

16-1368

TAX TYPE: INCOME TAX

TAX YEAR: 2013, 2014, 2015

DATE SIGNED: 04/18/2018

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

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>TAXPAYERS,</p> <p style="padding-left: 40px;">Petitioners,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align: center;"><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 16-1368</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Years: 2013, 2014 and 2015</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: TAXPAYER-1

For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on August 10, 2017 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) are appealing audit deficiencies for tax years 2013 through 2015. The Taxpayers had filed as part-year Utah residents for tax year 2013 and as nonresidents for tax years 2014 and 2015, with Utah source income. The Notices of Deficiency and Audit Change for each year had been issued by Respondent (“Division”) on August 24, 2016. No penalties were assessed with the audits. The audit tax and interest calculated to the notice date for each year is as follows:

Year	Tax	Interest	Audit Total Due <sup>1</sup>
2013	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2014	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2015	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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<sup>1</sup> 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.

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 factors considered for determination of domicile are addressed in Utah Code Ann. §59-10-136, as set forth below:

- (1) (a) An individual is considered to have domicile in this state if:
  - (i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
  - (ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.
- (b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:
  - (i) is the noncustodial parent of a dependent:
    - (A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and
    - (B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and
  - (ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).
- (2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
  - (a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;
  - (b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or
  - (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

- (3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:
- (i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
  - (ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
- (b) The determination of whether an individual is considered to have domicile in this state under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:
- (i) whether the individual or the individual's spouse has a driver license in this state;
  - (ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;
  - (iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;
  - (iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;
  - (v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;
  - (vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
  - (vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
  - (viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
  - (ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;
  - (x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
  - (xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or

- (xii) whether the individual is an individual described in Subsection (1)(b).
- (4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
- (i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
  - (ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
    - (A) return to this state for more than 30 days in a calendar year;
    - (B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
    - (C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
    - (D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
    - (E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.
- (b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.
- (c) For purposes of Subsection (4)(a), an absence from the state:
- (i) begins on the later of the date:
    - (A) the individual leaves this state; or
    - (B) the individual's spouse leaves this state; and
  - (ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.
- (d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:
- (i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and
  - (ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.
- (e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax

- return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.
- (ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:
    - (A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and
    - (B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).
- (5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.
  - (b) For purposes of this section, an individual is not considered to have a spouse if:
    - (i) the individual is legally separated or divorced from the spouse; or
    - (ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.
  - (c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.
  - (6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

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

- (2) 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.

The Servicemembers Civil Relief Act also governs the residence of a servicemember for tax purposes in 50 U.S.C. §571, below in pertinent part:

- (a) Residence of 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...
- (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.

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

#### DISCUSSION

The Taxpayers had been residents of Utah for years prior to 2013. The Taxpayer, TAXPAYER-1, had entered into the Army National Guard while a resident of Utah. The Taxpayers had purchased a residence in CITY, Utah, had Utah Driver Licenses, Utah Voter Registrations and registered vehicles in Utah. At the end of July 2013, the Taxpayers, along with their children, moved to STATE-1 because TAXPAYER-1 had military orders to be stationed at CITY, STATE-1 for a period of 16 months. Prior to the move they sold their Utah residence using a Contract for Deed; however, because they had owner-financed the residence, the title remained in their name. The Taxpayers provided a copy of the Contract for Deed, which had been signed on July 30 and July 31, 2017. After the move to STATE-1, the Taxpayers obtained STATE Driver licenses, registered their vehicles in STATE-1 and TAXPAYER-1 registered to vote in STATE-1. At the hearing, TAXPAYER-1 said he did not know if TAXPAYER-2 had registered to vote in STATE-1. After the hearing in response to a post hearing request for additional information, TAXPAYER-1 provided that TAXPAYER-2 never registered to vote in STATE-1, but also that she did not vote in Utah. He also clarified that he did not register to vote in STATE-1 until 2014. After the move to STATE-1, TAXPAYER-1 filed a DD Form 2058 with

the military indicating that he had changed his legal residence to STATE-1. While in STATE-1, the Taxpayers filed a part-year 2013 Utah Individual Income Tax return. However, the address on the return was the address of their Utah residence. The Taxpayer explained that the return had been prepared by the same Utah tax preparer who had prepared their prior returns and the tax preparer had just carried the address over from prior years.

After the 16 months in STATE-1, the Taxpayer was reassigned to CITY in STATE-2 and he and his family moved to STATE-2 in February 2015. Because they had the Utah source income from their residence, which was under contract, they did file a Utah nonresident return and claimed Utah source income on that return. As they were still in transition at the time the return was filed, they had used TAXPAYER-2's parents' address in Utah on this return. When TAXPAYER-1 was discharged from active duty in February 2016, he and his family moved from STATE-2 to STATE-3. They never returned to the residence in Utah. After leaving Utah in July 2013, the Taxpayers have been absent from Utah more than 761 days. Although the Taxpayers had returned to Utah to spend the holidays with extended family, the Taxpayers were not in Utah more than 30 days in any of the calendar years after moving from Utah in July 2013. The Taxpayers' children were with the Taxpayers and not enrolled in school in Utah after July 2013. The Taxpayers were not themselves enrolled in institutions of higher education in Utah after July 2013. The Taxpayers did receive the residential property tax exemption on their Utah residence for tax year 2013. Technically, although they sold the residence in July 2013, their names were on the deed because of the seller-financing contract. The property continued to receive the residential property tax exemption in 2014 and 2015, but would have qualified for this exemption as it was the primary residence of the purchasers.

At the hearing, the representative for the Division had argued that leaving the state for military orders did not change a person's domicile. Under the Service members Civil Relief Act, a service member would not lose or acquire domicile by reason of being absent solely in compliance with military orders. In addition, it was his contention that there would have had to be a break in service before a service member could change their "home of record" with the military.

After reviewing the law applicable in this matter, under both Administrative Rule R865-9I-2 and the Service members Civil Relief Act, domicile is not lost because of an absence from the State due to military orders. However, under Subsection (2)(b) of Administrative Rule R865-9I-2, an individual in military service may change their domicile if the requirements of Utah Code §59-10-136 are met. Utah Code Subsection §59-10-136(2) provides factors which establish a

presumption of domicile in Utah. These factors include if the individual or the individual's spouse is registered to vote in Utah or if the individual or individual's spouse claims the residential property tax exemption. The Taxpayers received the residential property tax exemption in 2013. In addition, TAXPAYER-2 was registered to vote in Utah in 2013. Therefore, the Taxpayers are presumed to be domiciled in Utah for 2013 unless the Taxpayers rebut the presumption or an exception applies. The Taxpayers did not provide any evidence to rebut a presumption of domicile under Utah Code Subsection 59-10-136(2)(a) or (b).

Utah Code §59-10-136(4) provides an exception where an individual is not considered to have domicile in this state if the individual is absent from the state for 761 consecutive days<sup>2</sup> and the following criteria are met:

(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.

From the information presented at the hearing, the Taxpayers had been absent from the state for more than 761 days and would have met the requirements of Subsections 59-10-136(4)(a)(ii)(A), (B) and (C) listed above to qualify for this exception. However, regarding Subsection (D), the Taxpayers' Utah residence qualified for the residential property tax exemption in 2013 because the Taxpayers were still residing in this residence up until they moved in July 2013. Because the Taxpayers received the residential property tax exemption for tax year 2013, the 761 day exception does not apply in 2013.

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<sup>2</sup> The Tax Commission has previously considered and applied this provision to military personnel in *Utah State Tax Commission Initial Hearing Order, Appeal No. 13-1609* (June 17, 2014). In that case, the Commission had concluded that the designation pursuant to Form DD2058 was not controlling and the Tax Commission should consider whether or not the service member was domiciled in Utah pursuant to Utah Code Sec. 59-10-136. These and other Tax Commission decisions are available for review in a redacted format at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

However, once the Taxpayers sold their Utah residence it was no longer the Taxpayers' primary residence and became the residence of the purchaser. The purchaser had possession of the residence, had made a down payment of \$\$\$\$ and was making monthly payments based on a 5% interest rate. For 2014 and 2015, this residence was no longer the primary residence of the Taxpayers and would qualify for the exemption as the primary residence of the new owner under contract.<sup>3</sup> Therefore, for 2014 and 2015 the Taxpayers could still qualify for the 761 day exception.

Subsection 59-10-136(4)(a)(ii)(E) provides that to qualify for the exception under Subsection 59-10-136(4), neither the individual nor the individual's spouse may "assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes." This provision merits discussion. The addresses the Taxpayers had provided on their 2013 and 2014 tax returns had been Utah addresses. One was the address of the home they sold and the second address was TAXPAYER-2's parents' home. Use of a Utah address as the mailing address on the return is not the same as claiming Utah as the individual's tax home for federal individual income tax purposes. A "tax home" for federal tax purposes is necessary for determining whether the taxpayer can deduct certain expenses. Utah Code Sec. 59-10-136 does clearly distinguish between a "tax home" and a mailing address. Whereas Subsection 59-10-136(4)(a)(ii)(E) references a "tax home for federal individual income tax purposes," Subsection 59-10-136(3)(b)(ix) lists as a criterion for determining domicile under that subsection "whether the individual or the individual's spouse lists an address in this state on a state or federal tax return." Had the Utah Legislature intended providing a Utah address as the mailing address on a federal return and "tax home" to have the same meaning, the Legislature could have drafted Subsection 59-10-136(4)(a)(ii)(E) and Subsection 59-10-136(3)(b)(ix) to have identical language. The Utah Legislature did not do so.

To give meaning to the plain language of Subsection 59-10-136(4)(a)(ii)(E), the commission finds use of a Utah mailing address on the taxpayers' federal tax return to be

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<sup>3</sup> In *Utah State Tax Commission Initial Hearing Order, Appeal No. 15-1063* (August 26, 2016), the Commission had discussed the exception to receiving the property tax exemption for a primary residence 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." In that appeal, the Commission looked at what constituted a tenant and concluded a tenant was someone who had the right to use or occupy a property in exchange for money or service. In the subject appeal, based on the Contract for Deed, the Taxpayers were not the owners of the Utah residence, so the Commission need not apply the exception set out at Subsection 59-10-136(6), however, it would apply as the buyers did have the right to use and occupy the residence in exchange for the payments they were making pursuant to the Contract for Deed.

insufficient to establish that the Taxpayers' "tax home" is Utah. As the Taxpayers did not claim Utah as their "tax home" on their federal return, they are not precluded from the 761 day exception due to listing a Utah address on returns. The Taxpayers qualify for the 761 day exception for tax years 2014 and 2015.

Therefore, although the Taxpayers remained domiciled in Utah in 2013, they were not domiciled in Utah for 2014 and 2015. The audit should be adjusted on that basis.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that the Taxpayers remained domiciled in Utah for all of tax year 2013, but were not domiciled in Utah in 2014 or 2015. The Utah individual income tax audits are to be adjusted on that basis. 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

Robert P. Pero  
Commissioner

Rebecca L. Rockwell  
Commissioner

Appeal No. 16-1368

**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.**