

APPEAL #: 22-2043
TAX TYPE: INDIVIDUAL INCOME TAX
TAX YEAR: 2019
DATE SIGNED: 3/28/2024
COMMISSIONERS: J.VALENTINE, M.CRAGUN, R.ROCKWELL, AND J.FRESQUES

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYERS,</p> <p>Petitioners,</p> <p>v.</p> <p>INCOME TAX AND EDUCATION DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 22-2043</p> <p>Account No: #####</p> <p>Tax Type: Audit - Individual Income Tax</p> <p>Tax Year: 2019</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioners: TAXPAYER-1

For Respondent: RESPONDENT'S REP-1, Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on January 2, 2024 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioners (“Taxpayers”) are appealing a Notice of Deficiency and Audit Change issued by Respondent (“Division”) on DATE. The Notice indicated the Taxpayers owed additional individual income tax and interest for tax year 2019. 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 2019, Utah Code Subsection 59-10-116(1) (2019)² 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 (2019) 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;

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.

(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;

(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 R865-9I-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 Taxpayers had filed a part-year Utah resident return for tax year 2019, indicating on that return that they were residents of Utah from DATE to DATE. They claimed on their Utah part-year return the wage income TAXPAYER-1 received from DATE to DATE. However, they did not include the wage income he received after they had moved from Utah. The Division did not dispute that the Taxpayers were part-year Utah residents and were no longer Utah resident individuals after they had moved from Utah to STATE-1 on DATE. The Division's audit deficiency was based on the Taxpayers being nonresidents, but having Utah source income during the period from DATE until DATE. The Division pointed out that the W-2 issued by TAXPAYER-1's employer in 2019 had sourced all of TAXPAYER-1's wage income for all of 2019 to Utah.³ It was the Division's position that because the employer had sourced all of TAXPAYER-1's wage income to Utah, the income was Utah source income, regardless of TAXPAYER-1's location when he was performing the work for his employer.

In response to the Division's audit inquiries, the Taxpayers had provided documentation to show that they were not Utah resident individuals after DATE and this was not disputed by the Division at the hearing. The Taxpayer explained at the hearing that he had worked for all of 2019 and he worked for one employer, EMPLOYER ("EMPLOYER"). He stated that he had been working for this employer since 2016. He stated that he was an information technology worker and had always been a remote worker for EMPLOYER. He did acknowledge that he was working under EMPLOYERS's Utah office organizationally in 2019, and EMPLOYER had a physical office location in Utah, but he stated that he always worked remotely. He stated that EMPLOYER was headquartered in STATE-2 and it has an office in almost every state. He explained that his job for EMPLOYER was to assist one of EMPLOYER's global customers. He stated that one customer had clients in every state and ##### countries.

The Taxpayer explained that after they had moved to STATE-1 in DATE, he continued to work for his same employer, and the same Utah Division of that employer. However, he worked from his new residence in STATE-1. He pointed out his supervisor was residing in STATE-3 and he was working with other employees located in other states. He explained that when he made the move to STATE-1, he changed his mailing address with his employer, but he did not change his address for tax withholding purposes. He stated this was the reason EMPLOYER continued to

³ TAXPAYER-2 was not employed during 2019, so the issue is solely TAXPAYER-1's wage income.

withhold Utah income taxes and paid those taxes to Utah. He stated that this was just an oversight on his part.

After being contacted by the Division and the Division telling the Taxpayer that the Division needed a letter from his employer that said the employer had incorrectly reported wages to Utah or for the employer to issue a corrected W-2, the Taxpayer did ask EMPLOYER for a letter or corrected W-2 and EMPLOYER would not issue one. The Taxpayer explained that he still worked for EMPLOYER and the only thing EMPLOYER would provide was a letter about his current employment situation at the time of the request. This letter, dated DATE, said the Taxpayer had been employed at EMPLOYER since DATE and that he “is currently approved to work remotely, from the home office location.” The Taxpayer argued that regardless of not being able to provide a corrected W-2 or letter from his employer stating that the employer had sourced his wages to Utah in error, his wages after DATE, were for the work he had performed from STATE-1 while he and his spouse were residents of STATE-1.

At the hearing, the Division agreed with the Taxpayers that they were not residents of Utah after DATE. The Division argued instead that all of the Taxpayer’s wages were Utah source income. The Division provided as evidence a copy of the Taxpayer’s 2019 W-2 that showed all the wage income reported from his employer as Utah income. The Division’s representative stated that the W-2 is the employer’s statement that the income should be sourced to Utah. He also indicated that sourcing the income to Utah for individual income tax purposes meant the employer was reporting the income to the Utah Department of Workforce Services for unemployment compensation purposes as well. The Division pointed to two Tax Commission decisions involving remote workers and argued that it did not matter that the Taxpayer was physically located in STATE-1 while he was working remotely for his employer EMPLOYER.⁴

Upon review of the applicable law and the parties’ arguments at the hearing, the issue in this appeal is not whether the Taxpayers were Utah resident individuals for individual income tax purposes for the period from DATE to DATE, as this was not in dispute. Rather, 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 2019, 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 said that if the Taxpayer had been

⁴ The Division cited *Utah State Tax Commission Initial Hearing Order Appeal No. 21-1302 (7/19/2022)*; and *Utah State Tax Commission Initial Hearing Order Appeal No. 22-339 (11/08/2022)*. These decisions are available for review in a redacted format at <https://tax.utah.gov/commission-office/decisions>.

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 Commission considers these proffered facts and the applicable law in effect for tax year 2019.⁵ In tax year 2019, 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 2019, 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 . . .” Regarding wage income, Subsection 59-10-117(2)(c) provided the further clarification that “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-14A.1., 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 determined that the Taxpayer was working from Utah, then the employer would be required to withhold Utah income taxes. EMC had a Utah Division and the Taxpayer was working under the Utah Division, although the employer had divisions in many other states. In this case, the evidence at the Initial Hearing indicated that the Taxpayer was residing in STATE-1 from DATE to DATE, while he was working for his employer remotely.

The Tax Commission has previously 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 the 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

⁵ The Utah Legislature enacted S.B. 39, Mobile Workforce Income Tax Amendments, during the 2022 General Session, to address the tax liability and withholding requirements for a nonresident individual earning wages in Utah. However, this legislation did not take effect until tax year 2023, so is inapplicable in this matter.

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 . . .”

was physically located at the time they were performing the services.” The Tax Commission also considered a remote worker and a W-2 sourced to Utah in *Utah State Tax Commission Initial Hearing Order Appeal No. 22-339* (11/8/2022). The petitioner in *Appeal No. 22-339* was not physically working in Utah at any time during the tax year at issue and was not working for a Utah office or Utah branch of his employer. The petitioner’s employer in *Appeal No. 22-339* did not have a physical location in Utah at any time during the tax year. The petitioner in *Appeal No. 22-339* taught via the Internet and his students were not physically present in a classroom in Utah; however, some students may have been physically located in Utah, as well as in other states. The petitioner’s employer in *Appeal No. 22-339* had issued a letter explaining the reason the wages had been sourced to Utah. In that case the Tax Commission concluded the petitioner’s wages were for personal services rendered outside of Utah and were not derived from Utah sources.

The facts in this appeal are more similar to those in *Appeal No. 21-1302*, because the petitioner in *Appeal No. 21-1302*, like the Taxpayer in this matter, was working for a multinational company that had a Utah Division and was working for that Utah Division, even though he was physically working from his residence in STATE-1. Also, in *Appeal No. 21-1302*, the employer of that petitioner would not issue a letter stating that the wage income was sourced to Utah in error. Although the Taxpayer in the subject appeal has stated that his employment was for one client who did business in every state and multiple countries, the Taxpayer was working for the Utah Division of his employer for all of the 2019 tax year. The Taxpayer does have the burden of proof in this appeal pursuant to Utah Code Subsection 59-1-1417(1), and has not provided sufficient evidence to establish that the W-2 issued by his employer reporting his wages as Utah source income was reported to Utah in error. The audit deficiency should be upheld.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the Utah individual income tax audit deficiency of tax and the interest accrued thereon for the 2019 tax year. 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 ____, 2024.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Jennifer N. Fresques
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.