

APPEAL #: 22-339
TAX TYPE: INDIVIDUAL INCOME TAX
TAX YEAR: 2018
DATE SIGNED: 11/08/2022
COMMISSIONERS: J.VALENTINE, M.CRAGUN, R.ROCKWELL, AND J.FRESQUES

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="padding-left: 40px;">Petitioner,</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;">INITIAL HEARING ORDER</p> <p>Appeal No. 22-339</p> <p>Account No: #####</p> <p>Tax Type: Individual Income Tax</p> <p>Tax Year: 2018</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER

For Respondent: RESPONDENTS REP-1, Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 19, 2022 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Taxpayer”) is appealing a Notice of Deficiency and Audit Change issued by Respondent (“Division”) on DATE. The Notice indicated the Taxpayer owed additional individual income tax and interest for tax year 2018. No penalties were assessed with the audit. The amount of the audit tax deficiency was \$\$\$\$ and the interest accrued through the date of the Notice was \$\$\$\$.¹

APPLICABLE LAW

Effective for tax year 2018, Utah Code Subsection 59-10-116(1)² imposed a tax on nonresident individuals as follows:

¹ Interest continues to accrue on the unpaid balance.

² The Tax Commission must apply the substantive law in effect for the tax year at issue.

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 (2018)³ 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 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;

³ Utah Code Subsection 59-10-117.5(2) was adopted effective January 1, 2023 to address how nonresident workers are to be treated for tax purposes. However, this provision was not effective for tax year 2018. 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).

(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 Subsection 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 R865-91-14 as follows:

- A. Except as otherwise provided 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

The Division’s audit deficiency was based on the Taxpayer being a nonresident of Utah for all of the tax year at issue in this appeal. The Division agreed with the Taxpayer that he had moved from Utah in 2017 and was not a Utah resident individual for individual income tax purposes at any time during 2018. The audit deficiency was based on the Taxpayer being a

nonresident with Utah source income. The Division pointed out that the W-2 issued by the Taxpayer's employer in 2018 had sourced the Taxpayer's wage income to Utah.

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 2018. He explained that he had been residing in Utah in 2017, but he sold his home in Utah in 2017 and moved to STATE-1 where he purchased a home in July 2017. He provided documentation of that purchase and also documentation that movers had shipped his belongings from his Utah residence to his STATE-1 residence on DATE. He provided evidence that he registered his vehicles in STATE-1 and also that he had filed a STATE-1 individual income tax return as a resident of that state for 2018. Based on his STATE-1 return, he owed \$\$\$\$ in tax to that state for tax year 2018. The Taxpayer had also filed a Utah nonresident return for tax year 2018, requesting a refund of all the withholding that his employer had withheld on his behalf as Utah source wages and paid to Utah. His 2018 Utah nonresident return had requested a refund in the amount of \$\$\$\$\$. The Taxpayer had provided a copy of his W-2 for tax year 2018, which was from BUSINESS-1 and indicated Utah income tax withholding in the amount of \$1,708.

Before and after the Taxpayer's move to STATE-1, the Taxpayer was employed by BUSINESS-1 as an adjunct professor. He explained at the Initial Hearing that BUSINESS-1 has only one physical university location and that is located in STATE-2. He explained that the university also has an online division where all classes are taught remotely via the internet and it did not matter where the teachers or students were physically located. He stated that he has always worked for the division of the university that provided only remote or online classes, so it did not matter where he was physically living or working from. He indicated the students he taught in his online classes were located all over the world at their own separate remote locations. There was no physical classroom anywhere for the classes that he taught online. When asked, he stated there may have been an occasional student physically located in Utah.

The Taxpayer stated that BUSINESS-1 had not changed his address when he moved to STATE-1, so it still had his Utah address on file as his address during all of 2018. The copy of the W-2 he had provided for tax year 2018 indicated his address to be his former residence in Utah and indicated Utah as the state for withholding. The Taxpayer stated that he did try to get his employer to issue a corrected 2018 W-2 at the time his taxes were due. He stated his employer advised him to file a \$\$\$\$ return with the state of Utah to get all of the withholding back. He stated that after the audit had been issued he asked his employer again for a corrected W-2 or letter that the income should have been sourced to STATE-1, but his employer would not

issue a corrected W-2. BUSINESS-1 did issue a letter dated DATE, which explained why it sourced the income to Utah. This letter stated:

I understand there is a question regarding why Professor TAXPAYER's 2018 W-2 was processed as Utah wages rather than STATE-1. When 2018 payrolls were originally calculated they were processed using the ADDRESS-1 address on file that Professor TAXPAYER had provided to BUSINESS-1 at that time. The wage and tax information for those payrolls have already been remitted to the State of Utah and those periods are now closed.

At the hearing the Taxpayer argued that he was not domiciled in Utah during 2018 and not a Utah resident individual pursuant to the Utah Supreme Court's recent decision in *Buck v. Tax Commission*.⁴ The Division agreed with the taxpayer that he was not a resident of Utah in 2018. The Taxpayer also argued that the Division had not submitted a copy of his W-2 that showed the income reported from his employer as Utah income. However, the Division had submitted the electronic copy that his employer had filed with the Tax Commission, and also the Taxpayer himself had provided a copy of the W-2 he had received from his employer.

This issue in this appeal is not whether the Taxpayer was a Utah resident individual for individual income tax purposes for 2018. The Taxpayer was a nonresident individual. The issue is whether the income in question in this matter is Utah source income. A nonresident individual is required to pay Utah income tax on any Utah source income. The Taxpayer's employer had sourced all of the Taxpayer's wage income to Utah in 2018, had withheld Utah tax from those wages and paid that withholding to Utah. Thus it was the Division's position that the wage income was considered to be Utah source income. The Division had said that if the Taxpayer had been able to get his employer to file an amended W-2 or even issue a letter saying the W-2 was wrong and the income should have been sourced to STATE-1, the Division may have reversed the audit, but the Taxpayer was not able to provide that. The Division considered the letter that the Taxpayer was able to obtain from BUSINESS-1 to be insufficient because that letter did not state that BUSINESS-1 had sourced the Taxpayer's wages incorrectly to Utah.

The Commission considers these proffered facts and the applicable law in effect for tax year 2018. Utah law did not specifically address remote workers in 2018.⁵ In tax year 2018, 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 2018, Utah Code Subsection 59-10-117(1)(b) 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 . . ."

⁴ The Taxpayer was referring to *Buck v. Tax Commission*, 2022 UT 11.

⁵ The statutes have recently been revised clarifying the tax treatment of remote workers, but the changes are not effective until tax year 2023.

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 . . .” Withholding tax obligations are further clarified at Utah Admin. Rule R865-9I-14(A)(1)(2018), which requires employers to withhold Utah income taxes from wages paid “to a nonresident employee for services performed within Utah.”⁶ If the Taxpayer’s employer thought the Taxpayer was working from Utah, then the employer would be required to withhold Utah income taxes. However, in this case the employer explained it had sourced the wages to Utah based on the address it had on file for the Taxpayer at that time. In this case, the evidence at the Initial Hearing indicated that despite the fact that the Taxpayer’s employer had sourced this income to Utah, the Taxpayer was residing in STATE-1 for all of tax year 2018 while he was working for his employer. His employer’s only physical location was also outside of Utah. The Taxpayer’s employment was to teach students and the students he was teaching for this employment were located in various locations throughout the world. Some students may have been physically located in Utah.

The Tax Commission had recently issued a decision in another appeal regarding a Utah nonresident who never resided in Utah prior to the audit period or during the audit period and never even traveled to Utah during the audit period, but was working remotely for a Utah branch of a multinational corporation. In that decision, *Utah State Tax Commission Initial Hearing Order Appeal No. 21-1302 (7/19/2022)*, the Tax Commission found that taxpayer’s income to be sourced to Utah, concluding that even though that taxpayer was not physically in Utah and was working remotely from another state during the entire audit period, the taxpayer “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.” The subject appeal, however, is distinguishable. The Taxpayer was not physically working in Utah at any time during 2018 and was not working for a Utah office or branch of his employer. The Taxpayer’s employer did not have a physical location in Utah at any time during 2018. The students the Taxpayer taught were not physically in a classroom in Utah, but some may have been physically located in Utah. The Taxpayer’s wages were for personal services rendered outside this state and pursuant to Subsection 59-10-117(2)(c) may not be considered to be derived from Utah sources. The audit should be abated.

⁶ 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 . . .”

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission abates the Utah individual income tax audit deficiency of tax and interest issued for the 2018 tax year in its entirety. 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 _____, 2022.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Jennifer N. Fresques
Commissioner