17-791 & 17-1134
TAX TYPE: INCOME TAX
TAX YEAR: 2010, 2011, 2013
DATE SIGNED: 10/9/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO
EXCUSED: 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 Nos. 17-791 & 17-1134 Account No. ##### Tax Type: Income Tax Tax Years: 2010, 2011 & 2013 Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1
REPRESENTATIVE FOR TAXPAYERS, Representative
For Respondent: REPRESENTATIVE FOR RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on May 3, 2018 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioners ("Taxpayers") are appealing Utah individual income tax audit deficiencies for tax years 2010, 2011 and 2013. The Taxpayers had not filed Utah individual income tax returns for tax years 2010 and 2011 and maintain that they were residents of STATE-1 for those years. The Taxpayers filed a part-year resident Utah return for tax year 2013, maintaining that they moved to Utah in August 2013. The Notices of Deficiency had been issued by Respondent ("Division") on April 7, 2017 for tax year 2013 and on May 22, 2017 for tax years 2010 and 2011. The audit tax, penalties and the interest accrued thereon calculated to the notice date for each year is as follows:

Year	Tax	Interest	Penalties	Audit Total Due[1]
2010	$$$$$	$$$$$	$$$$$	$$$$$
2011	$$$$$	$$$$$	$$$$$	$$$$$
2013	$$$$$	$$$$$	$$$$$	$$$$$

APPLICABLE LAW

Under Utah Code §59-10-104(1), tax is imposed on the state taxable income of a resident individual. "Resident individual" is defined in Utah Code Ann. §59-10-103(1)(q), as follows:

> (i) "resident individual" means:
> (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
> (B) an individual who is not domiciled in this state but:
> (I) maintains a place of abode in this state; and
> (II) spends in the aggregate 183 or more days of the taxable year in this state.

The law changed regarding "domicile" in Utah beginning with tax year 2012, so in this appeal the Tax Commission must apply the prior law to the 2010 and 2011 tax years and the current law to tax year 2013. For tax years 2010 and 2011 Utah Admin. Rule R865-9I-2 ("Rule 2") provides guidance concerning the determination of "domicile," as follows in pertinent part:[2]

> A. Domicile.
> 1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.
> 2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.
> a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.
> b) Domicile applies equally to a permanent home within and without the United States.

1 This is the total balance as of the date the Audit Notices were issued. Interest continues to accrue on any unpaid balance until paid in full.

2 Effective January 1, 2012, Utah law concerning "domicile" was substantively amended. The Rule 2 definition of "domicile" in effect for 2010 and 2011 was repealed beginning with tax year 2012 and new criteria concerning "domicile" were enacted in UCA §59-10-136. As a result, the Rule 2 definition of domicile in effect for 2010 and 2011 will be used to determine the taxpayers' domicile during 2010 and 2011, but Section 59-10-136 will be used to determine domicile during 2013.

3. A domicile, once established, is not lost until there is a concurrence of the following three elements:

a) a specific intent to abandon the former domicile;
b) the actual physical presence in a new domicile; and
c) the intent to remain in the new domicile permanently.

4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

. . . .

C. Determination of resident individual status for military servicepersons.

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

. . .

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

For the 2010 and 2011 tax years, Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective evidence that may be determinative of domicile, as follows:[3]

. . . .

(5) Factors or objective evidence determinative of domicile include:

(a) whether or not the individual voted in the place he claims to be domiciled;
(b) the length of any continuous residency in the location claimed as domicile;
(c) the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;
(d) the presence of family members in a given location;
(e) the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
(f) the physical location of the individual's place of business or sources of income;
(g) the use of local bank facilities or foreign bank institutions;
(h) the location of registration of vehicles, boats, and RVs;
(i) membership in clubs, churches, and other social organizations;
(j) the addresses used by the individual on such things as:
 (i) telephone listings;
 (ii) mail;

3 Rule 52 is referenced in the version of Rule 2 that was in effect for 2010 and 2011. As a result, Rule 52 is applicable when determining the taxpayers' 2010 and 2011 domicile, but not 2012 and 2013 domicile.

(iii) state and federal tax returns;
(iv) listings in official government publications or other correspondence;
(v) driver's license;
(vi) voter registration; and
(vii) tax rolls;

(k) location of public schools attended by the individual or the individual's dependents;
(l) the nature and payment of taxes in other states;
(m) declarations of the individual:

(i) communicated to third parties;
(ii) contained in deeds;
(iii) contained in insurance policies;
(iv) contained in wills;
(v) contained in letters;
(vi) contained in registers;
(vii) contained in mortgages; and
(viii) contained in leases.

(n) the exercise of civil or political rights in a given location;
(o) any failure to obtain permits and licenses normally required of a resident;
(p) the purchase of a burial plot in a particular location;
(q) the acquisition of a new residence in a different location.

. . . .

Beginning with the 2012 tax year, the factors considered for determination of domicile are addressed in Utah Code §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 effective for 2012 and subsequent tax years provides additional guidance on the determination of resident individual status for military personnel, as follows in relevant part:

(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 born and raised in Utah, and attended a university in Utah. Upon graduation from the university, TAXPAYER-1 became an active duty member of the United States Air Force in May 2003 and the couple moved from Utah to STATE-2 briefly for TAXPAYER-1's training. TAXPAYER-1 was then transferred to STATE-1 and TAXPAYER-2 moved with him to that state. TAXPAYER-1 explained at the hearing that they fell in love with STATE-1 at that time and decided to make STATE-1 their permanent home. The Taxpayers' obtained STATE-1 Driver Licenses, registered to vote in STATE-1 in 2003 and registered their vehicles in STATE-1. They made STATE-1 their "state of legal residence" with the military at this time.

Although TAXPAYER-1 has been unable to obtain or find a copy of his State of Legal Residence Certificate that he would have submitted to the Air Force, it is clear that he had changed his legal residence based on paystubs he was able to locate and which he submitted at the hearing for the years 2010 through 2013. These paystubs show the Air Force considered his "state of legal residence" to be STATE-1, because they show his state of withholding as being STATE-1.[4] The Taxpayer explained that the military bases its withholding on the service members "state of legal residence." The Taxpayers provided evidence at the hearing that although they had moved from STATE-1 to STATE-3 and then to STATE-4, they maintained their residency in STATE-1 and continued to be registered to vote in STATE-1 until they moved to Utah in 2013.[5]

After moving from Utah in 2003, the Taxpayers did not own any property in Utah, did not lease a residence or otherwise maintain a residence in Utah until they returned to Utah in 2013. They were both physically absent from Utah after 2003, living for a period in STATE-1 and then other states including STATE-3 and STATE-4 based on TAXPAYER-1's military assignments. The TAXPAYERS had children who attended schools in the states in which they were residing at that time. The Taxpayers were not registered to vote in Utah and did not obtain Utah Driver Licenses until 2013.

TAXPAYER-1 explained that in 2013, he was unexpectedly given the opportunity to retire early from the military. He and TAXPAYER-2 decided he should take that opportunity as they had young children and TAXPAYER-1 had already been through a number of deployments. At that point, they returned to Utah where they both had extended family to figure out what they were going to do next in their lives. TAXPAYER-1 stated they considered this to be a temporary move at the time. They had filed a part-year Utah return for the period of time they were in Utah in 2013.

The Division did not argue that the Taxpayers had not moved from Utah in 2003, were not living in other states, had Utah Driver Licenses, nor argue that they were registered to vote in Utah during the audit periods. Nor did the Division argue that the Taxpayers owned or leased a residence in Utah during the audit periods. It was the Division's position that because TAXPAYER-1 had been a Utah resident at the time he went into the military, Utah was his home of record and he continued to be a Utah resident for tax purposes during the entire time that he was in the military. The representative for the Division stated at the hearing that because TAXPAYER-1 was on officer in the military he could not change his residency without a break

4 See Petitioners' Exhibit 5.
5 See Petitioners' Exhibits 3 & 4.

in service. TAXPAYER-1 had not had a break in service so the Division's representative argued that he could not change his state residency for tax purposes from Utah to any other state.

However, when asked at the hearing for a citation to the statute, law or case law that supported the Division's contention that a break in service was required for an officer to change residency for tax purposes, the Division's representative was not able to provide one. The Division's representative was provided time to submit supporting information post-hearing, but did not submit support for this position after the hearing.

After reviewing the law applicable in this matter, under both Administrative Rule R865-9I-2 (as in effect both prior to and after the 2012 revision regarding domicile) and the Servicemembers Civil Relief Act, domicile is not lost because of an absence from the state solely due to military orders. However, under Administrative Rule R865-9I-2 (for both the pre and post domicile revision periods), an individual in military service may change from a resident individual to a nonresident individual or from a nonresident individual to a resident individual if they had met the domicile criteria in effect at that time. In this case, the Taxpayers clearly were not domiciled in Utah pursuant to the requirements of Administrative Rule R865-9I-2(A) for the tax years 2010 and 2011 or under Utah Code §59-10-136 for tax year 2013.[6] These provisions make it clear that a service member may change their state of domicile from the state in which they had resided at the time they entered into military service. There is nothing in the Utah statute or rule that supports the Division's contention that there is a different requirement for officers that imposes a break in service. The Division did not provide citation to federal law or provision under the Service Members Civil Relief Act to support this contention and this Administrative Law Judge is not aware of federal provisions that require this break in service. Therefore, the audits should be abated for all the tax years at issue in this appeal.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

6 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.

Based on the foregoing, the Commission finds that the Taxpayers were not domiciled or resident individuals in Utah for tax purposes in 2010, 2011 or in 2013 until they moved to Utah in August 2013. The audit deficiency of additional income tax, penalties and interest is to be abated for all tax years at issue. 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