

21-1302

TAX TYPE: INCOME TAX

TAX YEAR: 2020

DATE SIGNED: 7/19/2022

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

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 21-1302</p> <p>Account No: 3834</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2020</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, Assistant Director, Taxpayer Services Division
RESPONDENT-2, Tax Compliance Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on March 28, 2022 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Taxpayer”) is appealing a Notice of Change to Return issued by the Taxpayer Services Division (“Respondent”) on June 8, 2021. The Notice had disallowed the refund the Taxpayer had claimed of tax year 2020 Utah withholding on a nonresident Utah individual income tax return. The Taxpayer was claiming a refund of withholding that had been sourced to Utah and paid to Utah by the Taxpayer's employer. The amount of wage income sourced to Utah had been \$\$\$\$ and the withholding amount was \$\$\$\$\$. The issue is whether the withholding should be refunded to the Taxpayer.

APPLICABLE LAW

Effective for tax year 2020, Utah Code Subsection 59-10-116(1)¹ imposed a tax on nonresident individuals as follows:

Except as provided in Subsection (2), a tax is imposed on a nonresident individual in an amount equal to the product of the:

- (a) nonresident individual's state taxable income; and
- (b) percentage listed in Subsection 59-10-104(2).

Utah Code Sec. 59-10-117 (2020)² addresses state taxable income derived from Utah sources as follows:

(1) For purposes of Section 59-10-116, state taxable income derived from Utah sources includes state taxable income attributable to or resulting from:

(a) the ownership in this state of any interest in real or tangible personal property, including real property or property rights from which gross income from mining as described by Section 613(c), Internal Revenue Code, is derived;

(b) the carrying on of a business, trade, profession, or occupation in this state;

(c) an addition to adjusted gross income required by Subsection 59-10-114(1)(c), (d), or (h) to the extent that the addition was previously subtracted from state taxable income;

(d) a subtraction from adjusted gross income required by Subsection 59-10-114(2)(c) for a refund described in Subsection 59-10-114(2)(c) to the extent that the refund subtracted is related to a tax imposed by this state; or

(e) an adjustment to adjusted gross income required by Section 59-10-115 to the extent the adjustment is related to an item described in Subsections (1)(a) through (d).

(2) For purposes of Subsection (1):

(a) income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from Utah sources only to the extent that the income is from property employed in a trade, business, profession, or occupation carried on in this state;

(b) a deduction with respect to a capital loss, net long-term capital gain, or net operating loss shall be:

- (i) based solely on income, gain, loss, and deduction connected with Utah sources, under rules prescribed by the commission in

¹ The Tax Commission must apply the substantive law in effect for the tax year at issue and not the current law.

² Utah Code Subsection 59-10-117.5(2) was adopted effective January 1, 2023 and it clarifies for future tax years how nonresident workers are to be treated for tax purposes. However, this was not effective for tax year 2020. Subsection 59-10-117.5(2)(2023) provides: "A nonresident individual's wages may not be considered income derived from Utah sources if: (a) the nonresident individual has no other income from sources within this state for the taxable year in which the nonresident individual receives the wages; (b) the nonresident individual is present in this state to perform employment duties for 20 or fewer days during the tax year; and (c) the nonresident individual's state of residence: (i) provides a substantially similar exclusion; or (ii) does not impose a state individual income tax." Some additional requirements are set out at Subsection 59-10-117.5(3).

accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; and

(ii) otherwise determined in the same manner as the corresponding federal deductions;

(c) a salary, wage, commission, or compensation for personal services rendered outside this state may not be considered to be derived from Utah sources;

(d) a share of income, gain, loss, deduction, or credit of a nonresident pass-through entity taxpayer, as defined in Section 59-10-1402, derived from or connected with Utah sources shall be determined in accordance with Section 59-10-118;

(e) a nonresident, other than a dealer holding property primarily for sale to customers in the ordinary course of the dealer's trade or business, may not be considered to carry on a trade, business, profession, or occupation in this state solely by reason of the purchase or sale of property for the nonresident's own account;

(f) if a trade, business, profession, or occupation is carried on partly within and partly without this state, an item of income, gain, loss, or a deduction derived from or connected with Utah sources shall be determined in accordance with Section 59-10-118;

(g) the share of a nonresident estate or trust or a nonresident beneficiary of any estate or trust in income, gain, loss, or deduction derived from or connected with Utah sources shall be determined under Section 59-10-207; and

(h) any dividend, interest, or distributive share of income, gain, or loss from a real estate investment trust, as defined in Section 59-7-101, distributed or allocated to a nonresident investor in the trust, including any shareholder, beneficiary, or owner of a beneficial interest in the trust, shall:

(i) be income from intangible personal property under Subsection (2)(a); and

(ii) constitute income derived from Utah sources only to the extent the nonresident investor is employing its beneficial interest in the trust in a trade, business, profession, or occupation carried on by the investor in this state.

The burden of proof in this proceeding is set out at Utah Code Sec. 59-1-1417(1), which states, "The burden of proof is on the petitioner"

Guidance is provided to employers on withholding requirements at Utah Admin, Rule R865-9I-14 as follows:

- A. Except as otherwise prohibited in statute or this rule, every employer shall withhold Utah income taxes from all wages paid:
1. to a nonresident employee for services performed within Utah.
 2. to a resident employee for all services performed, even though such services may be performed partially or wholly without the state.

DISCUSSION

With his appeal in response to the Division's Notice, the Taxpayer had provided documentation to show that he was not a Utah resident individual in 2020 and that he moved to Utah in MONTH of 2021. At the Initial Hearing the Division did not dispute the Taxpayer's contention that he was not a Utah resident in 2020. It was the Division's position that the Taxpayer had received Utah source income which, even as a nonresident, was taxable to Utah in 2020.

It is clear from the information that the Taxpayer provided that he had been a STATE-1 resident and living in that state for several years when he accepted employment in MONTH of 2020 with the CITY-1, Utah office of COMPANY-1. The Taxpayer proffered at this hearing that before he started the process of moving to Utah, as a result of the COVID Pandemic, the employer required him and other employees to work remotely from home. Because of this the Taxpayer proffered that he never actually moved to Utah in 2020 and he specifically proffered that he never even traveled to Utah at any time in 2020 after he had been hired by COMPANY-1. It was the Taxpayer's proffer that he continued to reside in STATE-1, but he worked full time remotely from STATE-1 for COMPANY-1' CITY-1 office. The Taxpayer ended up moving to Utah in MONTH of 2021. He did provide documentation that supported that he remained in STATE-1 in 2020 and did not move to Utah until MONTH 2021.

The Division agreed that the Taxpayer was a nonresident of Utah in 2020 and did not have any information to refute the Taxpayer's proffer that the Taxpayer had physically remained in STATE-1 for all of 2020. However, COMPANY-1 had sourced the Taxpayer's wages to Utah. COMPANY-1 withheld amounts from the Taxpayer's wages as indicated on the W-2 and had paid that to Utah. Thus, it was the Division's position that the wage income was considered to be Utah source income and the Taxpayer had the burden of proof to establish that it was not Utah source income. Prior to the hearing, the Division told the Taxpayer that if COMPANY-1 would either amend the W-2 so that it did not report his wages as Utah source income, or if COMPANY-1 would provide a letter that indicated COMPANY-1 had reported this income as Utah source income in error, the Division would then have issued a refund of the withholding to the Taxpayer. Based on the Division's discussion at the hearing this was a situation that had occurred with other taxpayers and other taxpayers were able to resolve it by going to their employer and obtaining a corrected W-2 or a letter from the employer saying the income was sourced to Utah in error.

The Taxpayer stated at the hearing that he had asked his employer for a corrected W-2 or a letter, but his employer would not provide one. He said the employer told him it was their corporate policy not to do so. He noted that the address COMPANY-1 had used on the W-2 had been the Taxpayer's address in STATE-1.

Because the evidence supports the Taxpayer's position that he was a nonresident of Utah for all of 2020, the issue in this appeal is whether the income the Taxpayer received from his employment for COMPANY-1' CITY-1 office was Utah source income. Utah law did not specifically address remote workers in 2020.³ In tax year 2020 nonresident individuals were subject to Utah individual income tax on their Utah state taxable income pursuant to Utah Code Subsection 59-10-116(1). For tax year 2020, Utah Code Subsection 59-10-117(1)(b)(2020) provided that "state taxable income" was income derived from Utah sources including "the carrying on of a business, trade, profession, or occupation in this state . . ." Regarding wage income, Subsection 59-10-117(2)(c) provided the further clarification "a salary, wage, commission, or compensation for personal services rendered outside this state may not be considered to be derived from Utah sources . . ." In this case, the evidence at the Initial Hearing indicated that the Taxpayer was physically outside of Utah while he was working for an office of his employer that was located within Utah.

Withholding tax obligations are further clarified at Utah Admin. Rule R865-91-14(A)(1)(2020), which requires employers to withhold Utah income taxes from wages paid "to a nonresident employee for services performed within Utah."⁴ Remote workers may be performing services within Utah where the employer's physical location is in Utah, for example they could be rendering personal services for Utah customers, or working on accounts assigned to that Utah location. This would be performing services in Utah, regardless of where the employee was physically located at the time they were performing the services. In this case, the Taxpayer's employer, which was the CITY-1 office of a multinational company, sourced the Taxpayer's work to Utah and no evidence was presented in this matter to show that sourcing this income to Utah was in error. The Taxpayer has the burden of proof in this proceeding pursuant to Utah Code Sec. 59-1-1417 and has failed to establish that his services were not performed within Utah. Therefore, the Taxpayer's appeal should be denied.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

³ The statutes have recently been revised clarifying the tax treatment of remote workers, but the changes are not effective until tax year 2023.

⁴ See Publication 14, Withholding Tax Guide, p.2, which provides information to employers on withholding requirements. The publication states, "You must withhold Utah income tax (unless the employee has filed a withholding exemption certificate) if you: • pay wages to any employee for work done in Utah . . ."

Based on the foregoing, the Tax Commission finds that the Division properly denied the Taxpayer's request for refund of the tax year 2020 withholding and denies the Taxpayer's appeal in this matter. 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 **19** day of **July**, 2022.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Jennifer N Fresques
Commissioner