17-789
TAX TYPE: INCOME TAX
TAX YEAR: 2013
DATE SIGNED: 03/08/2019
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 17-789 Account No. ##### Tax Type: Individual Income Tax Tax Years 2013 Judge: Chapman

Presiding:

Lawrence C. Walters, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER-1, Taxpayer
For Respondent: REPRESENTATIVE FOR RESPONDENT-1, Assistant Attorney General
REPRESENTATIVE FOR RESPONDENT-2, Assistant Attorney General
REPRESENTATIVE FOR RESPONDENT-3, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 20, 2019.

Based upon the evidence and testimony, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is Utah individual income tax.

2. The tax year at issue is 2013.

3. TAXPAYERS ("Petitioners" or "taxpayers") have appealed the Auditing Division's ("Respondent" or "Division") assessment of Utah individual income taxes for the 2013 tax year.

4. On April 13, 2017, the Division issued a Notice of Deficiency and Audit Change ("Statutory Notice") to the taxpayers, in which it imposed taxes and interest (calculated as of May 13, 2017), as follows:[1]

Year	Tax	Penalties	Interest	Total
2013	$$$$$	$0.00	$$$$$	$$$$$

5. The taxpayers filed 2013 federal and Utah income tax returns with a status of married filing jointly. On both of these returns, the taxpayers reported their 2013 federal adjusted gross income ("FAGI") to be $$$$$. On the Form TC-40B that accompanied the taxpayers' Utah return, they reported that they were Utah nonresidents and they allocated $$$$$ of their 2013 FAGI to Utah.[2] TAXPAYER-1 testified that the taxpayers filed their 2013 Utah return in this manner to show that: 1) he was a Utah nonresident individual for all of 2013; 2) none of the 2013 income that he received was subject to Utah taxation; 3) TAXPAYER-2 was a Utah resident individual for all of 2013; and 4) all $$$$$ of the income that TAXPAYER-2 received during 2013 was subject to Utah taxation.[3]

6. TAXPAYER-1 was a servicemember in the United States Army ("Army") from 1988 until his retirement on August 31, 2013.[4] TAXPAYER-1 was assigned to duty in Utah from 2000 until his retirement. On May 14, 2013, TAXPAYER-1 moved to STATE-1 to live and work, and he continued to live in STATE-1 for the remainder of 2013.[5] TAXPAYER-1 worked for BUSINESS. (i.e., not the Army) while he lived in STATE-1 during 2013.[6] The taxpayers began to live separately in early 2013. As a result, TAXPAYER-2 did not move to STATE-1 when TAXPAYER-1 moved there on May 14, 2013. TAXPAYER-2 remained in Utah

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1 Respondent's Exhibit 5. Interest continues to accrue until any tax liability is paid. No penalties were imposed.

2 Respondent's Exhibit 7.

3 The Form TC-40B does not provide a separate space for each taxpayer to indicate whether he or she is a Utah resident individual.

4 Respondent's Exhibit 9.

5 TAXPAYER-1 explained that he was able to move to STATE-1 before the date of his retirement from the Army because of leave time he had accrued.

6 Respondent's Exhibit 7.

throughout the 2013 tax year.

7. The taxpayers contend that pursuant to the Servicemembers Civil Relief Act ("SCRA"), none of the income that TAXPAYER-1 received from the Army prior to his retirement is subject to Utah taxation. In addition, the taxpayers contend that the income that TAXPAYER-1 earned at his job in STATE-1 between May 14, 2013 and December 31, 2013, and the military retirement income he received from September 1, 2013 to December 31, 2013, is not subject to Utah taxation because he received this income after he had moved away from Utah.[7] The taxpayers concede, however, that the income that TAXPAYER-2 earned in Utah is subject to taxation, and they do not contend that the SCRA precludes Utah from taxing any of TAXPAYER-2's 2013 income.

8. The Division, however, determined that both taxpayers were Utah resident individuals for all of 2013. In addition, the Division determined that the SCRA did not preclude the Commission from taxing any of the taxpayers' 2013 income. As a result, the Division changed the taxpayers' 2013 Utah nonresident return to a 2013 Utah resident individual and imposed Utah income taxes on all income that both taxpayers received during the 2013 tax year. In addition, the Division increased the $$$$$ of FAGI that the taxpayers reported on their 2013 Utah return to $$$$$.[8]

9. While the taxpayers disagree with the Division's changing their 2013 Utah nonresident return to a Utah resident return and imposing Utah income taxes on TAXPAYER-1's income, the taxpayers do not contest the Division's action to increase the $$$$$ of 2013 FAGI that they reported on their Utah return to

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7 At the hearing, TAXPAYER-1 stated that after the Commission issued its Initial Hearing Order in this matter, he paid Utah income taxes on the retirement income he received in STATE-1 after he was retired from the Army. As a result, it is not entirely clear whether he believes that he is a Utah resident individual after his August 31, 2013 retirement date from the Army or not, especially where he stated that he does not believe that Utah should tax any of the income that he earned in STATE-1. For these reasons and because TAXPAYER-1 asks the Commission to find that he is a Utah nonresident individual for all of 2013, the Commission will address whether he is considered to be domiciled in Utah not only prior to his August 31, 2013 retirement, but also after his retirement.

8 Respondent's Exhibit 5.

$$$$$.[9] As a result, it appears that the taxpayers are asking the Commission to accept the 2013 Utah nonresident return that they filed, except to change the $$$$$ of FAGI that they reported on it to $$$$$. The Division, on the other hand, asks the Commission to sustain its assessment in its entirety.

10. TAXPAYER-1 was born in STATE-2. In or around 1968 (when TAXPAYER-1 was seven years of age), TAXPAYER-1's parents moved their family to STATE-3, where the family lived for more than 10 years. While TAXPAYER-1 was in college in STATE-3, his parents moved back to STATE-2. TAXPAYER-1, however, remained in STATE-3, where he married TAXPAYER-2 in 1985. In 1988, while the taxpayers were living in STATE-3, TAXPAYER-1 joined the Army. Afterwards, TAXPAYER-2 would move with TAXPAYER-1 to wherever he was stationed (except when TAXPAYER-1 was deployed to a combat zone).

11. In 2000, the Army transferred TAXPAYER-1 to Utah, where neither of the taxpayers had previously lived. TAXPAYER-1 explained that the Army transferred him to Utah in 2000, even though he had asked to be transferred to STATE-4. As a result, in 2000, the taxpayers and their three children (who were approximately 10 to 13 years old) moved to Utah.[10] Since 2000, TAXPAYER-2 has continued to live in Utah. From 2000 until May 14, 2013 (when he moved to STATE-1), TAXPAYER-1 also lived in Utah (except when he was deployed WORDS REMOVED during 2004 and 2005). TAXPAYER-1 admitted that once the Army transferred him to Utah, he did not request that the Army transfer him to a different state or country. TAXPAYER-1 stated that he did not request a transfer, in part, so that the taxpayers' children could live in one place while they completed high school. TAXPAYER-1 noted, however, that even though he did not request a transfer once he was stationed in Utah, the Army could have transferred him outside of Utah at any time.

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9 The taxpayers explained that they forgot to include some of their income on the 2013 federal and Utah returns that they filed.

10 During the 2013 tax year at issue, the taxpayers' three children were approximately 23 to 26 years in age. The taxpayers did not claim any of their children or any other dependents on their joint 2013 federal return. Respondent's Exhibit 7. In addition, neither taxpayer attended a Utah institution of higher education

12. TAXPAYER-1 has not lived in Utah since he moved to STATE-1 in 2013. TAXPAYER-1 stated that once he and TAXPAYER-2 separated and he retired from the Army, he wanted to move to STATE-2, where his parents and a sibling lived. He explained, however, that he moved to STATE-1 in 2013 because he was unable to find a job in STATE-2 at that time. In 2018, TAXPAYER-1 was able to find a job in STATE-2 and moved to STATE-2, where he still lives.[11]

13. After the taxpayers began to live separately in early 2013, one of the taxpayers filed for divorce in Utah. After TAXPAYER-1 moved to STATE-1 on May 14, 2013, the divorce action was moved to STATE-1. The taxpayers became divorced in May 2014, when a STATE-1 court entered a decree of divorce. The taxpayers admit that they did not file for "legal separation" prior to becoming divorced, and no evidence was submitted showing that any court entered a decree of separate maintenance, a temporary separation order, or another similar order prior to the taxpayers' May 2014 divorce. Given these circumstances, the taxpayers were not legally separated or divorced for any portion of the 2013 tax year at issue.

14. When TAXPAYER-1 joined the Army in 1988, he informed the Army that his "permanent address" would be his parents' address in STATE-2. From 1988 through his retirement from the Army in 2013, TAXPAYER-1 continued to use his parents' STATE-2 address as his "permanent address" for Army purposes. While TAXPAYER-1 was an active servicemember, he would also inform the Army of his "current address," which was the address at which he and TAXPAYER-2 lived wherever he was stationed. As a result, from 1988 through TAXPAYER-1's retirement from the Army on August 31, 2013, TAXPAYER-1 would receive some mail from the Army at his "permanent address" in STATE-2 and some at the various "current addresses" wherever he and TAXPAYER-2 were living in the places where he was stationed.

15. Soon after the taxpayers and their children moved to Utah in 2000, the taxpayers purchased a home in CITY-1, Utah (the "Utah home"). When the taxpayers began to live separately in early 2013,

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during 2013.

11 Petitioner's Exhibit 2 (documents showing that TAXPAYER-1 moved to STATE-2 in 2018).

TAXPAYER-1 rented a room in a different home in Utah, while TAXPAYER-2 continued to live in the taxpayers' Utah home. When TAXPAYER-1 moved to STATE-1 on May 14, 2013, he rented a room in a STATE-1 home.[12] After TAXPAYER-1 moved to STATE-1 on May 14, 2013, TAXPAYER-2 continued to live in the Utah home, where she lived for all of the 2013 tax year. Both taxpayers continued to own the Utah home until they were divorced in May 2014, at which time ownership of the home was transferred to TAXPAYER-2 alone. For the 2013 tax year, the taxpayers' Utah home received the Utah residential exemption from property taxation.[13]

16. Prior to being transferred to Utah in 2000, TAXPAYER-1 had been stationed in various other states and countries, including COUNTRY. The taxpayers, however, never owned a home until TAXPAYER-1 was transferred to Utah in 2000, at which time they purchased the Utah home.

17. TAXPAYER-1 has never been registered to vote in Utah. TAXPAYER-1 explained that when he joined the Army in 1988, he registered to vote in STATE-2 and that he remained registered to vote in STATE-2 until July 2, 2013, when he registered to vote in STATE-1 (at the same time he obtained a STATE-1 driver's license).[14] While he was in the Army and before he registered to vote in STATE-1 in July 2013, TAXPAYER-1 used his parents' STATE-2 address for STATE-2 voting purposes. In addition, TAXPAYER-1 voted in STATE-2 in the November 2012 election by absentee ballot.

18. TAXPAYER-1 testified that because he intended to be domiciled in STATE-2 while he was in the Army, he had always remained registered to vote in STATE-2 because he had understood that voter registration and voting were the most important indicators of domicile. To support this understanding,

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12 Respondent's Exhibit 4 (Domicile Survey – Question 16).

13 Respondent's Exhibit 3. Utah Code Ann. §59-2-103(2) (2013) provided that ". . . the fair market value of residential property located within the state shall be reduced by 45%, representing a residential exemption[,]" while Utah Code Ann. §59-2-102(33)(a) (2013) defined "residential property" 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 Respondent's Exhibit 4 (Domicile Survey – Question 10).

TAXPAYER-1 submitted a document from an Army website that is titled "Legal Residence and Domicile," which indicates that "[v]oting is considered the most important indicator of intent in most states. While voting 'absentee ballot' may be inconvenient, you should make the effort if your 'residence' is not the state in which you are stationed."[15]

19. TAXPAYER-2 was registered to vote in Utah throughout the 2013 tax year. No evidence was provided to show that TAXPAYER-2 was also registered to vote in a state other than Utah during 2013. TAXPAYER-2 voted in Utah in the November 2012 election.[16]

20. In 2005 (around the time he was deployed to Afghanistan), TAXPAYER-1 completed a DD Form 2058, State of Legal Residence Certificate ("Form 2058"), which he provided to the Army. On the Form 2058, TAXPAYER-1 declared the place of his "legal residence/domicile" to be Rowlett, STATE-2. The Form 2058 included, in part, the following instructions (emphases in original):[17]

> The purpose of this certificate is to obtain information with respect to your residence/domicile for the purpose of determining the State for which income taxes are to be withheld from your "wages" . . . .
>
> The terms "legal residence" and "domicile" are essentially interchangeable. . . .
>
> The formula for changing your State of legal residence/domicile is simply stated as follows: <u>physical presence in the new State with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile</u>. In most cases, you must actually reside in the new State at the time you form the intent to make it your permanent home. Such intent must be clearly indicated. Your intent to make the new State your permanent home may be indicated by certain actions such as: (1) registering to vote; (2) purchasing residential property or an unimproved residential lot; (2) titling and registering your automobile(s); (4) notifying the State of your previous legal residence/domicile of the change in your State of legal residence/domicile; and (5) preparing a new last will and testament which indicates your new State of legal residence/domicile. <u>Finally</u>, you must comply with the applicable tax laws of the State which is your new legal residence/domicile.

15 Petitioner's Exhibit 3.
16 Respondent's Exhibit 2.
17 Respondent's Exhibit 1. The taxpayers also showed that on TAXPAYER-1's 2013 pay statements from the Army prior to his retirement on August 31, 2013, the Army showed TAXPAYER-1's "state" for "state taxes" purposes to be STATE-2. Petitioner's Exhibit 1.

> Generally, unless these steps have been taken, it is doubtful that your State of legal residence/domicile has changed. . . .

21. The taxpayers prepared a last will and testament in STATE-3 prior to or around the time that TAXPAYER-1 joined the Army in 1988. The taxpayers did not prepare a new last will and testament while they lived in Utah prior to TAXPAYER-1's 2013 retirement.

22. TAXPAYER-2 had a Utah driver's license during all of 2013. TAXPAYER-1 had a Utah driver's license from January 1, 2013 to July 2, 2013, when he obtained a STATE-1 driver's license (which he had for the remainder of 2013).[18] TAXPAYER-1 explained that out of convenience, he often obtained a driver's license wherever he was stationed. However, TAXPAYER-1 explained that when he came back to the United States after being stationed in COUNTRY (sometime prior to 2000); he obtained a STATE-2 driver's license. TAXPAYER-1 stated that he kept the STATE-2 driver's license until he was stationed in Utah in 2000, after which he obtained a Utah driver's license.

23. While TAXPAYER-1 was stationed with the Army in Utah, he and TAXPAYER-2 registered their vehicles in Utah. For example, TAXPAYER-1's motor vehicle was registered in Utah from January 1, 2013 until July 2013, when he registered it in STATE-1. TAXPAYER-2's motor vehicle, however, was registered in Utah for all of 2013.[19]

24. When TAXPAYER-1 first joined the Army in 1988, he opened accounts with BANK in STATE-2, where he still banks. While TAXPAYER-1 was in the Army (including the period he was stationed in Utah), his Army paycheck was directly deposited into the STATE-2 account. While living in Utah, however, TAXPAYER-1 and/or TAXPAYER-2 also opened an account at a Utah credit union.[20]

25. Throughout 2013, TAXPAYER-2 attended church in Utah. TAXPAYER-1 attended church in Utah until he moved to STATE-1 on May 14, 2013, after which he attended church in STATE-1. Neither of

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18 Respondent's Exhibit 4 (Domicile Survey - Question 9).
19 Respondent's Exhibit 4 (Domicile Survey - Question 17).
20 Respondent's Exhibit 4 (Domicile Survey - Question 8).

the taxpayers were members of a club or other similar organization during 2013.

26. During 2014 (after TAXPAYER-1 had moved to STATE-1), the taxpayers used a Utah address to file their 2013 federal and Utah returns.[21] No information was provided to show where the taxpayers filed their 2012 income tax returns during the 2013 tax year at issue. The taxpayers, however, have the burden of proof in this matter and, thus, have not shown that they did not also use a Utah address in 2013 to file their 2012 income tax returns.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2013)[22], "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 the 2013 tax year at issue), UCA §59-10-136 provides guidance concerning 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.

21 Respondent's Exhibit 7.

22 All substantive law citations are to the 2013 version of Utah law, unless otherwise indicated.

(b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:

(i) is the noncustodial parent of a dependent:

(A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and

(B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and

(ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).

(2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:

(a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;

(b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or

(c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

(3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:

(i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and

(ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.

(b) The determination of whether an individual is considered to have domicile in this state under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:

(i) whether the individual or the individual's spouse has a driver license in this state;

(ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;

(iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;

(iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;

(v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;

(vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
(vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
(viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
(ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;
(x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
(xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or
(xii) whether the individual is an individual described in Subsection (1)(b).

(4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
(i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
(ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
(A) return to this state for more than 30 days in a calendar year;
(B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
(C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
(D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
(E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.

(b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.

(c) For purposes of Subsection (4)(a), an absence from the state:
(i) begins on the later of the date:
(A) the individual leaves this state; or
(B) the individual's spouse leaves this state; and
(ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.

(d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:

(i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and

(ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.

(e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.

(ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:

(A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and

(B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).

(5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.

(b) For purposes of this section, an individual is not considered to have a spouse if:

(i) the individual is legally separated or divorced from the spouse; or

(ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.

(c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.

(6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

4. For the 2013 tax year, Utah Admin. Rule R865-9I-2 ("Rule 2") provides guidance when determining whether a military serviceperson is considered a Utah resident individual for Utah income tax purposes, as follows in pertinent part:[23]

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23 Effective November 13, 2018, Rule 2 was amended to delete the entirety of Rule 2(2). After this amendment, the only subsection of Rule 2 to still exist is Rule 2(1), which is not cited because it is not applicable to this appeal.

. . . .
(2) Determination of resident individual status for military servicepersons.
(a) The status of a military serviceperson as a resident individual or a nonresident individual is determined as follows.
(i) A resident individual in active military service does not lose his status as a resident individual if the resident individual's absence from the state is a result of military orders.
(ii) A nonresident individual in active military service who is stationed in Utah does not become a resident individual for income tax purposes if the nonresident individual's presence in Utah is due solely to military orders.
(b) Subject to federal law, an individual in active military service may change from a resident individual to a nonresident individual or from a nonresident individual to a resident individual if he establishes that he satisfies the conditions of Section 59-10-136.
(c) A nonresident individual serviceperson is exempt from Utah income tax only on his active service pay. All other Utah source income received by the nonresident individual serviceperson is subject to Utah income tax as provided by Section 59-10-116.

5. Under federal law, "servicemembers" are afforded certain protections in the Servicemembers Civil Relief Act ("SCRA" or the "Act"), which, for the 2013 tax year, were found at 50 U.S.C. App. §§501 et seq.[24] Section 502 of the SCRA provides that the Act's "purposes" are, as follows:

The purposes of this Act are—
(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

6. Section 512 of the SCRA provides for the Act's jurisdiction and applicability, as follows in pertinent part:

(a) Jurisdiction. This Act applies to—
(1) the United States;
(2) each of the States, including the political subdivisions thereof; and
(3) all territory subject to the jurisdiction of the United States.
(b) Applicability to proceedings. This Act applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this Act. This Act does not apply to criminal proceedings.
. . . .

24 Effective for tax year 2015, the SCRA is cited 50 U.S.C. §§3901 et seq.

7. Section 571 of the SCRA provides guidance concerning the residence or domicile of a servicemember or a servicemember's spouse for income tax purposes, as follows in pertinent part:

> (a) Residence or domicile.
>
> (1) In general. A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.
>
> (2) Spouses. A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.
>
> (b) Military service compensation. Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.
>
> (c) Income of a military spouse. Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.
>
> . . . .
>
> (e) Increase of tax liability. A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.
>
> . . . .

8. For the instant matter, UCA §59-1-1417(1) (2019) 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.

. . . .

DISCUSSION

Pursuant to Subsection 59-1-1417(1), the taxpayers have the burden of proof in this matter. At issue is whether both of the taxpayers were Utah resident individuals for the 2013 tax year. The taxpayers concede that TAXPAYER-2 was a Utah resident individual for all of 2013, but contend that TAXPAYER-1 was not a Utah resident individual for any portion of 2013. The Division, however, contends that both taxpayers were Utah resident individuals for all of 2013. For the 2013 tax year, 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").

The Division does not argue that TAXPAYER-1 is a Utah resident individual for all of 2013 under the 183 day test. Instead, the Division asserts that he is a Utah resident individual for all of 2013 under the domicile test. As a result, the Commission will first apply the facts to Section 59-10-136 (the Utah domicile statute in effect for the 2013 tax year) to determine whether TAXPAYER-1 is considered to be domiciled in Utah under this statute during 2013. Second, if the Commission determines that TAXPAYER-1 would be considered to be domiciled in Utah for the 2013 tax year when Section 59-10-136 alone is considered, the Commission will then determine whether finding TAXPAYER-1 to be domiciled in Utah for income tax purposes for any portion of 2013 would be contrary to and, thus, preempted by federal law (i.e., by the SCRA).

I. Would TAXPAYER-1 be Considered to be Domiciled in Utah during 2013 under Section 59-10-136 (Before the SCRA is Considered)?

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 tax year, 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)).[25]

A. 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 because the taxpayers were not legally separated or divorced during 2013[26] and because they filed a joint 2013 federal return. Accordingly, for the 2013 tax year, each taxpayer is considered to have a spouse for purposes of Section 59-10-136.

In addition, Subsection 59-10-136(5)(a) 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." While the taxpayers concede that TAXPAYER-2 is a Utah resident individual for all of 2013, the Commission may need to determine whether TAXPAYER-2 is considered to be domiciled in Utah "in accordance with the section" in order to determine whether TAXPAYER-1 is considered to be domiciled in

25 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.

26 Admittedly, the taxpayers were living separately for most of 2013, and one of them filed for divorce in early 2013. However, the Commission has found that married individuals are not considered to be "legally separated" solely because they are living separately or solely because one or both of them have filed for divorce. *See, e.g., USTC Appeal No. 17-832* (Initial Hearing Order Oct. 31, 2018), in which the Commission found "that in order to be 'legally separated or divorced' for purposes of Subsection 59-10-136(5)(b)(i), a Utah court must have issued a decree or order approving a petition for temporary separation, separate maintenance, or divorce; or a court of a different jurisdiction must have issued a decree or order approving a similar type of petition." This and other Commission decisions can be reviewed in a redacted format on the Commission's

Utah. Accordingly, the Commission will determine whether each of the taxpayers is considered to have domicile in Utah for the 2013 tax year under Section 59-10-136.

B. Subsection 59-10-136(4). The taxpayers do not argue that either of them is *not* considered to be a Utah domiciliary for the 2013 tax year under Subsection 59-10-136(4). This subsection applies to an individual if the individual *and* the individual's spouse are both "absent from the state" for at least 761 consecutive days and if a number of other listed conditions are all met. Both taxpayers were not absent from Utah for a 761-day or more period that included 2013 because TAXPAYER-2 lived in Utah throughout 2013. As a result, neither taxpayer is *not* considered to be domiciled in Utah during 2013 under Subsection 59-10-136(4), regardless of whether they meet all of the other conditions.[27]

Accordingly, the Commission must analyze whether the taxpayers *are* considered to be domiciled in Utah for the 2013 tax year under one or more of 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. It is clear that neither taxpayer would not be considered to be domiciled in Utah for any portion of 2013 under Subsection 59-10-136(1) or Subsection 59-10-136(2)(c).[28] Of

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website at https://tax.utah.gov/commission-office/decisions.

27 The taxpayers, however, do not meet all of the other Subsection 59-10-136(4) conditions. For example, the condition found in Subsection 59-10-136(4)(a)(ii)(D) (which, for purposes of Subsection 59-10-136(4), is not a rebuttable presumption) has not been met because the taxpayers claimed the residential exemption on their Utah home for the 2013 tax year. Even if TAXPAYER-2 had been the only one of the taxpayers to claim the residential exemption on the Utah home for the 2013 tax year, neither taxpayer would have met the Subsection 59-10-136(4)(a)(ii)(D) condition.

28 Because the taxpayers did not claim any dependents on their joint 2013 federal return and because neither taxpayer attended an institution of higher education during 2013, neither of the taxpayers would be considered to be domiciled in Utah during any portion of 2013 under Subsection 59-10-136(1). In addition, because the taxpayers did not claim to be a Utah resident individual for any portion of 2013 on their 2013 Utah income tax return, neither taxpayer would be considered to be domiciled in Utah during any portion of 2013 under Subsection 59-10-136(2)(c).

the three remaining subsections of Section 59-10-136 that have not yet been discussed (Subsections 59-10-136(2)(a), (2)(b), and (3)), the Commission will begin its analysis with Subsection 59-10-136(2)(b).

C. Subsection 59-10-136(2)(b). Under this subsection, an individual is presumed to be domiciled in Utah if the individual or the individual's spouse is registered to vote in Utah, unless the presumption is rebutted. TAXPAYER-2 was registered to vote in Utah during all of the 2013 tax year at issue. As a result, both taxpayers will be considered to be domiciled in Utah for all of 2013 under Subsection 59-10-136(2)(b), unless they are able to rebut this presumption.[29]

Because Subsection 59-10-136(2)(b) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual whose actions give rise to this presumption *is* considered to have domicile in Utah, but also for there to be circumstances where an individual whose actions give rise to this presumption *is not* considered to have domicile in Utah.[30] 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)(b) 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 an individual has not rebutted a Subsection 59-10-136(2) 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"

29 Admittedly, TAXPAYER-1 was not registered to vote in Utah during any portion of 2013. Nevertheless, because Subsection 59-10-136(2)(b) provides that an individual is presumed to be domiciled in Utah if either that individual *or* that individual's spouse is registered to vote in Utah, this presumption arises for *both* taxpayers for all of 2013 because of TAXPAYER-2's Utah voter registration. Furthermore, where the presumption has arisen for both taxpayers, the taxpayers cannot rebut the presumption for only one of the taxpayers. Either the presumption is rebutted for both taxpayers, or the presumption is not rebutted for both taxpayers. This conclusion is supported by Subsection 59-10-136(5)(a), which, as discussed earlier, provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah.

30 The Legislature did not provide that being registered to vote in Utah 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

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 Legislature's "new" law little or no effect, which the Commission declines to do.[31]

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).[32]

In addition, it appears that neither taxpayer voted in Utah during the 2013 tax year at issue. This alone, however, is insufficient to rebut the presumption.[33] The Commission has also found that an individual can rebut the Subsection 59-10-136(2)(b) presumption by showing that they were registered to vote in Utah only because a Utah county clerk failed to remove their name from the official voter register as required by law.[34] The taxpayers, however, have not shown that a Utah county clerk was required to remove TAXPAYER-2's name from the Utah official voter register prior to or during the 2013 tax year at issue.

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kindergarten, elementary, or secondary school).

31 That being said, 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.

32 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.

33 *See USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016), in which the Commission found that the Subsection 59-10-136(2)(b) presumption was not rebutted for the period that an individual was registered to vote in Utah, but had not voted in Utah. The Commission explained that it reached this conclusion, at least in part, because the Utah Legislature elected to use voting registration, not actual voting, as the criterion that could trigger domicile.

34 *See USTC Appeal No. 17-1307* (Initial Hearing Order Apr. 30, 2018).

In addition, for reasons explained earlier, where the Subsection 59-10-136(2)(b) presumption has arisen for both of the taxpayers, the taxpayers may not rebut the presumption for TAXPAYER-1 alone by showing that he was registered to vote in another state (STATE-2) during 2013. Based on the evidence that the taxpayers have provided, the Commission finds that the taxpayers have not rebutted the Subsection 59-10-136(2)(b) presumption for any portion of the 2013 tax year for which the presumption has arisen for both of them. Accordingly, the Commission finds that under Section 59-10-136 alone (i.e., prior to any consideration of the SCRA), both taxpayers are considered to be domiciled in Utah for the entirety of the 2013 tax year.

D. Other Subsections of Section 59-10-136. Because both taxpayers would be considered to be domiciled in Utah for all of 2013 under Subsection 59-10-136(2)(b), the Commission need not discuss the remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(a) and (3)) to determine whether the taxpayers would be considered to be domiciled in Utah under Section 59-10-136 (prior to any consideration of the SCRA). However, it may be helpful to make some cursory comments about these two remaining subsections.

Subsection 59-10-136(2)(a) provides that an individual 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's primary residence, unless the presumption is rebutted. This presumption arises for both taxpayers because they owned a Utah home in which TAXPAYER-2 lived throughout the 2013 tax year and which received the residential exemption for the 2013 tax year. As a result, even though TAXPAYER-2 is the only one of the taxpayers to have lived in the taxpayers' Utah home for most of 2013, the Subsection 59-10-136(2)(a) presumption arises for both taxpayers for all of 2013. Accordingly, both taxpayers would be considered to be domiciled in Utah under Subsection 59-10-136(2)(a), unless they are able to rebut this presumption for both of them. The taxpayers have not provided sufficient evidence to rebut the Subsection 59-10-136(2)(a) presumption for both of them. Accordingly, both taxpayers would also be considered to be domiciled in Utah for all of 2013 under Subsection 59-10-136(2)(a) (prior to any consideration of the SCRA).

Even if an individual is not considered to be domiciled in Utah under Subsection (1), (2)(a), (2)(b), or (2)(c), he or she may still 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). At the hearing, the Division proffered that both of the taxpayers would meet a preponderance of these factors for all of the 2013 tax year. Because the Commission has found that both taxpayers would be considered to be domiciled in Utah for 2013 under one or more subsections of Subsection 59-10-136(2), it is unnecessary for the Commission to determine whether the taxpayers would also be considered to be domiciled in Utah for 2013 under Subsection 59-10-136(3). Nevertheless, a cursory review of the 12 Subsection 59-10-136(3)(b) factors suggests that many of the relevant factors would show a Utah domicile for both taxpayers for all of 2013, while few, if any, of the relevant factors would show a domicile outside of Utah for them.[35] Accordingly, the Commission would also find that both taxpayers are considered to be domiciled in Utah for all of 2013 under Subsection 59-10-136(3) (prior to considering the SCRA).

E. Domicile Conclusions Based on Section 59-10-136 Alone (Prior to Considering the SCRA). Under Section 59-10-136, both taxpayers will be considered to be domiciled in Utah for all of the 2013 tax year (unless such a finding is precluded by the SCRA).

II. Does the SCRA Preclude the Commission from Finding that the Taxpayers are Domiciled in Utah for Income Tax Purposes for All or a Portion of the 2013 tax year?

35 For example, when determining whether an individual is considered to be domiciled in Utah under Subsection 59-10-136(3)(b), the first factor to be considered is "whether the individual or the individual's spouse has a driver license in this state" (pursuant to Subsection 59-10-136(3)(b)(i)). Because of the use of the word "or" in this factor, an individual meets this factor if either the individual or the individual's spouse has a Utah driver's license. While TAXPAYER-1 did not have a Utah driver's license for all of 2013, TAXPAYER-2 did have a Utah driver's license for all of 2013. As a result, when determining the taxpayers' domicile under Subsection 59-10-136(3)(b), *both* taxpayers would meet the Subsection 59-10-136(3)(b)(i) factor for all of the 2013 tax year.

The taxpayers do not contend that the SCRA precludes the Commission from finding that TAXPAYER-2 was domiciled in Utah for any portion of the 2013 tax year. For this reason and because TAXPAYER-2 is considered to be domiciled in Utah for all of 2013 under Section 59-10-136 (for reasons discussed earlier), she is a Utah resident individual for all of 2013, pursuant to Subsection 59-10-103(1)(q)(i)(A).

As to TAXPAYER-1, the taxpayers contend that he was not domiciled in Utah for any portion of the 2013 tax year because of the protections provided by the SCRA while he was in the Army (prior to his retirement) and because he had moved outside of Utah (specifically to STATE-1) prior to his retirement. The SCRA provides a number of protections for servicemembers during their military service. While these protections exist for a servicemember during their military service, they do not apply to a former servicemember who is retired from military service. Accordingly, the SCRA protections do not apply to TAXPAYER-1 for the September 1, 2013 to December 31, 2013 portion of 2013 that he was retired from the Army. For this reason and because TAXPAYER-1 would be considered to be domiciled in Utah for this September 1, 2013 to December 31, 2013 portion of 2013 under Section 59-10-136 (for reasons discussed earlier), TAXPAYER-1 is a Utah resident individual for the September 1, 2013 to December 31, 2013 portion of 2013, pursuant to Subsection 59-10-103(1)(q)(i)(A).

For the January 1, 2013 to August 31, 2013 portion of 2013 that TAXPAYER-1 was a servicemember (before his retirement from the Army), however, the SCRA does provide him a number of protections, one of which is prescribing when a taxing jurisdiction can and cannot impose its income tax laws on him. This is the only SCRA protection that the Commission will be addressing in this appeal. Specifically, Subsection 571(a)(1) of the SCRA provides that "[a] servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders." In *United States v. Minnesota*, 97 F. Supp. 2d 973 (D. Minn. 2000), the United States District Court for the District of Minnesota discussed a similar provision in the Soldiers' and Sailors' Civil Relief Act ("SSCRA"), which is precursor to the SCRA in effect for the 2013 tax year at issue.[36]

In *Minnesota*, the Court considered "the apparent conflict between a broad system of federal regulation and a detailed state regulatory scheme[,]" specifically the apparent conflict between the SSCRA and Minnesota's regulatory scheme for the determination of domicile for Minnesota income tax purposes. The Court summarized its decision by stating that "the Court is convinced that the State of Minnesota cannot, as a matter of law, presume [that servicemembers] are domiciled in the State of Minnesota solely because their spouses are considered to be. However, the Court is equally convinced that the State may consider other factors as indicative of domicile without categorically running afoul of federal legislation."

Furthermore, the Court noted that "the Supreme Court has held that the SSCRA should be interpreted liberally, with ambiguities resolved 'with an eye friendly to those who dropped their affairs to answer the country's call'" (citation omitted). The Court noted that Minnesota revenue law set forth a number of presumptions and factors and found these presumptions to be flawed because the presumptions appear to be irrebuttable and because the presence of even a single factor is often sufficient to establish domicile in Minnesota. The Court found that the SSCRA "makes clear that a State may tax a serviceperson only when he has manifestly taken affirmative action to abandon his old domicile and acquire a new one." It also found that:

> The marital presumption, used by itself, has absolutely nothing to do with any explicit actions of a serviceperson which could be interpreted as indicating an intent to remain in a given state following his posting. As the facts relating to the PHS officers detailed in the Complaint demonstrate, many PHS officers and their spouses stay at a given post for a lengthy period of time and often purchase a home . . . As at least one court has recognized, arrangements of this type speak more toward sound financial planning and considerations of convenience rather than an attempt to establish domicile.

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36 The Commission has found the *Minnesota* case to be useful when determining whether a servicemember who would otherwise be considered to be domiciled in Utah under Section 59-10-136 is protected by the SCRA. *See, e.g., USTC Appeal No. 17-1812* (Initial Hearing Order Aug. 29, 2018).

(Citations omitted).

The Court further stated that "[u]sing the domicile of a serviceperson's spouse as a presumption as to a serviceperson's domicile violates both the clear line of case law handed down under the SSCRA as well as substantial public policy concerns." The Court stated that "the SSCRA does not *insure* that a serviceperson's domicile will not change during his tenure" (emphasis in original) and that "a plain reading of the text of the SSCRA thus leads to the conclusion that a state may tax a serviceperson as long as other factors exist, in addition to physical presence in the state, which leads to the conclusion that a serviceperson has affirmatively chosen the state of posting as his home." The Court cautioned, however, that "[a]lthough use of these action-specific factors is not preempted by the SSCRA categorically, as a matter of law, applying these factors in a manner which does not truly pay heed to a particular serviceperson's intention to remain in Minnesota following the conclusion of his service could easily render the factors preempted as applied."

When applying the guidance found in *Minnesota* to the instant case, the Commission finds that TAXPAYER-1's designation of STATE-2 as the place of his "legal residence/domicile" on a Form 2058 does not, by itself, preclude the Commission from finding him to be domiciled in Utah. However, this action is a factor that the Commission may consider when determining whether finding TAXPAYER-1 to be domiciled in Utah would be a violation of the SCRA. For reasons discussed earlier, TAXPAYER-1 would be considered to be domiciled in Utah under Section 59-10-136, in part at least, because his spouse, TAXPAYER-2, is considered to be domiciled in Utah. Pursuant to *Minnesota*, finding TAXPAYER-1 to be domiciled in Utah solely because of TAXPAYER-2's domicile would violate the SCRA.

While *Minnesota* indicates that TAXPAYER-1's own actions can be considered when determining whether the SCRA allows the Commission to find that TAXPAYER-1 is domiciled in Utah, the Court cautions against applying these factors "in a manner which does not truly pay heed to a particular serviceperson's intention to remain [in the state in which the servicemember is stationed] following the conclusion of his service[.]" In this case, the Commission finds that TAXPAYER-1 did not take sufficient steps to change his domicile to Utah for the portion of 2013 that he was still in the Army (before his retirement) because: 1) while TAXPAYER-1 was a servicemember (including the period he was stationed in Utah), TAXPAYER-1 used a STATE-2 address as his "permanent address," 2) TAXPAYER-1 registered to vote in STATE-2 when he joined the Army, and he remained registered to vote in STATE-2 until he moved to STATE-1 in 2013; 3) TAXPAYER-1 voted in STATE-2 in the November 2012 election; 4) when TAXPAYER-1 retired from the Army, he moved away from Utah and eventually returned to STATE-2; 5) while TAXPAYER-1 was a servicemember stationed in Utah, he maintained a STATE-2 bank account, in which he had his military pay directly deposited; 6) while TAXPAYER-1 was stationed in Utah, he had family in STATE-2; and 7) when TAXPAYER-1 moved from Utah to STATE-1, the taxpayers' divorce action was moved from Utah to STATE-1.

When TAXPAYER-1 moved to Utah in 2000, he did so solely because the Army transferred him to Utah. TAXPAYER-1 did establish contacts with Utah during the 2000 to 2013 period that he was assigned to duty in Utah. However, TAXPAYER-1's stated intent not to live in Utah and to eventually return to STATE-2 after his retirement was supported by his actions. When the Commission considers all of TAXPAYER-1's actions in the context that the SCRA should be interpreted liberally in favor of the servicemember to whom its protections apply, the Commission finds that the SCRA precludes the Commission from finding that TAXPAYER-1 is domiciled in Utah prior to his retirement from the Army (i.e., precludes the Commission from finding that TAXPAYER-1 was domiciled in Utah for income tax purposes for the January 1, 2013 to August 31, 2013 portion of 2013). Accordingly, the Commission finds that TAXPAYER-1 is not domiciled in Utah and is not a Utah resident individual for Utah income tax purposes from January 1, 2013 to August 31, 2013.

III. Taxpayers' Argument About the Income that TAXPAYER-1 Earned in STATE-1.

Above, the Commission has found that TAXPAYER-2 is a Utah resident individual for all of 2013 and that TAXPAYER-1 is a Utah resident individual from September 1, 2013 to December 31, 2013. As a result, all income that TAXPAYER-2 earned during 2013 and that TAXPAYER-1 earned from September 1, 2013 to December 31, 2013 is subject to Utah taxation. The taxpayers contend that the income that TAXPAYER-1 earned at his job in STATE-1 during this September 1, 2013 to December 31, 2013 period should not be subject to taxation because it was earned while TAXPAYER-1 was living and working there.

The Commission, however, has found that TAXPAYER-1 is a Utah resident individual from September 1, 2013 to December 31, 2013. 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 TAXPAYER-1 is a Utah *resident* individual from September 1, 2013 to December 31, 2013, Subsection 59-10-117(2)(c) does not apply to him for this portion of 2013. Accordingly, all of the income that TAXPAYER-1 earned from September 1, 2013 to December 31, 2013 is subject to Utah taxation, even if it was earned outside of Utah.

IV. Conclusion.

TAXPAYER-2 is a Utah resident individual for all of 2013, while TAXPAYER-1 is a Utah resident individual only from September 1, 2013 to December 31, 2013. The Division should be ordered to revise its assessment to reflect this decision.

CONCLUSIONS OF LAW

1. Pursuant to Subsection 59-1-1417(1), the taxpayers bear the burden of proof in this matter.

2. For purposes of Section 59-10-136, the taxpayers are not considered to be "legally separated or divorced" for any portion of the 2013 tax year.

3. Pursuant to Subsection 59-10-136(5)(b), each of the taxpayers is considered to have a "spouse" for purposes of Section 59-10-136 for the entirety of the 2013 tax year.

4. As to TAXPAYER-2, she meets one or more of the Section 59-10-136 criteria to be considered to be domiciled in Utah for all of 2013. For this reason and because the taxpayers do not contend that the SCRA precludes the Commission from finding that TAXPAYER-2 is domiciled in Utah for any portion of the 2013 tax year, TAXPAYER-2 is considered to be domiciled in Utah for income tax purposes for all of the 2013 tax year.

5. As to TAXPAYER-1, he also meets one or more of the Section 59-10-136 criteria to be considered to be domiciled in Utah for all of 2013. However, the SCRA precludes the Commission from finding that TAXPAYER-1 is considered to be domiciled for the January 1, 2013 to August 31, 2013 portion of 2013 prior to his retirement from the Army. Accordingly, TAXPAYER-1 is considered to be domiciled in Utah for income tax purposes only from September 1, 2013 to December 31, 2013.

6. Because TAXPAYER-2 is considered to be domiciled in Utah for all of 2013, she is a Utah resident individual for all of 2013, pursuant to Subsection 59-10-103(1)(q)(i)(A). As a result, any income that TAXPAYER-2 received during 2013 is subject to Utah taxation.

7. Because TAXPAYER-1 is considered to be domiciled in Utah from September 1, 2013 to December 31, 2013, he is a Utah resident individual from September 1, 2013 to December 31, 2013, pursuant to Subsection 59-10-103(1)(q)(i)(A). As a result, any income that TAXPAYER-1 received from September 1, 2013 to December 31, 2013 is subject to Utah taxation.

8. Based on the foregoing, the Commission should order the Division to revise its assessment to reflect TAXPAYER-2's being a Utah resident individual for all of 2013 and TAXPAYER-1's being a Utah resident individual only from September 1, 2013 to December 31, 2013.

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that while TAXPAYER-2 is a Utah resident individual for all of 2013, TAXPAYER-1 is a Utah resident individual only from September 1, 2013 to December 31, 2013. The Division is ordered to revise its assessment to reflect this decision.

DATED this _________ day of ________________________, 2019.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601et seq. and 63G-4-401 et seq.