellewell said the bill: *"... make(s) it so in special needs adoption it is open to anybody; not just children from DCFS."*

I also take administrative notice of the presentation of ***SB125 (2005)*** on the floor of the Utah House of Representatives, of which the audio is available on the public legislative website. Rep. Morley as the House Sponsor of SB125, in his presentation of the bill on the floor of the House of Representatives said,[11] *"...this actually makes that tax credit available to people who are adopting children who are also outside of DCFS. It's a fairness issue, it addresses special needs children. It's a good bill."*

These Legislative statements counter the Division's position that the special needs adoption credit is only for children who are in Utah and being supported by state resources until they are adopted.

Sen. Hellewell said, *"it is hard to get parents to take these special needs kids, who might have a lot of problems…This bill says you can have that tax credit if you adopt these special needs kids from somebody else like LDS social services or private adoption or whatever."* I note in the hearing file is a letter from NAME-1 MD, dated DATE, which reads:

> This letter is in response to a request from TAXPAYER-1 regarding a state audit. He has three children that are disabled. CHILD-1, born BIRTH DATE-1, is DISABLED and has (X). CHILD-3, born BIRTH DATE-3, has (Y) and is disabled because of it. CHILD-2, WORDS REMOVED, was born BIRTH DATE-3[12]without BODY PARTS.

Based on information in the hearing file, CHILD-1 and CHILD-2 were adopted by the Taxpayers from FOREIGN COUNTRY on ADOPTION DATE-1, and CHILD-3 adopted from FOREIGN COUNTRY on ADOPTION DATE-2. There are also Third District Court documents for all three children that read "The adoption order was issued by a court of competent jurisdiction in the country of

[10] On the Senate floor Senator Bramble refers to a question raised in committee as to whether a step-parent could claim the credit. In the scenario presented a parent has a special needs child, and marries, and the step-parent is willing to adopt the special needs child. In that scenario, could that step-parent claim the tax credit? Sen. Bramble advocated "yes" saying that in doing so the State is providing an incentive for a step–parent to accept responsibility for the needs of that child, stating this is a "benefit to the State and society" because there is less chance that child will need State assistance (as transcribed by Commissioner Dixon).

[11] As transcribed by Commissioner Dixon

[12] The Certificate of Adoption Registration (Translation) of the FOREIGN COUNTRY gives the date of birth as (DATE).

FOREIGN COUNTRY." It would thus appear the Taxpayers did adopt special needs children, and met the intent of the sponsor of the legislation, which was to adopt special needs children.

Supporting Reason Two (#2): The required Utah residency of adopting parent(s)

The sponsor of SB 125 (2005), Sen. Hellewell, makes it clear through his statements on the Senate floor that the phrase "adopts in this State" refers to the parent(s) being a resident of Utah. The phrase "adopts in this State" does not imply the child(ren) must be a resident of the State of Utah before the adoption occur or that the adoption decree be issued by a Utah court. The location of the child or the place where the custodial relationship was established[13] usually determines where the adoption decree is issued, but where the adoption decree is issued is not the determining factor of whether a special needs adoption credit can be claimed. This is true for special needs adoptions from foreign countries as well as special needs adoptions from other states. The majority is improperly interpreting the intent of the statute. **In looking at the totality of the legislative intent, I am convinced that in Section 59-10-1104(2) the phrase "in this state" should be interpreted as a qualifier of the term "claimant," and understood as "a claimant in this state."**

Supporting Reason Three (#3): The required recognition of adoption orders by courts in the State

When a foreign adoption decree is registered with a state district court in Utah, the Court recognizes it as an adoption in this state and issues a registration order titled "ORDER OF REGISTRATION OF ADOPTION FROM FOREIGN COUNTRY." This court order is forwarded to the Registrar for the State of Utah ordering the state registrar to file the order and prepare a birth certificate. **The Utah Court does not issue another adoption decree because under 76B-6-142 a foreign adoption decree is as valid and binding as an adoption decree issued by a court in the state, and as such, an adoption in this state.** This is supported by the fact that Utah Code 78B-6-103(2) (2009) defines "adoption" as the judicial act which creates the relationship of parent and child where it did not previously exist and which permanently deprives a birth parent of parental rights. In the case before us the judicial act was the foreign adoption decree, which is recognized by Utah Courts.

In Utah, the registration[14] of a foreign adoption order is so adopting parents who are residents of Utah can obtain a U.S. birth certificate from the State of Utah for their adopted child with the adopted child(s)'s name, any name changes, and the adopting parents' names as the child's parent(s). A foreign country can issue an adoption order that is recognized and accepted as an adoption decree by Utah Courts,

[13] As in tax commission order 10-1311

[14] Utah Law does not require a foreign adoption order to be registered; the law reads "may" register. Again, the purpose for registering a foreign adoption is to obtain a U.S. birth certificate issued by the State of Utah.

but a foreign country cannot issue a U.S. birth certificate. This counters and makes irrelevant the Divisions' position and majority's finding based on 78B-6-137 that the filing of an order of registration is not the same as the filing of a final decree of adoption. It is undisputed that there are Third District Court documents in the hearing file that read a "court of competent jurisdiction in the country of FOREIGN COUNTRY" issued an adoption order. Utah law 78B-6-142 reads "an adoption order rendered to a resident of this state that is made by a foreign country shall be recognized by the courts of this state and enforced as if the order were rendered by a court in this state."

Final Conclusions

Based on the Legislative Intent and Utah law as I understand it, I would find in favor of the Taxpayers. The Taxpayers were residents of Utah when a foreign court issued an order granting the adoption of their special needs children. The Taxpayers claimed the special needs adoption tax credit in the same taxable years the foreign court issued the orders granting adoption of their special needs children. Utah courts, which I hold includes the Tax Commission as an administrative court, must recognize and enforce a foreign adoption order as if rendered by a Utah court. Therefore and accordingly under Utah Code §59-10-1104 the Taxpayers are claimants who adopted in this state children with special needs and should be granted the special needs adoption credit.

Finally, I take notice of one additional item in the majority opinion. In terms of the "full faith and credit" argument advanced by the majority in appeal 10-2068 and cited in this order, a foreign adoption is registered with the State of Utah for the purposes of the children receiving U.S. birth certificates. A marriage performed in another state is not registered in the State of Utah for the purposes of receiving a U.S. document; therefore, the full faith and credit argument is not germane.

Signed by Commissioner Dixon
4/11/13 in Appeal No. 12-1694

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D'Arcy Dixon Pignanelli
Commissioner