17-774
TAX TYPE: INCOME TAX
TAX YEAR: 2012, 2013, 2014
DATE SIGNED: 01/08/2018
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. 17-774 Account No. ##### Tax Type: Income Tax Years: 2012, 2013 & 2014 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1, Taxpayer (by telephone)
TAXPAYER-2, Taxpayer (by telephone)
For Respondent: RESPONDENT-1, from Auditing Division
RESPONDENT-2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on November 27, 2017.

TAXPAYERS ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessments of additional Utah individual income taxes for the 2012, 2013, and 2014 tax years. On March 30, 2017, the Division issued Notices of Deficiency and Audit Change for the 2012 and 2013 tax years and a Notice of Deficiency and Estimated Income Tax for the 2014 tax year ("Statutory Notices") , in which it imposed additional tax, penalties, and interest (calculated as of April 29, 2017),[1] as follows:

1 Interest continues to accrue until any tax liability is paid.

Year	Tax	Penalties	Interest	Total
2012	$$$$$	$$$$$	$$$$$	$$$$$
2013	$$$$$	$$$$$	$$$$$	$$$$$
2014	$$$$$	$$$$$	$$$$$	$$$$$

For the 2012, 2013, and 2014 tax years, the taxpayers were a married couple who filed joint federal returns and joint STATE-1 resident returns. Because TAXPAYER-1 worked in STATE-2 during 2012 and a portion of 2013 and because TAXPAYER-2 worked in Utah during 2012 and a portion of 2013, the taxpayers also filed joint 2012 and 2013 STATE-2 nonresident returns and joint 2012 and 2013 Utah nonresident returns. The taxpayers did not file 2014 returns with either STATE-2 or Utah. All federal and state returns that the taxpayers filed for the 2012, 2013, and 2014 tax years were filed with a STATE-1 address.

2012 Tax Year. On their 2012 Utah nonresident return, the taxpayers included a TC-40B form on which they checked the "nonresident" box (thereby claiming a nonresident status), reported their 2012 federal adjusted gross income ("FAGI") to be $$$$$, and allocated $$$$$ of this amount to Utah. The taxpayers indicate that they filed this return to show that neither of them was a Utah resident during 2012, but that the income that TAXPAYER-2 earned in Utah during 2012 would be subject to Utah taxation.

On the 2012 Statutory Notice, the Division indicated that it received information showing that the Internal Revenue Service ("IRS") increased the taxpayers' 2012 FAGI by $$$$$, which resulted in the Division making the following adjustments to the taxpayers' 2012 Utah return:

Item(s) Changed on Utah Return	Original	Revised	Change
Federal Adjusted Gross Income	$$$$$	$$$$$	$$$$$
Utah AGI[2] on a Part-Year or Nonresident Return	$$$$$	$$$$$	$$$$$
Total AGI on a Part-Year or Nonresident Return	$$$$$	$$$$$	$$$$$

At the hearing, the taxpayers admitted that they failed to report $$$$$ of income on their 2012 federal and state returns and that the IRS assessed them additional federal tax on the $$$$$ of income during 2013.

2 It is assumed that "AGI" refers to "adjusted gross income." Neither party indicated otherwise.

The taxpayers also admitted that they did not file an amended Utah return to report the additional $$$$$ of income. The taxpayers, however, contend that they did not file an amended Utah return to report the additional income because the $$$$$ was income from a gas lease on a property they owned in STATE-1 and that the $$$$$ would not be subject to Utah taxation. As a result, the taxpayers ask the Commission to reverse the Division's 2012 assessment.

The Division did not refute the taxpayers' claim that the $$$$$ of unreported income was from a STATE-1 gas lease. In addition, the Division did not refute the taxpayers' claim that their 2012 Utah tax liability would not have increased because of the $$$$$ of additional income, if the taxpayers had filed an amended 2012 Utah nonresident return on which they added the $$$$$ of income to their total income, but not to Utah income.[3] However, the Division states that it has assessed Utah tax on the $$$$$ of income because it has determined that both taxpayers are actually 2012 Utah resident individuals, not Utah nonresidents as the taxpayers claimed on their 2012 Utah return.[4]

The Division further explained that it could not change the taxpayers' 2012 Utah nonresident return to a Utah resident return and impose Utah tax on all income that both taxpayers earned in 2012, because the three-year statute of limitations to issue such an assessment had expired prior to the March 30, 2017 date on which it issued its 2012 Statutory Notice. Nevertheless, because the taxpayers did not report to the Tax Commission the IRS's 2013 action to increase the taxpayers' 2012 FAGI by $$$$$, the Division contends that a six-year statute of limitations, as set forth in Utah Code Ann. §59-10-536(2017), was triggered, thus allowing the Division to assess Utah tax on the $$$$$ of unreported income. As a result, while the Division claims that it *cannot* change the nonresident status the taxpayers claimed on their 2012 Utah return for the income that the

3 A review of 2012 Utah income tax forms (specifically the TC-40 and TC-40B) suggests that the taxpayers' 2012 Utah tax liability would have remained constant or might even have decreased, if the taxpayers had filed an amended 2012 Utah nonresident return on which they added the $$$$$ of income to their total income, but not to Utah income.

4 The Division explained that it has determined that under Utah law, both taxpayers would be considered to be domiciled in Utah for the 2012 tax year.

taxpayers reported on the return, it *can* change the nonresident status they claimed on the 2012 Utah return for the $$$$$ of income they omitted from the return. The Division, however, did not explain this distinction on its 2012 Statutory Notice.

On the 2012 Statutory Notice, it appears that the Division accepted the nonresident status the taxpayers claimed on their 2012 Utah return and merely added the $$$$$ to the nonresident return's total AGI and to the Utah portion of the AGI. Nevertheless, the Division asks the Commission to find that it can change the nonresident status the taxpayers claimed on their 2012 Utah return for purposes of assessing the $$$$$ of income from the STATE-1 gas lease that the taxpayers failed to report. For these reasons, the Division asks the Commission to sustain its 2012 assessment.

2013 Tax Year. On their 2013 Utah nonresident return, the taxpayers included a TC-40B form on which they checked the "nonresident" box, reported their 2013 total AGI to be $$$$$, and allocated $$$$$ of this amount to Utah.[5] The taxpayers indicate that they filed this return to show that neither of them was a Utah resident during 2013, but that the income that TAXPAYER-2 earned in Utah during 2013 would be subject to Utah taxation. The taxpayers ask the Commission to find that they properly filed their 2013 Utah nonresident return and to reverse the Division's 2013 assessment.

The Division, however, has determined that both taxpayers were domiciled in Utah during 2013 and, thus, were full-year 2013 Utah resident individuals. As a result, the Division amended the taxpayers' 2013 Utah nonresident return to a 2013 Utah resident return on which all of their 2013 income would be subject to Utah taxation (subject to a credit for 2013 income taxes the taxpayers paid to other states).[6] For these reasons, the Division asks the Commission to sustain its 2013 assessment.

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5 The amount of 2013 income that the taxpayers allocated to Utah is less than the amount they allocated to Utah for 2012 because TAXPAYER-2 only worked in Utah for the first five months of 2013. As will be explained in more detail later in the decision, TAXPAYER-2 moved from Utah to STATE-1 on or about June 1, 2013.

6 It appears that the three-year statute of limitations to change the taxpayers' 2013 Utah nonresident return to a 2013 Utah resident return had not expired prior to the March 30, 2017 date of the 2013 Statutory

2014 Tax Year. The taxpayers explain that they did not file a 2014 Utah return because they were STATE-1 residents during 2014 and because neither of them earned any income in Utah during 2014. As a result, the taxpayers ask the Commission to find that they do not owe any 2014 Utah taxes and to reverse the Division's 2014 assessment.

The Division, however, has determined that the taxpayers were both domiciled in Utah for the first five months of 2014[7] and assessed them as part-year Utah resident individuals. On the 2014 Statutory Notice, the Division indicated that the taxpayers' 2014 FAGI was $$$$$, which their total 2014 AGI was $$$$$, and that $$$$$ of the total AGI of $$$$$ should be allocated to and taxed by Utah.[8] At the hearing, the Division explained that it estimated the $$$$$ amount of AGI to be allocated to Utah by multiplying the taxpayers' total 2014 income by 5/12 (five-twelfths) so that five months of the taxpayers' 12 months of 2014 income would be subject to Utah taxation.[9] For these reasons, the Division asks the Commission to sustain its 2014 assessment,

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Notice. The taxpayers did not argue otherwise. It is also noted that for a resident individual, Utah Code Ann. §59-10-1003 (2012 – 2014) provides that a nonrefundable tax credit may be applied against a person's Utah tax liability based on the amount of tax imposed on the person by another state, if certain conditions are met. Because the Division has assessed both taxpayers as Utah resident individuals for the 2013 tax year, it applied a credit against their Utah tax liability for the 2013 income taxes they paid to STATE-1 and STATE-2. In the event the Commission sustains the Division's determination that the taxpayers are both full-year Utah resident individuals, the taxpayers have not contested the amount of the Section 59-10-1003 credit that the Division allowed for this year.

7 As will be discussed in more detail later in the decision, the taxpayers did not sell their Utah home until May 2014. The Division has determined that the taxpayers were both domiciled in Utah until they sold the Utah home.

8 The Division also allowed a credit for the income taxes the taxpayers paid to STATE-1 for the 2014 tax year. In the event the Commission sustains the Division's determination that the taxpayers are both Utah resident individuals for the first five months of 2014, the taxpayers, again, have not contested the amount of the Section 59-10-1003 credit that the Division allowed for this year.

9 Multiplying the total 2014 AGI of $$$$$ by 5/12 is $$$$$, while multiplying the 2014 FAGI of $$$$$ by 5/12 is $$$$$. Both of these products is less than the $$$$$ of 2014 income that the Division allocated to Utah on the Statutory Notice. However, in the event the Commission finds that both taxpayers are domiciled in Utah for the first five months of 2014, the taxpayers, who have the burden of proof in this matter, have not shown that they received less than $$$$$ of their 2014 income during the first five months of 2014. Accordingly, if the Commission finds that the taxpayers were domiciled in Utah for the first five months of 2014, the Division's 2014 assessment will be sustained (i.e., the Commission will sustain the Division's estimate that $$$$$ of the taxpayers' 2014 income should be allocated to and taxed by Utah).

with one exception concerning penalties. The Division proffers that it would not object to the Commission waiving the penalties it imposed in its 2014 assessment.

APPLICABLE LAW

I. Domicile and the Taxation of Utah Resident Individuals.

1. Under Utah Code Ann. §59-10-104(1) (2012)[10], "a tax is imposed on the state taxable income of a resident individual[.]"

2. For purposes of Utah income taxation, a "resident individual" is defined in UCA §59-10-103(1)(q)(i), as follows in pertinent part:

> (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.
> . . . .

3. Effective for tax year 2012 (and applicable to all three years at issue), UCA §59-10-136 provides for the determination of "domicile," as follows:

> (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

10 All substantive law citations are to the 2012 version of Utah law. Unless otherwise noted, the substantive law remained the same during the 2012, 2013, and 2014 tax years.

(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.

4. In Section 59-10-136, two subsections require the Commission to determine whether the property for which an individual or an individual's spouse claims a residential exemption is that individual's or individual spouse's "primary residence."[11] To assist in determining whether a property is considered the "primary residence" of the individual or individual's spouse who claimed the exemption, the Legislature enacted new property tax provisions at the same time it enacted the new domicile law in Section 59-10-136.

11 *See* Subsections 59-10-136(2)(a) and (4)(a)(ii)(D). It is noted that the term "primary residence" is also found in Subsection 59-10-136(6). However, Subsection 59-10-136(6) concerns the "primary residence" of a tenant, not the "primary residence" of the individual or individual's spouse who owns the property for which the residential exemption was claimed. Accordingly, the guidance provided in Subsections 59-2-103.5(5) and

Specifically, to assist in the determination of Utah income tax domicile of a property owner, Utah Code Ann §59-2-103.5(5) provides, as follows:

> (5) Except as provided in Subsection (6), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence, the property owner shall:
> (a) file a written statement with the county board of equalization of the county in which the property is located:
> (i) on a form provided by the county board of equalization; and
> (ii) notifying the county board of equalization that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence; and
> (b) declare on the property owner's individual income tax return under Chapter 10, Individual Income Tax Act, for the taxable year for which the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence.

II. Waivers of Penalty and Interest and Burden of Proof.

5. UCA §59-1-401(14) (2017) provides that "[u]pon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part."

6. Utah Admin. Rule R861-1A-42 ("Rule 42") (2017) provides guidance concerning the waiver of penalties and interest, as follows:

> . . . .
> (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
> (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
> (a) Timely Mailing…
> (b) Wrong Filing Place…
> (c) Death or Serious Illness…
> (d) Unavoidable Absence…
> (e) Disaster Relief…
> (f) Reliance on Erroneous Tax Commission Information…

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(6) does not apply when determining the "primary residence" of a tenant.

(g) Tax Commission Office Visit…
(h) Unobtainable Records…
(i) Reliance on Competent Tax Advisor…
(j) First Time Filer…
(k) Bank Error…
(l) Compliance History. . . .
(m) Employee Embezzlement…
(n) Recent Tax Law Change…

(4) Other Considerations for Determining Reasonable Cause.

(a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:

(i) whether the commission had to take legal means to collect the taxes;
(ii) if the error is caught and corrected by the taxpayer;
(iii) the length of time between the event cited and the filing date;
(iv) typographical or other written errors; and
(v) other factors the commission deems appropriate.

(b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.

(c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.

(d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

7. For the instant matter, UCA §59-1-1417(1) (2017) provides guidance concerning which party has the burden of proof, as follows:

(1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

(a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;

(b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and

(c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:

(i) required to be reported; and

(ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

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III. Statutory Timeframes for Division to Issue an Assessment.

8. UCA §59-1-1410 (2017) addresses the "general" timeframes within which the Tax Commission can issue an assessment, as follows in pertinent part:

> (1) (a) Except as provided in Subsections (3) through (7) and Sections 59-5-114, 59-7-519, 59-10-536, and 59-11-113, the commission shall assess a tax, fee, or charge within three years after the day on which a person files a return.
> (b) Except as provided in Subsections (3) through (7), if the commission does not assess a tax, fee, or charge within the three-year period provided in Subsection (1)(a), the commission may not commence a proceeding to collect the tax, fee, or charge.
> (2) (a) Except as provided in Subsection (2)(b), for purposes of this part, a return filed before the last day prescribed by statute or rule for filing the return is considered to be filed on the last day for filing the return.
> . . . .
> (3) The commission may assess a tax, fee, or charge or commence a proceeding for the collection of a tax, fee, or charge at any time if:
> (a) a person:
> . . . .
> (ii) fails to file a return; or
> . . . .

9. UCA §59-10-536(2017) provides timeframes within which a taxpayer must make certain tax filings and additional timeframes within which the Tax Commission can assess a deficiency in Utah income taxes, as follows in pertinent part:

> . . . .
> (2) (a) (i) Except as provided in Subsection (2)(a)(iii), if a change is made in a taxpayer's net income on the taxpayer's federal income tax return because of an action by the federal government, the taxpayer shall file with the commission within 90 days after the date there is a final determination of the action:
> (A) a copy of the taxpayer's amended federal income tax return; and
> (B) an amended state income tax return that conforms with the changes made in the taxpayer's amended federal income tax return.
> (ii) Except as provided in Subsection (2)(a)(iii), if a change is made in a taxpayer's net income on the taxpayer's federal income tax return because the taxpayer files an amended federal income tax return, the taxpayer shall file with the commission within 90 days after the date the taxpayer files the amended federal income tax return:
> (A) a copy of the taxpayer's amended federal income tax return; and
> (B) an amended state income tax return that conforms with the changes made in the taxpayer's amended federal income tax return.
> (iii) A taxpayer is not required to file a return described in Subsection (2)(a)(i) or (ii) if a change in the taxpayer's federal income tax return does not increase state tax liability.
> (b) (i) Subject to Subsection (2)(b)(iii), the commission may assess a deficiency in state

> income taxes within three years after a notification or amended federal income tax return described in Subsection (2)(a) is filed.
> (ii) The amount of an assessment of tax under this Subsection (2)(b) may not exceed the amount of the increase in Utah tax attributable to the change described in Subsection (2)(a).
> (iii) If a taxpayer fails to report to the commission a change specified in this Subsection (2)(b), the assessment may be made at any time within six years after the date of the change.

. . . .

DISCUSSION

Pursuant to Subsection 59-1-1417(1), the taxpayers have the burden of proof in this matter. The first issue to be discussed is whether the Division is authorized to assess additional tax on the $$$$$ of 2012 income that the taxpayers received from the STATE-1 gas lease. If the Commission finds that Utah law allows the Division to assess the taxpayers as 2012 Utah resident individuals on this $$$$$ of income, the Commission will next have to determine whether the taxpayers were both domiciled in Utah for the 2012 tax year before deciding whether to sustain or reverse the 2012 assessment. If the Commission finds that Utah law does not allow the Division to assess the taxpayers as 2012 Utah resident individuals on this $$$$$ of income, the Commission will reverse the Division's 2012 assessment on the basis that the $$$$$ of income is sourced to STATE-1, not to Utah.

Second, in the event the Commission decides that Utah law allows the Division to assess the taxpayers as 2012 Utah resident individuals on the $$$$$ of income, the Commission must then determine whether the taxpayers are Utah resident individuals for all of 2012 and 2013 and for the first five months of 2014. In the event the Commission decides that Utah law does not allow the Division to assess the taxpayers as 2012 Utah resident individuals on the $$$$$ of income, the Commission need only to determine if the taxpayers are Utah resident individuals for all of 2013 and for the first five months of 2014.

The taxpayers contend that neither of them is a Utah resident individual for any portion of the 2012, 2013, and 2014 tax years. For these years, Subsection 59-10-103(1)(q)(i) provides that a person is a Utah

resident individual under either of two scenarios: 1) if the person is domiciled in Utah (the "domicile test"); or 2) if the person maintains a place of abode in Utah and spends 183 or more days of the taxable year in Utah (the "183 day test"). For 2012, the Division asserts that TAXPAYER-2 is a full-year Utah resident individual under both the 183 day and the domicile test and that TAXPAYER-1 is a full-year Utah resident individual under the domicile test only. For all of 2013 and the first five months of 2014, the Division asserts that both TAXPAYER-2 and TAXPAYER-1 are Utah resident individuals under the domicile test (not the 183 day test).

I. Can the Division Change the Nonresident Status the Taxpayers Claimed on Their 2012 Utah Return to a Resident Status for the $$$$$ of Income They Omitted from the Return?

Had the Division issued its 2012 assessment within three years after the day on which the taxpayers filed their 2012 Utah return, Subsection 59-1-1410(1) would have allowed the Division to change the taxpayers' 2012 Utah nonresident return to a Utah resident return and assess tax on all of the taxpayers' 2012 income (including the $$$$$ of income they omitted from the return). However, the Division admits that the three-year statute of limitations to issue an assessment under Subsection 59-1-1410(1) had expired before it issued its 2012 Statutory Notice. In addition, it appears that the three-year statute of limitations found in Subsection 59-10-536(2)(b)(i) had also expired before the Division issued the 2012 Statutory Notice, because the Division proffered that it was able to impose its 2012 assessment only because the six-year statute of limitations found in Subsection 59-10-536(2)(b)(iii) had been triggered.

Under Subsections 59-10-536(2)(a)(i) and (iii), the taxpayer is required to file an amended Utah return to report an IRS change to net income if the change increases the taxpayer's Utah tax liability. If the change does not increase the taxpayer's Utah tax liability, the taxpayer is not required to file an amended Utah return to report the change. As discussed earlier, it does not appear that the IRS change (i.e., the IRS's action to increase the taxpayers' net income by the $$$$$ of income generated by the STATE-1 gas lease) would have increased the taxpayers' 2012 Utah tax liability, if the taxpayers had filed an amended 2012 Utah nonresident

return on which they added the $$$$$ to their total income, but not to Utah income. As a result, it is arguable that the taxpayers were not required to report the IRS change to the Tax Commission and that the six-year statute of limitations of Subsection 59-10-536(2)(b)(iii) is not triggered.

Regardless, the Commission finds that where the Division missed the three-year deadline to change the nonresident status the taxpayers claimed on their 2012 Utah return to a resident status, the Division is precluded from changing the nonresident status for any of the taxpayers' income, including the $$$$$ of income that they had omitted from the return. Otherwise, the Division would be allowed to change the nonresident status that the taxpayers claimed on their 2012 Utah return, even though the Division was barred by the statute of limitations from making changes to this return.[12] For these reasons, the Commission finds that the Division is precluded from assessing the taxpayers as Utah resident individuals in regards to the $$$$$ of income generated by the STATE-1 gas lease (which is not Utah source income). Accordingly, the Commission reverses the 2012 assessment.

II. Additional Facts to be used in Determining Domicile.

Because the Commission has reversed the Division's 2012 assessment, the Commission need not determine whether either taxpayer is considered to be a Utah resident individual for the 2012 tax year. However, the Commission must still decide whether the taxpayers are Utah resident individuals for all of 2013 and the first five months of 2014, which requires the Commission to determine whether the taxpayers are considered to be domiciled in Utah for these periods. The following facts will assist in this determination.

The taxpayers were married in or around 1969. During the 2013 and 2014 tax years, the taxpayers were not legally separated or divorced. In addition, the taxpayers did not claim any dependents (other than

12 Furthermore, the Division's 2012 Statutory Notice only refers to changes associated with a Utah part-year resident or nonresident return and makes no mention that the Division has changed the nonresident status claimed by the taxpayers to a resident status in order to assess Utah tax on the $$$$$ of omitted income. The Commission is concerned that the 2012 Statutory Notice did not inform the taxpayers that the Division was assessing Utah tax on the $$$$$ of income on the basis that they were Utah residents, not Utah nonresidents.

themselves) on their joint 2013 and 2014 federal returns. The taxpayers explained that their children, who they raised in STATE-2, have been grown and living on their own for many years prior to 2013. Neither of the taxpayers attended a Utah institution of higher education during 2013 or 2014, nor was either of the taxpayers a member of a church or other organization during these years.

The taxpayers lived in STATE-2 until 1992, when TAXPAYER-1 moved to Utah for his job. TAXPAYER-2 remained in STATE-2 until 1994, when she moved to Utah to join her husband. The taxpayers explained that because of a poor real estate market, they were not able to sell their STATE-2 home until 1999. In 1995, the taxpayers purchased a residential building lot in CITY, Utah. However, they lived in apartments in Utah until 2000, when after selling their STATE-2 home, they built a home on the CITY lot. The home the taxpayers built in CITY (which will be referred to as the "Utah home") had ##### square feet of finished living space on the main floor and in the basement. It also had five bedrooms, three baths, and a two-car garage.

In 2007, TAXPAYER-1's employer transferred him to work at a facility in STATE-2 that was located near the STATE-1 border. TAXPAYER-1 rented a home in CITY, STATE-1 (the "STATE-1 home") to live in while he worked at the STATE-2 facility. The STATE-1 home had ##### square feet of living space on its main floor (it did not have a basement). The STATE-1 home did not have a garage. The taxpayers explain that in late 2007, they first listed their Utah home for sale in the hopes that it would sell and TAXPAYER-2 could join TAXPAYER-1 in STATE-1. However, because the real estate market declined around this time and because they would have lost money had they sold the Utah home, the taxpayers decided that TAXPAYER-2 would continue to work in Utah and live in the Utah home. TAXPAYER-2 continued to work in Utah and live in the Utah home until the end of May 2013, when she moved to STATE-1 to join her husband. TAXPAYER-2, who had been working from the Utah home, started working from the STATE-1 home once she moved to STATE-1. Upon moving to STATE-1 in 2013, TAXPAYER-2 had her employer

change her work records to reflect the address of the STATE-1 home and start withholding STATE-1 taxes instead of Utah taxes from her wages.

The taxpayers continued to rent and live in the STATE-1 home until 2016, when they moved from STATE-1 to STATE-3, where they still live. While the taxpayers never purchased the STATE-1 home in which TAXPAYER-1 lived from 2007 to 2016 and in which TAXPAYER-2 lived from the end of May 2013 to 2016, they did own a small summer cottage in STATE-1 that has been in TAXPAYER-2's family for many years. The gas lease referred to earlier is on the land on which the summer cottage is located. The summer cottage cannot be lived in during the winter months.

The taxpayers received the residential exemption from property taxation on the Utah home for all of 2013 and until they sold the home in May 2014.[13] The taxpayers listed the Utah home for sale with various real estate agents at various times between 2007 and 2013, but would take the home off the market periodically. On May 17, 2013 (around the time that TAXPAYER-2 moved to STATE-1), the taxpayers listed the Utah home again with a REALTOR office in CITY. It appears that the taxpayers continued to try to sell the Utah home from May 2013 until it was finally sold on May 19, 2014.[14] Although the taxpayers were trying

13 For all years at issue, UCA §59-2-103(2) provided that ". . . the fair market value of residential property located within the state shall be reduced by 45%, representing a residential exemption[,]" while "residential property" was defined in Utah Code Ann. §59-2-102(31) to mean, in part, "any property used for residential purposes as a primary residence." As a result, for property tax purposes, a home that is used as a person's primary residence is only taxed on 55% of its fair market value, while a home that is not a person's primary residence (such as a vacation home) is taxed on 100% of its fair market value.

14 The Division questioned whether the Utah home was listed for sale for the entire period from May 17, 2013 to May 14, 2014, because the Multiple Listing Service ("MLS") information sheet showing a list date of May 17, 2013 also shows an expiration date of November 1, 2013, and because the MLS information sheet showing the sales date of May 14, 2014 also shows a list date of March 11, 2014. Specifically, the Division questioned whether the Utah home was listed for sale between November 1, 2013 and March 11, 2014. However, the MLS information sheet showing a list date of March 11, 2014 indicates that the "Sale Failed – Buyer could not get Financing[.]" As a result, it appears that sometime between November 11, 2013 and March 11, 2014, the Utah home was under contract, and that it was relisted for sale on March 11, 2014 after this sale failed. For this reason and because the taxpayers proffer that they were continuously trying to sell the Utah home once TAXPAYER-2 moved to STATE-1, the Commission finds that the taxpayers were attempting to sell the Utah home for the entire period after TAXPAYER-2 moved to STATE-1 in later May 2013 until it sold in May 2014. Determining that the taxpayers were attempting to sell the Utah home for this entire period,

to sell the Utah home once TAXPAYER-2 moved to STATE-1, the taxpayers did not move their furniture out of the Utah home until it sold, and they never moved the furniture to STATE-1. After the Utah home sold in May 2014, the taxpayers stored the furniture from the Utah home at a storage facility in CITY, STATE-4. The taxpayers proffer that since they purchased their STATE-3 home, they have had the furniture at the CITY storage facility shipped to STATE-3 "in pieces."

The taxpayers proffer that they kept their furniture at the Utah home to "stage it" while it was listed for sale. However, because the taxpayers were not ready for the furniture to be shipped back east, the taxpayers were not required to lease storage space for it while they still owned the Utah home. In addition, because the Utah home was furnished, the taxpayers could stay at the Utah home on their periodic trips to Utah between late May 2013 and May 2014 instead of having to stay somewhere else. The taxpayers proffer that they both visited Utah several times between late May 2013 and May 2014 to "check" on the house and take care of problems that arose (such as a frozen pipe during the winter of 2013/2014 and a fly infestation). The taxpayers did not lease the Utah home out to tenants during the late May 2013 to May 2014 period. The taxpayers could not state with certainty how many times they stayed at the Utah home during the late May 2013 to May 2014 period. However, they indicated that TAXPAYER-1 stayed at the Utah home two or three times during this period, and that he spent less time at the Utah home during this period than TAXPAYER-2. Although TAXPAYER-2 could not recall how many times she stayed at the Utah home during this period, she stated that her various visits would usually last only four to five days.

Until the Utah home sold in May 2014, the taxpayers kept the vehicle that TAXPAYER-2 had driven in Utah at the Utah home (TAXPAYER-2 stated that she did not drive in STATE-1 once she moved there in late May 2013). On one of TAXPAYER-2's trips to Utah in November 2013, she renewed the Utah registration of the vehicle the taxpayers kept at the Utah home. After the Utah home sold in May 2014, the

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however, does not affect the outcome of this case (for reasons that will be explained later in the decision).

taxpayers had this vehicle shipped to STATE-1. During 2013 and 2014, another vehicle that TAXPAYER-1 drove in STATE-1 was registered in STATE-1.

When TAXPAYER-1 moved to STATE-1 in 2007, he obtained a STATE-1 driver's license, and he registered to vote in STATE-1. On the other hand, when TAXPAYER-2 moved to STATE-1 in late May 2013, she did not obtain a STATE-1 driver's license, nor did she register to vote in STATE-1. TAXPAYER-2 retained her Utah driver's license and was registered to vote in Utah until 2016, when she obtained a STATE-3 driver's license and registered to vote in STATE-3. TAXPAYER-2 explained that because she never drove in STATE-1, she did not need to relinquish her Utah driver's license and obtain a STATE-1 driver's license. TAXPAYER-2 also stated that she never registered to vote in STATE-1 because she knew that she and her husband would only be there temporarily and because no presidential election occurred during the time she lived there from late May 2013 to sometime in 2016. TAXPAYER-2 explained that she only voted in presidential elections. TAXPAYER-2 admitted that she may have voted in Utah for the 2012 presidential election. TAXPAYER-2 also admits that she took no action to terminate her Utah voter registration before or after she moved to STATE-1.[15]

For the tax years at issue neither taxpayer asserted residency on a Utah return, and they filed all federal and state returns using a STATE-1 address. The taxpayers proffer that once TAXPAYER-2 moved to STATE-1 in late May 2013, she changed all of her mail from a Utah address to a STATE-1 address. The Division did not refute the taxpayers' statement that they only received mail in STATE-1 after late May 2013.

III. Domicile Test for 2013 and 2014.

15 Again, the taxpayers have the burden of proof in this matter. The taxpayers have not provided any information from the Clerk/Auditor's Office of COUNTY, Utah showing that TAXPAYER-2 was not registered to vote in Utah during all of 2013 and the first five months of 2014 or information from STATE-1 showing that she was registered to vote in STATE-1 during these periods. As a result, for all of 2013 and the first five months of 2014 (the periods that remain at issue), the Commission finds that TAXPAYER-2 was registered to vote in Utah.

UCA §59-10-103(1)(q)(i)(A) defines a "resident individual" as "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[.]" For the 2013 and 2014 tax years, a taxpayer's domicile for income tax purposes is determined under Section 59-10-136, which contains four subsections addressing when a taxpayer is considered to have domicile in Utah (Subsections (1), (2), (3), and (5)) and a fifth subsection addressing when a taxpayer is not considered to have domicile in Utah (Subsection (4)).[16]

Section 59-10-136(5)(b). For a married individual, it is often necessary, as in this case, to determine whether that individual is considered to have a "spouse" for purposes of Section 59-10-136. Subsection 59-10-136(5)(b) provides that a married individual is *not* considered to have a spouse for purposes of Section 59-10-136 if the individual is legally separated or divorced from the individual's spouse or if the individual and the individual's spouse file federal income tax returns with a status of married filing separately. Neither of these circumstances applies to the taxpayers for any portion of 2013 or 2014 because the taxpayers were not legally separated or divorced during these years and because they filed joint federal returns for these years. Accordingly, for each of the 2013 and 2014 tax years, the taxpayers are both considered to have spouses for purposes of Section 59-10-136.

Subsection 59-10-136(4). The taxpayers do not argue that they are *not* considered to be Utah domiciliaries for any of the periods at issue under Subsection 59-10-136(4). This subsection applies to individuals who are "absent from the state" if certain requirements are met, one of which is that an individual and the individual's spouse both must be absent from Utah for at least 761 consecutive days. Clearly, this subsection does not apply to the first five months of 2013 while TAXPAYER-2 was living and working in

16 Prior to tax year 2012, an individual's income tax domicile was determined under Utah Admin. Rule R865-9I-2 (2011) ("Rule 2"), which provided, in part, criteria to be used when determining an individual's income tax domicile and which referred to a non-exhaustive list of domicile factors in Utah Admin. Rule R884-24P-52 (2011) ("Rule 52") (which is a property tax rule). After the Legislature enacted new criteria in Section 59-10-136 to determine income tax domicile for the 2012 tax year, Rule 2 was amended to remove any reference to domicile and to the Rule 52 factors.

Utah. In addition, this subsection also does not appear to apply to the last seven months of 2013 and the first five months of 2014 because the taxpayers claimed the property tax residential exemption on their Utah home until it sold in May 2014[17] and because the taxpayers have not shown that TAXPAYER-2 was present in Utah for less than 30 days in either the 2013 or 2014 calendar year. Accordingly, the taxpayers have not shown that Subsection 59-10-136(4) applies to them for 2013 or the first five months of 2014.

As a result, the Commission must analyze whether the taxpayers are considered to have domicile in Utah for the years at issue under the remaining subsections of Section 59-10-136 (i.e., under Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), and (3)). If an individual meets the criteria found in *any one* of these subsections, that individual is considered to be domiciled in Utah, even if the individual does not meet the criteria found in any of the other subsections.

Subsection 59-10-136(1). This subsection provides that an individual is considered to be domiciled in Utah if: 1) a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on their federal return is enrolled in a Utah public kindergarten, elementary, or secondary school; or 2) the individual or the individual's spouse is enrolled in a Utah institution of higher education. Neither of these circumstances are applicable to the taxpayers during 2013 or the first five months of 2014. Accordingly, under Subsection 59-10-136(1), the taxpayers are not considered to be domiciled in Utah during these periods.

17 When Section 59-10-136 and Subsection 59-2-103.5(5) are read in concert, a property on which an individual or individual's spouse claims the residential exemption is considered their "primary residence" unless one or both of the property owners take affirmative steps to: 1) file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence; and 2) declare on the property owner's Utah individual income tax return for the taxable year for which the property owner no longer qualifies to receive the residential exemption, that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence. The taxpayers did not file any such written statement with the County in which the Utah home is located during 2013 or the first five months of 2014, nor did the taxpayers declare on page 3 of the 2013 Utah return (which they filed in 2014) that they no longer qualified to receive the residential exemption for their Utah home. As a result, the Utah home on which the taxpayers claimed the residential exemption is considered to be TAXPAYER-2's and/or TAXPAYER-1's primary residence for all of 2013 and through May 19, 2014 (when it was sold).

The Commission, however, must determine whether the taxpayers are considered to be domiciled in Utah for these periods under another subsection of Section 59-10-136.

Subsection 59-10-136(2)(a). This subsection provides that an individual or an individual's spouse is presumed to be domiciled in Utah if the individual or the individual's spouse claims a property tax residential exemption for that individual or individual's spouse primary residence, unless the presumption is rebutted. For the presumption to arise, two elements must exist.[18] First, one or both of the taxpayers must have claimed the residential exemption on a Utah home that one or both of them own. Second, the Utah home on which the residential exemption is claimed must be considered the "primary residence" of one or both of the taxpayers in accordance with the guidance provided in Subsection 59-2-103.5(5). The first element is present during all of 2013 and from January 1, 2014 to May 19, 2014 (when the home was sold) because the taxpayers claimed the residential exemption on the Utah home that they owned during these periods.

For reasons previously discussed in regards to Subsection 59-10-136(4), the second element is also present for these periods because the taxpayers did not notify the county in which the Utah home is located that they no longer qualified to receive the residential exemption on the Utah home, nor did they declare on a 2013 or 2014 Utah income tax return that they no longer qualified to receive the residential exemption on the Utah home. As a result, the Subsection 59-10-136(2)(a) presumption has arisen in regards to both taxpayers for all of 2013 and from January 1, 2014 to May 19, 2014.[19] Accordingly, the taxpayers will be considered to be domiciled in Utah for all of 2013 and from January 1, 2014 to May 19, 2014 under Subsection 59-10-

18 Pursuant to Subsection 59-10-136(6), this presumption would also not arise if the Utah home were the primary residence of a "tenant." This exception is not applicable to the instant case because the taxpayers' Utah home was not the primary residence of a tenant during 2013 or the first five months of 2014.

19 Even if TAXPAYER-2 had been the only one of the taxpayers to have owned the Utah home and/or to have resided in it during 2013 and 2014, the Subsection 59-10-136(2)(a) presumption would still have arisen in regards to both taxpayers because Subsection 59-10-136(2)(a) provides that there is a rebuttable presumption that an *individual* is considered to be domiciled in Utah if *the individual or the individual's spouse* claims the exemption. This conclusion is supported by Subsection 59-10-136(5)(a), which provides that "[i]f 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."

136(2)(a), unless they are able to rebut this presumption.

Because Subsection 59-10-136(2)(a) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual who claims a residential exemption on a Utah primary residence *is* considered to have domicile in Utah, but also for there to be circumstances where an individual who claims a residential exemption on a Utah primary residence *is not* considered to have domicile in Utah.[20] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-136(2)(a) 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.

The Commission has previously found that the Subsection 59-10-136(2)(a) presumption can be rebutted if an individual has asked a county to remove the residential exemption, and the county failed to implement the individual's request. This circumstance is not present in the instant case. In addition, the Commission has indicated that the presumption may be rebutted if an individual received the residential exemption for a *vacant* home that was listed for sale and which would qualify for the exemption upon being sold.[21] This circumstance clearly does not exist for the first five months of 2013 that TAXPAYER-2 was living and working in Utah. In addition, this circumstance does not exist for the last seven months of 2013 and from January 1, 2014 to May 19, 2014 (when the home was sold) because the home was not vacant during this period. The taxpayers left their furniture and a vehicle at the Utah home during these periods, and one or both of the taxpayers resided in the home on a number of occasions during these periods.

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20 The Legislature did not provide that claiming a residential exemption on a Utah primary residence is 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 a dependent enrolled in a Utah public kindergarten, elementary, or secondary school).

21 *See* Utah Admin. Rule R884-24-52(6)(f), which provides that "[i]f the county assessor determines that an unoccupied property will qualify as a primary residence when it is occupied, the property shall qualify for the residential exemption while unoccupied." While Rule 52 is no longer the controlling law for purposes of determining income tax domicile, there may be limited portions of Rule 52 that may be useful when the Commission delineates which circumstances are sufficient or insufficient to rebut a Subsection 59-10-136(2) presumption.

The Commission has also found that the Subsection 59-10-136(2)(a) presumption is not rebutted because an individual had never heard of the residential exemption or did not know that he or she was receiving the residential exemption. Furthermore, the Commission has found that an individual has not rebutted the presumption because he or she would not be considered to be domiciled in Utah under Rule 52, the property tax rule used to determine income tax domicile for tax years prior to 2012. It is arguable that using the "old" income tax domicile criteria found in the pre-2012 version of Rule 2 and/or in Rule 52 to determine an individual's income tax domicile for years when Section 59-10-136 is in effect would be giving the new law enacted by the Legislature little or no effect, which the Commission declines to do.[22]

Similarly, the Commission has found that an individual cannot rebut a Subsection 59-10-136(2) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). If the Commission were to do so, one could argue that the Commission was giving no meaning to the Subsection 59-10-136(2) presumptions (i.e., that it was determining domicile as though the Subsection 59-10-136(2) presumptions did not exist).[23]

The Commission has also indicated that there may be other circumstances to be raised in future cases that will be sufficient to rebut the presumption. The taxpayers, however, have not proffered any convincing arguments to rebut the Subsection 59-10-136(2)(a) presumption that has arisen for all of 2013 and from January 1, 2014 to May 19, 2014. After TAXPAYER-1 moved to STATE-1 in 2007, TAXPAYER-2 continued to live in the Utah home until she joined him in STATE-1 in 2013. In addition, until the Utah home

22 Again, the Commission is not precluded from considering certain facts that might be described in Rule 52 when determining whether a Subsection 59-10-136(2) presumption has been effectively rebutted. However, the Commission will not determine an individual's income tax domicile for 2012 and subsequent tax years solely from the factors found in Rule 52.

23 This conclusion is further supported by the plain language of Subsection 59-10-136(3)(a), which provides that a person may be considered to be domiciled in Utah subject to Subsection 59-10-136(3)(b) "if the requirements of Subsection (1) or (2) are not met[.]" As a result, the provisions of Subsection 59-10-136(3)(b) only come into play if Subsection 59-10-136(1) or one of the presumptions of Subsection 59-10-136(2) does not apply.

sold on May 19, 2014, the taxpayers continued to reside in the home periodically. Furthermore, both taxpayers continued to benefit from the Utah home being taxed at a lower rate during 2013 and 2014. For these reasons, the circumstances of this case do not warrant the Commission's finding that the taxpayers have rebutted the Subsection 59-10-136(2)(a) presumption. Accordingly, under Subsection 59-10-136(2)(a), TAXPAYER-2 and TAXPAYER-1 are both considered to be domiciled in Utah for all of 2013 and from January 1, 2014 to May 19, 2014.

Subsection 59-10-136(2)(b). Because TAXPAYER-2 and TAXPAYER-1 have both been found to be domiciled in Utah for all of 2013 and from January 1, 2014 to May 19, 2014 under Subsection 59-10-136(2)(a), they are Utah domiciliaries for these periods regardless of whether they are also considered to be domiciled in Utah for these periods under another subsection of Section 59-10-136. However, the Division has determined that the taxpayers are considered to be domiciled in Utah until May 31, 2014 (through the first five months of 2014), not just to the May 19, 2014 date on which the Utah home was sold. As a result, the Commission must determine whether the taxpayers are considered to be domiciled in Utah from May 20, 2014 to May 31, 2014 under another subsection of Section 59-10-136. In addition, it may be helpful for the Commission to make some observations about these other subsections, beginning with Subsection 59-10-136(2)(b).

This subsection provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah. For reasons previously discussed, the Commission finds that TAXPAYER-2 was registered to vote in Utah during all of 2013 and during the first five months of 2014 that the Division has assessed the taxpayers as Utah resident individuals. Accordingly, under Subsection 59-10-136(2)(b), both taxpayers are considered to be domiciled in

Utah during all of 2013 and during the first five months of 2014 (i.e. from January 1, 2014 to May 31, 2014), unless they are able to rebut this presumption.[24]

The taxpayers claim that TAXPAYER-2 did not vote in Utah during 2013 or 2014. This, however, is insufficient to rebut the Subsection 59-10-136(2)(b) presumption. In prior decisions, the Commission has found that had the Legislature intended actual voting in Utah to be the event that triggered domicile in Utah, it could have easily stated so, but it did not. As a result, the Commission finds that the Subsection 59-10-136(2)(b) presumption is not rebutted solely because a taxpayer shows that he or she did not vote in Utah despite being registered to do so.

Had TAXPAYER-2 also registered to vote in STATE-1 upon moving there in 2013, perhaps this additional factor would have been sufficient to rebut the presumption. However, TAXPAYER-2 admitted that she did not do so. The taxpayers suggest that they have rebutted the presumption by showing that TAXPAYER-2 changed her mailing address to STATE-1 after May 2013. This factor, however, is relevant in determining whether the taxpayers are considered to be domiciled in Utah under Subsection 59-10-136(3). As explained earlier, the Commission declines to find that an individual can rebut a Subsection 59-10-136(2) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). Again, if the Commission were to do so, one could argue that the Commission was giving no meaning to the Subsection 59-10-136(2) presumptions (i.e., that it was determining domicile as though the Subsection 59-10-136(2) presumptions did not exist).

There may be other circumstances that are sufficient to rebut the Subsection 59-10-136(2)(b) presumption. Where the taxpayers did not raise any other argument to rebut this presumption and where TAXPAYER-2 remained registered to vote in Utah until 2016, the Commission finds that the taxpayers have

24 Because the Division did not assess the taxpayers as Utah resident individuals after May 31, 2014, the Commission will not discuss Section 59-10-136 in regards to any period after this date. In addition, for reasons previously discussed, the Subsection 59-10-136(2)(b) presumption arises in regards to both taxpayers even though TAXPAYER-2 was the only one of the taxpayers to be registered to vote in Utah during 2013 and

not rebutted this presumption for 2013 and the first five months of 2014. Accordingly, under Subsection 59-10-136(2)(b), both taxpayers are considered to be domiciled in Utah during all of 2013 and during the first five months of 2014 (i.e., from January 1, 2014 to May 31, 2014).

Subsection 59-10-136(2)(c). Under this subsection, an individual is presumed to be domiciled in Utah if the individual or the individual's spouse asserts Utah residency on a Utah return. Neither taxpayer asserted Utah residency on a 2013 or 2014 Utah return. Accordingly, neither taxpayer is considered to be domiciled in Utah for any portion of 2013 or 2014 under Subsection 59-10-136(2)(c).

Subsection 59-10-136(3). Even if an individual is not considered to be domiciled in Utah under Subsection (1), (2)(a), (2)(b), or (2)(c), they may be considered to be domiciled in Utah based on a preponderance of the evidence relating to 12 specific facts and circumstances listed in Subsection 59-10-136(3)(b). Neither party addressed these 12 factors. However, a cursory review of the 12 factors indicates that TAXPAYER-2's actions satisfy a preponderance of the relevant factors for the first five months of 2013 and that her actions satisfy some of the relevant factors for the last seven months of 2013 and the first five months of 2014. As a result, even had the Commission not already found both taxpayers to be Utah domiciliaries for all of 2013 and the first five months of 2014 under another subsection of Section 59-10-136, they may have also been found to be Utah domiciliaries for all or a portion of these periods under Subsection 59-10-136(3).

Domicile – Summary. Based on the foregoing, TAXPAYER-2 and TAXPAYER-1 are both considered to be domiciled in Utah for all of 2013 and for the first five months of 2014. As a result, TAXPAYER-2 and TAXPAYER-1 are both considered to be Utah resident individuals for these periods. Accordingly, all income that TAXPAYER-2 and TAXPAYER-1 received during 2013 and the first five months of 2014 is subject to Utah taxation (subject to a credit for income taxes paid to other states). For these reasons, the Commission should sustain the additional taxes the Division imposed in its 2013 and 2014 assessments.

2014.

IV. Taxpayers' Other Arguments.

The Commission has abated the 2012 assessment. The taxpayers raise a number of other arguments as to why the Commission should abate all or portions of the 2013 and 2014 assessments, as well. First, the taxpayers point out that neither of them earned any income in Utah after May 31, 2013. As a result, they contend that none of the income they earned in the last seven months of 2013 and the first five months of 2014 should be subject to Utah taxation. However, the Commission has found that TAXPAYER-2 and TAXPAYER-1 are both Utah resident individuals for all of 2013 and the first five months of 2014. Pursuant to Subsection 59-10-104(1) and Subsection 59-10-103(1)(w), all of a Utah resident individual's federal adjusted gross income is subject to Utah income taxation, subject to certain subtractions and additions not applicable to this case. The Commission acknowledges that Utah Code Ann. §59-10-117(2)(c) provides that "a salary, wage, commission, or compensation for personal services rendered outside this state may not be considered to be derived from Utah sources[.]" However, in accordance with Subsection 59-10-117(1) and Utah Code Ann. §59-10-116, Subsection 59-10-117(2)(c) only applies to a Utah nonresident individual. Because the taxpayers are both Utah resident individuals for all of 2013 and the first five months of 2014, Subsection 59-10-117(2)(c) does not apply to them for these periods. Accordingly, all of the income that both taxpayers earned during 2013 and the first five months of 2014 is subject to Utah taxation, even if it was earned outside of Utah and even though it may also have been subject to taxation in another state. As explained earlier, double taxation concerns are alleviated through the application of a credit for taxes paid to another state, pursuant to Subsection 59-10-1003(1).

Second, the taxpayers contend that Utah's relatively new domicile law (i.e., Section 59-10-136) is not fair. In effect, the taxpayers are asking the Commission to find that the new domicile law does not always result in good tax policy and should not be upheld under the specific circumstances of their case. The Commission's role, however, is to implement the law. The Commission is not authorized to change the law to

achieve what the taxpayer may consider to be a better tax policy for the specific circumstances of their case. That is the role of the Utah Legislature. Accordingly, none of the 2013 and 2014 taxes that the Division assessed to the taxpayers should be abated for these reasons.

Third, the taxpayers indicate that they were not told that their actions could lead to them being subject to Utah taxation on the income the Division has assessed for 2013 and 2014. They also indicate that Utah's new domicile law is not "publicly known." Just because a taxpayer has not investigated and/or does not understand a law that applies to him or her does not mean that that law no longer applies to that taxpayer. Furthermore, the instructions for Utah's 2012, 2013, and 2014 income tax returns (i.e., the instructions for the 2012, 2013, and 2014 TC-40's) discuss Section 59-10-136 and the consequences resulting from this "new" domicile law. For example, Page 2 of the 2012 instructions contains a "What's New" section, which provides as follows:

> **Domicile Definition Changed**. Utah law defining domicile has changed. Consequently, Pub 49, *Special Instructions for Married Couples where one is a full-year resident and the other is a full-year nonresident no longer applies.* See page 3. (Emphasis in original).

In addition, pages 3 and 4 of the 2012 instructions contain the new Section 59-10-136 definition of domicile, and page 4 of the 2012 instructions specifically provides that:

> If an individual is considered to have domicile in Utah, the spouse is also considered to have domicile in Utah. This rule does not apply if the couple are legally separated or divorced, or they file their federal returns as married filing separately.

Accordingly, none of the 2013 and 2014 taxes that the Division assessed to the taxpayers should be abated for these reasons.

Fourth, the taxpayers claim that prior to the Initial Hearing, one of the Division's employees asked them to send in information about the listing of the Utah home for sale after verbally telling them that this information would "make a difference." It appears that the taxpayers inferred from this conversation that the Division would reverse its assessments if the taxpayers were able to show that the Utah home was listed for

sale. The Division employee may have been asking for this information so that the Division could determine *if* the taxpayers' circumstances were similar to those where the Commission had found that listing a vacant home for sale may be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. If so, the employee would have been asking for the listing information so that the Division could review it and determine whether its assessments were correct or needed to be amended. The information the taxpayers proffered at the Initial Hearing, however, lacks sufficient detail to know whether or not the Division employee gave the taxpayers incorrect advice.[25]

Fifth, at the hearing, the taxpayers claimed that some portion of their 2014 FAGI is income that TAXPAYER-1 withdrew from an individual retirement account in 2014. The taxpayers contend that Utah should not be assessing state taxes on this retirement income because STATE-1 is a state that taxes money when it is contributed into a retirement account instead of taxing money when it is withdrawn from the account. It appears that the taxpayers first raised this issue at the hearing, because the Division did not seem prepared to address the issue.

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25 Even if the evidence had shown that the Division employee gave the taxpayers erroneous or incorrect advice during the audit process, it would not warrant an abatement of the *taxes* at issue under the doctrine of equitable estoppel, especially where that advice was not given in writing. The Utah Supreme Court has found that a state agency cannot be held responsible for representations of its employees except in rare circumstances. *See Holland v. Career Serv. Review Bd.*, 856 P.2d 678 (Utah Ct. App. 1993), in which the Utah Court of Appeals found that "it is well settled that equitable estoppel is only assertible against the State or its institutions in unusual situations in which it is plainly apparent that failing to apply the rule would result in manifest injustice." In *Holland*, the Court explained that in such cases, "the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *See also Anderson v. Public Service Comm'n*, 839 P.2d 822 (Utah 1992), in which the Utah Supreme Court stated that "[t]he few cases in which Utah courts have permitted estoppel against the government have involved very specific written representations by authorized government entities." *See also Eldredge v. Utah State Retirement Bd*., 795 P.2d 671 (Utah Ct. App. 1990); and *Orton v. State Tax Comm'n*, 864 P.2d 904 (Utah Ct. App. 1993).

The Commission has also addressed the principle of equitable estoppel in a number of prior cases. *See, e.g., USTC Appeal No. 11-2658* (Initial Hearing Order, Apr. 14, 2013); and *USTC Appeal No. 15-585* (Initial Hearing Order May 6, 2016). None of these prior cases would support an abatement of the taxes that the Division assessed for the 2013 and 2014 tax years. These and other selected Commission decisions can be reviewed in a redacted format on the Commission's website at http://tax.utah.gov/commission-office/decisions.

Regardless, the taxpayers, who have the burden of proof in this matter, have not provided any statutory or other basis to show why Utah should not be taxing such income. Furthermore, even if Utah cannot tax such income, the taxpayers did not provide information at the hearing to show how much of their 2014 FAGI was income that was withdrawn from TAXPAYER-1's retirement account. In addition, they did not provide information to show whether the withdrawal occurred during the first five months of 2014 (when the taxpayers are subject to Utah taxation) or during the last seven months of 2014 (when they are not subject to Utah taxation). Furthermore, the taxpayers provided no information to show whether the amounts that TAXPAYER-1 withdrew in 2014 were contributed to his retirement account while he was living in STATE-1 instead of STATE-2 or Utah. If these amounts were contributed to his retirement account while he was working in STATE-2 or Utah, the amounts may not have been taxed at the time of contribution. For these reasons, the information the taxpayers provided about the income that TAXPAYER-1 withdrew from his retirement account in 2014 is insufficient to show that the Division's 2014 assessment of additional taxes should be reduced.

Sixth, at the hearing, the taxpayers stated that they would agree to settle the case by paying 50% of the assessments imposed by the Division. The two parties (i.e., the taxpayers and the Division) may reach agreement between themselves and submit that agreement to the Commission for review. However, where the parties do not reach agreement in an audit deficiency case, the purpose of the appeals process is for the Commission to determine whether or not the Division's audit assessment complies with Utah law. *In the appeals process*, the Commission does not waive *taxes* that were properly imposed (unlike properly imposed *penalties and interest*, which, under statute, may be waived for reasonable cause). Once an appeal is closed, a taxpayer may submit a request to Taxpayer Services Division to reduce his or her tax liability, which that division will review as part of the collections process. However, the appeal process is not the proper venue to propose a settlement of properly imposed taxes.

In conclusion, these various arguments do not show that the Division's assessments of additional taxes for the 2013 and 2014 tax years should be abated or reduced.

V. Waiver of Penalties and Interest.

For this case, the applicable law to determine whether the penalties and interest assessed to the taxpayers may be waived is found in Subsection 59-1-401(14) and Rule 42.[26] In Subsection 59-1-401(14), the Commission is authorized to waive penalties and interest upon a showing of reasonable cause. The Commission has adopted Rule 42 to provide guidance as to when reasonable cause exists to waive penalties and interest.

Rule 42(2) provides that interest is waived only if a taxpayer shows that the Tax Commission gave the taxpayer erroneous information or took inappropriate action that contributed to the taxpayer's error.[27] The taxpayers assert that a Division employee erroneously indicated that they would not owe any taxes if they were able to show that they had listed their Utah home for sale. As discussed earlier, however, the Commission has found that the employee may have been asking for the listing information so that the Division could review it and determine whether its assessments were correct or needed to be amended. In addition, the Commission has found that the information the taxpayers proffered at the Initial Hearing lacked sufficient detail to know whether or not the Division employee gave the taxpayers incorrect advice. For these reasons, reasonable cause does not exist to waive any of the interest that the Division has imposed for the 2013 and 2014 tax years.

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26 Different criteria concerning the imposition and/or waiver of penalties and interest are provided in Subsections 59-10-136(4)(d) and (4)(e), which apply if an individual did not file a Utah return based on a belief that he or she was not considered to be domiciled in Utah under Subsection 59-10-136(4)(a). Because the limited circumstances described in Subsections 59-10-136(4)(d) and (4)(e) are not present in this case, these specific provisions are not applicable in determining whether the penalties and interest assessed to the taxpayers may be waived.

27 The Rule 42 criteria to waive interest are more stringent than the rule's criteria to waive penalties because a taxpayer has had use of money that should have been paid to the state and because of the time value of this money.

The only year for which the Division imposed penalties was the 2014 tax year. Pursuant to Subsection 59-1-401(14) and Rule 42, the Commission generally waives penalties in domicile cases because of the complexity of the issues. In addition, the Division stated at the hearing that it would not object to the Commission waiving the penalties it imposed. Accordingly, reasonable cause exists to waive all penalties that the Division imposed for the 2014 tax year.

VI. Conclusion.

The Division's 2012 assessment should be abated. The taxpayers have not met their burden of proof to show that they do not owe the additional taxes and interest that the Division imposed in its 2013 and 2014 assessments. Accordingly, the Commission should sustain the Division's 2013 assessment in its entirety. In addition, the Commission should sustain the Division's 2014 assessment in its entirety, with the exception of waiving all penalties the Division imposed for this year.

_____

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission reverses the Division's 2012 assessment. In addition, the Commission sustains the Division's 2013 and 2014 assessments, except that the Commission waives all penalties that the Division imposed for the 2014 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 _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.