

16-1804
TAX TYPE: INCOME TAX
TAX YEAR: 2013 & 2014
DATE SIGNED: 05/10/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS,

Petitioners,

v.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 16-1804

Account No. #####

Tax Type: Income Tax

Tax Years: 2013 and 2014

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1

For Respondent: RESPONDENT, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on January 4, 2018 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners (“Taxpayers”) are appealing audit deficiencies for tax years 2013 and 2014. The Taxpayers had filed Utah Individual Income Tax returns for tax years 2013 and 2014, but had claimed income based on their contention that TAXPAYER-2 was a part-year resident for each tax year. Respondent (“Division”) issued the audits on the basis that the Taxpayers were both resident individuals in Utah for all of 2013 and 2014. The Notices of Deficiency had been issued by the Division on October 31, 2016. No penalties were assessed with the audit. The audit deficiency and interest calculated to the date the notices were issued for each year are as follows:

Year	Tax	Interest	Penalties	Audit Total Due ¹
2013	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$
2014	\$\$\$\$\$	\$\$\$\$\$	\$0	\$\$\$\$\$

¹ This is the total balance as of the date the Audit Notices were issued. Interest continues to accrue on the 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.

Effective beginning with tax year 2012 the Utah Legislature adopted a law specifying the factors considered for the determination of domicile. This law replaced the prior Tax Commission rule defining domicile and was a significant change in this area. The new law is Utah Code Ann. §59-10-136 and is as set forth below in its entirety:

- (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.

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 explained that they had tried to file their Utah returns showing TAXPAYER-2 to be a part-year resident for both 2013 and 2014, because they thought that was the proper filing for him, but the Utah returns did not have a way to show that one spouse was a part-year resident and the other a full year resident. What they had done was to separate out the income TAXPAYER-2 had earned in STATE-1 because they had thought that for the period of time that TAXPAYER-2 was living and working in STATE-1, he was a resident of STATE-1.

TAXPAYER-1 attended the hearing and explained that she was from Southern STATE-2 and in 2011 both TAXPAYER-1 and TAXPAYER-2 were residing in STATE-2. TAXPAYER-2

worked large construction jobs as an OCCUPATION and his jobs generally lasted about one year until the construction project was completed. TAXPAYER-2 and TAXPAYER-1 were not married. In January 2011, TAXPAYER-2 found employment at a project in Utah. TAXPAYER-1 decided she would move to Utah as well, where she found employment. They rented an apartment in CITY. At this time they did not think this would be a permanent move as TAXPAYER-2's employment would last about one-year in Utah and TAXPAYER-1 was apprehensive about the Utah winter weather. They did not obtain Utah Driver Licenses or register to vote in Utah. They were both in Utah for all of 2012 and both working in this state, so they both filed Utah Individual Income Tax returns for 2012. Their 2012 Utah and federal returns were filed with the status of single because they were not married at this time.

In 2013, TAXPAYER-1 was employed in Utah managing a BUSINESS. TAXPAYER-2's Utah employment ended by June of 2013, and he found another job in CITY, STATE-1. He entered into a lease of an apartment on June 15, 2013 in CITY and moved there on July 1, 2013. TAXPAYER-1 stayed in Utah, maintaining an apartment for herself in CITY, Utah and working at her Utah employment. On November 10, 2013, the Taxpayers were married. As they were married before the end of tax year 2013, they filed as married filing joint on their federal and Utah returns. TAXPAYER-2, however, continued to live and work in STATE-1 at that job site until April 2014 when that construction work was completed. After that, he moved to Utah with TAXPAYER-1 and found employment in Utah.

In 2013 and 2014, the Taxpayers did not have any children. Neither Taxpayer was enrolled in an institution of higher education in Utah. They were not registered to vote in Utah. They did not own a residence in Utah for which they were receiving a primary residential exemption. They had filed joint Utah returns for both tax years 2013 and 2014 on which they had tried to claim TAXPAYER-2 as a part-year resident and TAXPAYER-1 as a full year Utah resident. They did not have Utah Driver Licenses. They did register one vehicle in Utah, which was the vehicle TAXPAYER-1 used.

It was the Division's position that the Taxpayers were both resident individuals of Utah for all of 2013 and 2014 for purposes of Utah Code §59-10-104(1). There was not a dispute that TAXPAYER-1 was a resident of Utah for both tax years. "Resident individual" is defined in Utah Code §59-10-103(1)(q) to be "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 "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." It is clear that for 2013 and 2014, TAXPAYER-1 was a resident individual because

she maintained a place of abode in Utah and spent more than 183 days each year in Utah, even if she was not “domiciled” in Utah under Utah Code §59-10-136. The issue was TAXPAYER-2’s residency. The Division argued that if TAXPAYER-2 was not domiciled in Utah under Utah Code §59-10-136, he was a resident individual under the alternative test because he was in Utah more than 183 days for both 2013 and 2014.

Utah Code §59-10-136 provides the definition for how one is domiciled in Utah. Under Subsection §59-10-136(1) an individual is domiciled in Utah if they have dependents in a Utah public school or the individual or individual’s spouse is enrolled as a resident student in a Utah institution of higher education. Neither Taxpayer met these criteria. Subsection §59-10-136(2) provides rebuttable presumptions of domicile, which are claiming the primary residential exemption on residential property in Utah, being registered to vote in Utah and, under Subsection §59-10-136(2)(c), claiming residency on a Utah return. The Taxpayers neither owned a residential property in Utah nor registered to vote in Utah for either year at issue. They did however, file a joint Utah return on which their intent was to claim that TAXPAYER-1 was a Utah resident and TAXPAYER-2 was a part year resident in both 2013 and 2014. TAXPAYER-1 then is domiciled in Utah under Subsection §59-10-136(2)(c), unless she can rebut this presumption.

It should be noted that as a resident individual based on the 183 day test, TAXPAYER-1 was required by law to file a Utah resident individual return. TAXPAYER-1 did file a Utah return on which she was asserting residency in this state for both tax years 2013 and 2014 and paid taxes on her Utah wages as a resident. However, by filing the return as a Utah resident, she and, therefore, her spouse are presumed to be domiciled in Utah under Subsection §59-10-136(2)(c) unless she can rebut this presumption. The Utah Legislature did not provide guidance in the statute on what factors should be considered in whether any of the presumptions of domicile under §59-10-136(2)(c) have been rebutted, and therefore, this has been left to the Tax Commission to decide in its appeal decisions.

In *Utah State Tax Commission Initial Hearing Order Appeal No. 15-1714*, the Commission considered the presumption at §59-10-136(2)(c) in an appeal with facts similar to the subject case. In that appeal the Commission noted:

Because Subsection 59-10-136(2)(c) involves a rebuttable presumption, the Legislature clearly intended for there to be circumstances not only where an individual who files a full-year or part-year Utah resident return *is* considered to have domicile in Utah, but also circumstances where an individual who files a full-year or part-year Utah resident return *is not* considered to have domicile in Utah. Otherwise, the Legislature would have made filing a Utah resident return an “absolute” indication of domicile (as it did in Subsection 59-10-136(1) for an

individual who is enrolled as a resident student in a Utah institution of higher education or, with certain exceptions, has dependents enrolled in a Utah public kindergarten, elementary, or secondary school). In addition, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-136(2)(c) presumption. As a result, it is left to the Commission to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

In *Appeal No. 15-1714* the Commission goes on to set out a three part test for rebutting the presumption set out at Subsection 59-10-136(2)(c) which was: 1) neither taxpayers met any of the other domicile criteria; 2) their Utah resident return “shows on its face that they believed that some of their income was not subject to Utah taxation”; and 3) “evidence at the hearing clearly shows that they believed that one (or both) of them was a Utah nonresident.” *Appeal No. 15-1714* appears to be the only decision issued on this presumption by the Tax Commission. Therefore, it is guidance that should be considered in the subject appeal.

One fact that was different between the subject appeal and *Appeal No. 15-1714* was that the subject Taxpayers were not married for most of tax year 2013 and so TAXPAYER-2 did not have a spouse for purposes of the domicile provisions until November 10, 2013. Although the couple did file a joint 2013 return as they were married by the end of 2013, Subsection §59-10-136(5)(c) provides, that except for specified circumstances, “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.” Therefore, the married filing joint status for tax year 2013 does not make the Taxpayers spouses for the period of time during the year that they were not married. However, once they were married on November 10, 2013, TAXPAYER-2 would be presumed domiciled in Utah if TAXPAYER-1 was domiciled in Utah under Subsection §59-10-136(2)(c).

The first factor to consider from the guidance provided in *Appeal No. 15-1714* is whether the Taxpayers met any of the other domicile criteria set out at Subsection §59-10-136. They did not meet the automatic provisions of domicile at Subsection §59-10-136(1) because they had no dependents and they were not enrolled in Utah institution of higher education as a resident student. They did not meet the other presumptions of domicile at Subsection §59-10-136(2)(a) or (b) because they did not own a Utah residence, nor were they registered to vote in Utah. If the requirements of Subsections §59-10-136(1) or (2) are not met, then Subsection (3) provides that domicile in Utah is to be determined on the preponderance of the evidence taking into account twelve factors. Considering the twelve factors less than a preponderance supports domicile in Utah.

The Commission finds that the Taxpayers also meet the second and third parts of the three part test for rebutting the presumption set out at Subsection 59-10-136(2)(c). Taxpayers had tried to claim TAXPAYER-2 as a part-year resident on their Utah returns, as they had tried to file under the contention that he was a Utah resident from January through June 2013, then a STATE-1 resident from July 1, 2013 through April 2014, and then a Utah resident after April 2014. For the third part, it is clear from the information presented that the Taxpayers thought TAXPAYER-2 was not domiciled in Utah from July 1, 2013 until April 2014.

The Commission finds that the Taxpayers rebutted the presumption of domicile set out at Subsection 59-10-136(2)(c). Therefore, TAXPAYER-2 was not domiciled in Utah from July 1 to April 2014, when he moved back to Utah.

Next consideration should be given to the Division's argument that even if TAXPAYER-2 was not domiciled in Utah under Utah Code Section §59-10-136, he was a resident individual under the alternative definition at Utah Code §59-10-103(1)(q), where one spends in the aggregate 183 days or more in Utah and maintains a place of abode in Utah. TAXPAYER-2 may have been in Utah 183 days in 2013, but he did not maintain a place of abode in Utah after he moved from the state. From July to the end of the year he maintained a place of abode in STATE-1. His girlfriend and then fiancé maintained a place of abode in Utah. TAXPAYER-2 was not a Utah resident under the alternative definition provided in the statute and he was a part year-resident in 2014, for the period of time after he moved back to Utah.

The audit deficiency should be revised to reflect that TAXPAYER-2 was not domiciled in Utah from July 1, 2013 to April 2014.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission orders the Division to adjust the audit for tax years 2013 and 2014 on the basis that TAXPAYER-2 was not a Utah resident individual from July 1, 2013 to April 2014. It is so ordered.

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

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

or emailed to:
taxappeals@utah.gov

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

DATED this _____ day of _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

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.