

16-1272

TAX TYPE: INCOME TAX

TAX YEAR: 2012 and 2013

DATE SIGNED: 10/10/2017

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>TAXPAYER-1, TAXPAYER-2,</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;"><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 16-1272</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Years: 2012 and 2013</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVE FOR TAXPAYERS, CPA  
For Respondent: RESPONDENT-1, Manager, Income Tax Auditing  
RESPONDENT-2, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on June 6, 2017 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioners (“Taxpayers”) had appealed Utah individual income tax audit deficiencies under Utah Code §59-1-501 for tax years 2012 and 2013. Respondent (“Division”) had issued a Notice of Deficiency and Audit Change on July 7, 2016 for tax year 2013, which had been timely appealed by the Taxpayers resulting in this appeal being opened. Later, at the request of the parties, an audit deficiency issued for tax year 2012 was added to this appeal. Originally, the Taxpayers had paid the 2012 audit deficiency, which had been issued on November 16, 2015, and were now requesting a refund of all taxes paid for that year. The Division had audited the Taxpayers and issued the audits for both years on the basis that the Taxpayers were full year Utah resident individuals for income tax purposes.<sup>1</sup> It was the Taxpayers’ position that they were not Utah resident individuals and had been residents of STATE-1. No

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<sup>1</sup> TAXPAYER-1 passed away in 2013.

penalties were assessed with the audits. The amounts of additional tax and interest due as of the date the Notices of Deficiency were issued are as follows:

	<u>Tax</u>	<u>Interest<sup>2</sup></u>	<u>Penalties</u>	<u>Total as of Notice Date</u>
2012	\$\$\$\$\$ <sup>3</sup>	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2013	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Subsection 59-10-104(1) as follows:

. . . . a tax is imposed on the state taxable income of a resident individual as provided in this section . . . .

Resident individual is defined in Utah Code Subsection 59-10-103(1)(q) as follows:

(q)(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.

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 all 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:

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<sup>2</sup> Interest continues to accrue until a balance is paid in full.

<sup>3</sup> In calculating the Utah tax deficiency the Division did allow for a credit for taxes paid to the State of STATE-1. The reason for the large amount of tax due for the 2012 tax year was that the Taxpayers had sold property they owned in STATE-1 and based on STATE-1 tax law this resulted in a capital gain of which 60% was excluded from STATE-1 taxable income. Under Utah law, the entire capital gain would be included in the Utah taxable income.

- (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.

If a property owner no longer qualifies for the residential exemption they are required by law to notify the county at Utah Code Sec. 59-2-103.5(4):

Except as provided in Subsection (5), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, the property owner shall:

(a) file a written statement with the county board of equalization of the county in which the property is located:

(i) on a form provided by the county board of equalization; and

(ii) notifying the county board of equalization that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence; and

(b) declare on the property owner's individual income tax return under Chapter 10, Individual Income Tax Act, for the taxable year for which the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence.

The applicable statutes generally provide that the taxpayers bear the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . .

#### DISCUSSION

The Division based its audit on the assertion that the Taxpayers were Utah resident individuals for income tax purposes for all of 2012 and 2013. It was the Taxpayers' position that they had been residents of STATE-1 and the Taxpayers had filed STATE-1 returns as resident individuals. The issue in this appeal is whether the Taxpayers were "resident individuals" in the State of Utah for the purposes of Utah Code Sec. 59-10-104. Under Utah Code Sec. 59-10-103, a resident individual is one who is "domiciled" in Utah, or if not "domiciled" in Utah, is one who maintains a place of abode in this state and spends in the aggregate 183 days or more per year in Utah. It was the Division's position that the Taxpayers were Utah "resident individuals" because they were "domiciled" in Utah under Utah Code Subsection 59-10-136(2). Utah Code Subsection 59-10-136(2) provides, "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 the individual's or individual's spouse's primary residence . . ."

The Taxpayers' representative explained that the Taxpayers had been lifelong residents of STATE-1. When they were married, they purchased a house and farm property in that state. It was

their position that this STATE-1 residence was the Taxpayers' primary home and they received the homeowner's exemption on this residence on their STATE-1 property tax. Later, in 1989, they purchased a house in CITY-1, Utah where they would spend the winter months. The representative for the Taxpayers stated that the Taxpayers had STATE-1 Driver Licenses, were registered to vote in STATE-1 and that TAXPAYER-1 had a STATE-1 resident hunting and fishing license in 2012. However, the representative did not provide copies of these documents at the hearing. She stated that the Utah property was only for winter use, about three months of the year. She also explained that the Taxpayers had filed STATE-1 resident returns for both 2012 and 2013. However, after receiving the 2012 audit the Taxpayers had felt pressured by the Division to accept the Division's position that they were Utah residents, so then had filed amended STATE-1 and Utah returns claiming to be part-year residents of both states.

Although the Taxpayers claim that STATE-1 was their primary place of residence, the Taxpayers were receiving the primary residential exemption on their Utah residence for the tax years at issue. The representative for the Taxpayers had stated at the hearing that the Taxpayers spent about three months per year at this residence and a family member resided year round at this Utah residence, maintaining the property. After the hearing, the representative provided a letter dated June 7, 2017, from this family member, NAME-1. NAME-1 explained that she was the granddaughter of the Taxpayers, and resided full time at their Utah residence. NAME-1 had not attended the hearing and there was no opportunity to ask her questions about her statements in the letter. In the letter, she states that the Utah residence had been used exclusively as a winter home for her grandparents for many years. She states, "I found myself at a point in life where I could make a change and moved down to CITY-1 with the intent of helping my grandmother maintain the house, take care of the home when she occupies her STATE-1 home in CITY-2 . . . . The house is multi-level and myself and rest of the family had been experiencing growing concern at having my Grandmother there on her own." NAME-1 does not state the date that she moved into her grandparents' residence in CITY-1, Utah. So it is unclear whether she was there in 2012 or 2013 or moved to the residence sometime after, but as TAXPAYER-1 passed away sometime in 2013, it appears from this statement that NAME-1 had moved into the residence sometime after that. NAME-1 does explain that she paid rent through the services she performed by fixing up and maintaining the residence and property. NAME-1 stated that she had paid the utilities for the first few months that she resided at the residence, but apparently not after that.

The Division argues that the Taxpayers were domiciled in Utah under Utah Code Subsection 59-10-136(2) because they were receiving the residential exemption on their Utah residence. Utah Code Subsection 59-10-136(2)(a) provides that an individual is presumed

domiciled in Utah if the individual or spouse claims the residential exemption on Utah property that is the individual or spouse's primary residence. If the Taxpayers did not consider their Utah residence to be their primary residence, they had the affirmative requirement to notify the county in which the residence was located that they no longer qualified for the property tax exemption pursuant to Utah Code Subsection 59-2-103.5(4) and beginning in 2012 they were required to declare that they no longer qualified for this exemption on their Utah individual income tax returns.<sup>4</sup> Because the Taxpayers failed to meet these two requirements regarding their Utah residence they are presumed to be domiciled in Utah under this provision.

The presumption that an individual is domiciled in Utah if the individual or spouse claims the residential exemption under Utah Code Subsection 59-10-136(2)(a) is a rebuttable presumption. Additionally, an exception is provided at Utah Code Subsection 59-10-136(6) which states "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." "Tenant" is not defined at Utah Code Section 59-10-136; however, the Tax Commission has previously issued a decision on what would constitute a tenant for purposes of this code section in *Utah State Tax Commission Initial Hearing Order, Appeal No. 15-1063* (August 23, 2016).<sup>5</sup> In *Appeal No. 15-1063* a family not related to the taxpayer in that appeal was residing in the residence paying utilities, maintaining the property and protecting it from vandalism. The Tax Commission in *Appeal No. 15-1063* found that the family living in the residence was providing services in exchange for the use of the property and should be considered "tenants" for purposes of Utah Code Subsection 59-10-136(6) regardless of the fact that they were not paying money as rent. However, the facts in *Appeal No. 15-1063* are different from the facts of the subject appeal, as the taxpayers did not ever stay at the residence simultaneously with the family considered to be the tenants. In the subject appeal, the Taxpayer, TAXPAYER-2, would stay at the Utah residence with her granddaughter for several months per year. Additionally, it was unclear that NAME-1 was even residing at the Utah property in 2012 or 2013.<sup>6</sup> Therefore, the Taxpayers have not shown that NAME-1 was the "tenant" of this property and this exception does not apply.

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<sup>4</sup> See TC-40, pg. 3, Part 7, Property Owner's Residential Exemption Termination Declaration, which states, "If you are a Utah residential property owner and declare you no longer qualify to receive a residential exemption authorized under UC §59-2-103 for your primary residence, check box and enter the county code where the residence is located (see instructions for county codes and additional information)."

<sup>5</sup> This and other Tax Commission decisions are published in a redacted format and available for review at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

<sup>6</sup> The Taxpayer does have the burden of proof in this proceeding under Utah Code Sec. 59-1-1417.

The Taxpayers have not shown they had a tenant in their Utah property. In addition, they have also not shown other factors that would rebut the rebuttable presumption under Utah Code Subsection 59-10-136(2)(a) that arises due to the Utah property receiving the primary residential exemption. In *Utah State Tax Commission, Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (September 21, 2015)* the Commission concluded that it would take something more than a preponderance of the domicile factors listed at Subsection 136(3) to rebut this presumption. In prior decisions, other taxpayers had argued that they did not have knowledge of the receipt of this exemption or the implications of domicile for receiving this exemption and the Tax Commission has concluded that ignorance of the law is not sufficient to rebut the presumption of domicile under Utah Code Subsection 59-10-136(2).<sup>7</sup>

Although the Division argued that the Taxpayers were Utah resident individuals based on Utah Code Subsection 59-10-136(2)(a), the Division also points out that there were a few facts that indicated more contacts with Utah than the Taxpayers' representative had stated. For instance, the Division provided copies of the Utah Driver License Records for the Taxpayers. TAXPAYER-1 had a Utah Driver License from May 15, 2008 until it expired on July 30, 2013. The Taxpayers had used their Utah address on their federal returns and tax information was mailed to the Utah address. The Taxpayers also had a vehicle registered in Utah during the audit period.

Regardless of these additional facts, after review of the law and noting that the burden of proof is on the Taxpayers, the Taxpayer has failed to rebut the presumption set out in Utah Code Subsection 59-10-136(2)(a) and, therefore, the Taxpayers are found to have domicile in Utah. This makes them Utah resident individuals subject to tax on all of their income, consistent with the Division's audit. No penalties were assessed with the audits.

Jane Phan  
Administrative Law Judge

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<sup>7</sup> See *Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30 (9/2/2015)*; and *Initial Hearing Orders, Appeal No. 16-117(1/18/17)* and *Appeal No. 16-792 (8/16/17)*.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's audit deficiencies of additional Utah individual income tax and the interest accrued thereon for tax years 2012 and 2013. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this 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 \_\_\_\_\_, 2017.

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.**