

17-1748  
TAX TYPE: INCOME TAX  
TAX YEAR: 2014, 2015, 2016  
DATE SIGNED: 08/09/2018  
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS,  Petitioners,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No.    17-1748  Account No.    ##### Tax Type:    Income Tax Years:    2014, 2015 & 2016  Judge:        Chapman
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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    TAXPAYER-1, Taxpayer  
                    TAXPAYER-2, Taxpayer  
For Respondent:    RESPONDENT-1, from Auditing Division  
                    RESPONDENT-2, from Auditing Division  
                    RESPONDENT-3, 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 June 19, 2018.

TAXPAYERS (“Petitioners” or “taxpayers”) have appealed Auditing Division’s (the “Division”) assessments of additional Utah individual income taxes for the 2014, 2015, and 2016 tax years. On October 10, 2017, the Division issued Notices of Deficiency and Audit Change (“First Statutory Notices”) to the taxpayers, in which it imposed additional tax and interest (calculated as of November 9, 2017),<sup>1</sup> as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
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<sup>1</sup> Interest continues to accrue until any tax liability is paid. No penalties were imposed.

2014	\$\$\$\$\$	\$0.00	\$\$\$\$\$	\$\$\$\$\$
2015	\$\$\$\$\$	\$0.00	\$\$\$\$\$	\$\$\$\$\$
2016	\$\$\$\$\$	\$0.00	\$\$\$\$\$	\$\$\$\$\$

The taxpayers are a married couple who filed federal returns with a status of married filing jointly for the 2015 and 2016 tax years. For the 2014 tax year, it appears that the taxpayers also filed a federal return with a status of married filing jointly, because the Internal Revenue Service (“IRS”) transcript that the Division proffered at the hearing shows the taxpayers’ 2014 federal filing status, as of April 6, 2017, to be “married filing jointly.” The taxpayers have proffered copies of two other 2014 federal returns, ones for TAXPAYER-1 only with a status of married filing separately and one for TAXPAYER-2 only with a status of married filing separately. No information was provided, however, to show if the taxpayers have submitted these separate 2014 federal returns to the IRS and, if so, when. In addition, no information was provided to show that the IRS has changed the taxpayers’ 2014 federal filing status from married filing jointly to married filing separately since the April 6, 2017 date of the 2014 IRS transcript that the Division proffered at the hearing. For reasons that will be explained in more detail later in the decision, the Commission finds that the taxpayers claimed a filing status of married filing jointly for purposes of filing a federal return for each of the 2014, 2015, and 2016 tax years at issue.

For the 2014 tax year, TAXPAYER-2 originally filed a Utah resident return with a status of married filing separately on which she reported her income only, while TAXPAYER-1 (who owns and operates a veterinary hospital in CITY-1, STATE) did not originally file a Utah return. However, in July 2017 (after the Division began its audit), the taxpayers filed an amended 2014 Utah nonresident return with a status of married filing jointly, on which they only allocated to Utah a loss that pertained to a Utah property that one or both of them owned.<sup>2</sup> For each of the 2015 and 2016 tax years, the taxpayers filed a Utah nonresident return with a

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<sup>2</sup> Originally, TAXPAYER-2 also filed a 2014 STATE nonresident return with a status of married filing separately. The taxpayers now claim that both of them were STATE residents for each of the 2014, 2015, and 2016 tax years at issue. It was not disclosed at the hearing whether the taxpayers have subsequently filed an amended 2014 STATE resident return with a status of married filing jointly on which they have reported all of

status of married filing jointly, on which they only allocated to Utah the income that was earned in Utah and the losses that pertained to the Utah property.

The Division, however, has determined that both of the taxpayers are considered to be domiciled in Utah during all of the 2014, 2015, and 2016 tax years. As a result, the Division changed all of the Utah returns that the taxpayers filed for 2014, 2015, and 2016 to Utah full-year resident returns with a status of married filing jointly and assessed Utah income tax on all income that both taxpayers received during these three years. In the 2014 assessment, the Division allowed a credit for \$\$\$\$ of income taxes paid to STATE, pursuant to Utah Code Ann. §59-10-1003 (2014-2016). The Division’s original assessments for the 2015 and 2016 tax years, however, did not reflect the \$5,423 of 2015 income taxes and the \$\$\$\$ of 2016 income taxes that the taxpayers paid to STATE. As a result, on April 23, 2018, the Division issued amended Statutory Notices and Audit Change (“Second Statutory Notices”) for the 2015 and 2016 tax years to reflect the income taxes that the taxpayers paid to STATE for these years.

Based on the First Statutory Notice for 2014 and the Second Statutory Notices for 2015 and 2016, the Division contends that the taxpayers now owe tax and interest (calculated as of the June 19, 2018 hearing date),<sup>3</sup> as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2014	\$\$\$\$	\$0.00	\$\$\$\$	\$\$\$\$
2015	\$\$\$\$	\$0.00	\$\$\$\$	\$\$\$\$
2016	\$\$\$\$	\$0.00	\$\$\$\$	\$\$\$\$

The Division asks the Commission to find that both taxpayers are considered to be domiciled in Utah for all of 2014, 2015, and 2016, and to sustain its First Statutory Notice for the 2014 tax year and its Second Statutory Notices for the 2015 and 2016 tax years. The taxpayers, on the other hand, ask the Commission to

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their 2014 income as being subject to STATE taxation.

3 Again, interest continues to accrue until any tax liability is paid, and no penalties were imposed.

find that both of them are not domiciled in Utah and are not Utah resident individuals for any portion of the 2014, 2015, and 2016 tax years and to overturn all assessments that the Division has issued for these years.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2016)<sup>4</sup>, “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.

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3. Effective for tax year 2012 (and applicable to the 2014, 2015, and 2016 tax 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
    - (B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and

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<sup>4</sup> All substantive law citations are to the 2016 version of Utah law. Unless otherwise noted, the substantive law remained the same during the 2014, 2015, and 2016 tax years.

- (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."<sup>5</sup> 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. Specifically, to assist in the determination of Utah income tax domicile of a property owner, Utah Code Ann

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

§59-2-103.5(4) provides, as follows:<sup>6</sup>

(4) Except as provided in Subsection (5), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the 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 the 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 the property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence.

5. For the instant matter, UCA §59-1-1417(1) (2018) 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 the taxpayers were Utah resident individuals for the 2014, 2015, and 2016 tax years. The Division claims that they were Utah resident individuals for these years, while the taxpayers claim that they were not.

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<sup>6</sup> Effective for the 2015 tax year, Subsection 59-2-103.5(4) was renumbered and amended. The amendments to Subsection 59-2-103.5(4) that were effective for tax year 2015 were nonsubstantive.

For 2014, 2015, and 2016, 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 the taxpayers were Utah resident individuals for any of the 2014, 2015, and 2016 tax years under the 183 day test. Instead, the Division asserts that the taxpayers are Utah resident individuals for all of these years under the domicile test. As a result, the Commission will apply the facts to the domicile law in effect for the 2014, 2015, and 2016 tax years to determine whether both taxpayers are considered to be domiciled in Utah during these years (as the Division contends) or whether the taxpayers are not considered to be domiciled in Utah during these years (as the taxpayers contend).

**I. Facts.**

The taxpayers have been married for many years and have five children who, as of the hearing date, are all grown. The taxpayers have not been legally separated or divorced since they married. In 2004, the taxpayers and their five children moved to CITY-1, STATE (“CITY-1”), where they purchased a home and where TAXPAYER-1 opened a veterinary hospital, which he still operates. Both taxpayers lived in CITY-1 until 2012, when TAXPAYER-2, alone, purchased a condominium in CITY-2, Utah (“CITY-2”) and when she moved there with the taxpayers’ two youngest children (twin daughters who were in high school at the time). When TAXPAYER-2 and the taxpayers’ two youngest children moved to CITY-2 in 2012, TAXPAYER-1 remained living at the taxpayers’ home in CITY-1. In 2012, the taxpayers’ three oldest children were all married and living on their own.

TAXPAYER-2 explained that the primary reason she purchased the condominium in CITY-2 was because her daughters needed to finish high school in a city other than CITY-1 for personal reasons. However, TAXPAYER-2 also explained that she purchased the condominium because of the convenience it would offer

Appeal No. 17-1748

her and her family, who would often travel from CITY-1 to CITY-2 to shop, attend their church temple, see doctors, and visit non-immediate family members who lived in CITY-2. The CITY-2 condominium that TAXPAYER-2 purchased in 2012 had two bedrooms and two baths and was approximately ##### square feet in size. This condominium will be referred to as the “1<sup>st</sup> Utah home.”

The taxpayers’ two youngest children graduated from high school in CITY-2 in May 2013, at which time TAXPAYER-2 moved back to the taxpayers’ home in CITY-1 (where both taxpayers still live). The home in CITY-1 has four bedrooms and two baths, is approximately ##### square feet in size, and will be referred to as the “STATE home.” After TAXPAYER-2 moved back to CITY-1, she kept the 1<sup>st</sup> Utah home for the taxpayers’ two youngest daughters to live in and for her and her husband to stay in when they were in CITY-2 for the various reasons described earlier.

Beginning in January 2014, however, the 1<sup>st</sup> Utah home was vacant much of the time because one of the taxpayers’ twin daughters left for a church mission and because their other twin daughter chose to reside elsewhere most of the time. The taxpayers could not remember what specific portion of 2014 that either of their daughters was living in the 1<sup>st</sup> Utah home. However, the taxpayers stayed at the 1<sup>st</sup> Utah home whenever they were in CITY-2 during 2014 until November 5, 2014, when TAXPAYER-2 sold the home.

During the January 1, 2014 to November 5, 2014 period that TAXPAYER-2 owned the 1<sup>st</sup> Utah home, she would also let friends occasionally stay at and/or “rent” the home. For example, the taxpayers proffered an email from NAME-1, who stated that she “rented” the 1<sup>st</sup> Utah home from October 2014 to January 2015. TAXPAYER-2 explained that NAME-1 was the child of family friends and that she allowed NAME-1 to stay in the 1<sup>st</sup> Utah home for a short period until TAXPAYER-2 sold the 1<sup>st</sup> Utah home on November 5, 2014. TAXPAYER-2 explained that the person to whom she sold the 1<sup>st</sup> Utah home then allowed NAME-1 to stay in the home for another several months after the sale.

On October 20, 2014 (shortly before selling the 1<sup>st</sup> Utah home), the taxpayers, together, purchased another condominium in CITY-2 (which they still own). This condominium will be referred to as the “2<sup>nd</sup> Utah home.” The taxpayers purchased the 2<sup>nd</sup> Utah home for some of the same reasons that TAXPAYER-2 had purchased the 1<sup>st</sup> Utah home. In an undated letter that the taxpayers sent to the Division, the taxpayers indicated that they purchased the 2<sup>nd</sup> Utah home “to attend the temple on a more regular basis[.]” The 2<sup>nd</sup> Utah home has four bedrooms and three baths and is ##### square feet in size.

The taxpayers also let friends occasionally stay at and/or “rent” the 2<sup>nd</sup> Utah home. For example, the taxpayers proffered a letter from NAME-2, who stated that he stayed at the 2<sup>nd</sup> Utah home for around four months at the end of 2015 (until his parents were able to move to CITY-2). He stated that he gave the taxpayers around \$\$\$\$ in cash each month while he stayed there to pay for utilities and that the taxpayers “would come to the [2<sup>nd</sup> Utah home] about once a month.”<sup>7</sup> The taxpayers also proffered an email from NAME-3, who is the president of the homeowner’s association of the condominium project in which the 2<sup>nd</sup> Utah home is located. In this email, NAME-3 indicated that the taxpayers live in CITY-1 and that the 2<sup>nd</sup> Utah home “has been vacant most of the time [that the taxpayers] have owned it.”

The 1<sup>st</sup> Utah home received the residential exemption from property taxation for the 2014 tax year, including the period from January 1, 2014 to November 5, 2014 that TAXPAYER-2 owned it.<sup>8</sup> From the evidence proffered at the Initial Hearing, it appears that the 2<sup>nd</sup> Utah home did not receive the residential exemption for any portion of the 2014 tax year (including the October 20, 2014 to December 31, 2014 period

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7 The taxpayers admitted that they never listed the 1<sup>st</sup> Utah home or the 2<sup>nd</sup> Utah home for rent. The taxpayers further proffer that the homeowner’s association of the condominium project in which the 2<sup>nd</sup> Utah home is located does not allow an owner to rent out his or her condominium.

8 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.

Appeal No. 17-1748

that the taxpayers owned it). However, for the 2015 and 2016 tax years, the 2<sup>nd</sup> Utah home did receive the residential exemption at the time its 2015 and 2016 property taxes were assessed and paid. Accordingly, it appears that the only portion of the 2014, 2015, and 2016 tax years for which a Utah home owned by one or both of the taxpayers did not receive the residential exemption was from November 6, 2014 (the date after TAXPAYER-2 sold the 1<sup>st</sup> Utah home) to December 31, 2014.

COUNTY, Utah (“COUNTY”) changed the 2<sup>nd</sup> Utah home from a secondary residence that did not receive the residential exemption for the 2014 tax year to a primary residence that did receive the residential exemption for the 2015 and 2016 tax years after receiving an “Application for Residential Exemption” that TAXPAYER-2 signed on October 17, 2014 (“October 17, 2014 Application”). On the October 17, 2014 Application, TAXPAYER-2 declared that the 2<sup>nd</sup> Utah home would be “owner-occupied full time” and that she did “not have another permanent full-time residence in any state or province.” On the application, TAXPAYER-2 had other options to declare that the 2<sup>nd</sup> Utah home would be “tenant-occupied full time” or that it “is not a permanent full-time residence[,]” but she did not choose either of these two options. The October 17, 2014 Application was stamped as having been received by COUNTY on November 10, 2014.

The taxpayers, however, believe that COUNTY should never have changed the 2<sup>nd</sup> Utah home to a primary residence that received the residential exemption for the 2015 and 2016 tax years. TAXPAYER-2 contends that before she submitted the October 17, 2014 Application to COUNTY in November 2014, she went and spoke to a COUNTY employee about the exemption status of the 2<sup>nd</sup> Utah home. TAXPAYER-2 proffers that the employee gave her incorrect advice that led her to submit the October 17, 2014 Application on which she declared that the 2<sup>nd</sup> Utah home would be “owner-occupied full time” and that she did “not have another permanent full-time residence in any state or province.”

TAXPAYER-2 admits that COUNTY will not now admit that it gave her incorrect advice, but she proffers another “Application for Residential Exemption” that she signed on October 31, 2014 (“October 31,

Appeal No. 17-1748

2014 Application”) to show that she relied on COUNTY to advise her as to which application to submit. On the October 31, 2014 Application, TAXPAYER-2 declared that the 2<sup>nd</sup> Utah home “is not a permanent full-time residence.” TAXPAYER-2 indicated that she found the October 31, 2014 Application in a file in her home and admits that COUNTY does not have it in its records. As a result, it is possible that after TAXPAYER-2 completed both the October 17, 2014 Application and the October 31, 2014 Application, she decided in November 2014 to submit the October 17, 2014 Application that led to COUNTY changing the 2<sup>nd</sup> Utah home to a primary residence that received the residential exemption. Less clear, however, is whether the COUNTY employee with whom TAXPAYER-2 spoke before she submitted the October 17, 2014 Application gave TAXPAYER-2 erroneous information or not. TAXPAYER-2 did not provide the name of the employee in COUNTY with whom she spoke, nor could she recall with much, if any, specificity the questions she asked and the answers she received from the employee.

Regardless, the taxpayers contend that they have rectified the mistake of claiming the residential exemption on the 2<sup>nd</sup> Utah home for the 2015 and 2016 tax years by having COUNTY retroactively change the home to a secondary residence for these years. On June 20, 2017 (after the Division began its audit), TAXPAYER-2 submitted a new application to COUNTY, on which she declared that the taxpayers’ 2<sup>nd</sup> Utah home “is not a permanent full-time residence.” This action appears to have resulted in COUNTY changing the 2<sup>nd</sup> Utah home to a secondary residence that does not qualify for the residential exemption for 2017 and subsequent tax years. In addition, it appears that at the request of the taxpayers, COUNTY took retroactive action on November 8, 2017 to change the 2<sup>nd</sup> Utah home to a secondary residence for the 2015 and 2016 tax years and to impose the additional 2015 and 2016 property taxes associated with such a change.

The taxpayers did not claim any of their three oldest children as dependents on their federal income tax returns for any of the 2014, 2015, and 2016 tax years. While the taxpayers claimed one or both of their two youngest children as dependents for the 2014, 2015, and/or 2016 tax years, neither of the taxpayers’ two

youngest children attended a Utah public kindergarten, elementary, or secondary school or a Utah institution of higher education during these three years. In addition, neither of the taxpayers attended a Utah institution of higher education during the years at issue.

During 2014, 2015, and 2016, TAXPAYER-2 owned a motor vehicle that she registered in Utah, while TAXPAYER-1 owned a motor vehicle that he registered in STATE. On February 7, 2013, TAXPAYER-2 obtained a Utah driver's license and registered to vote in Utah. TAXPAYER-2 retained her Utah driver's license and remained registered to vote in Utah throughout all of 2014, 2015, and 2016. TAXPAYER-2, however, only voted in one Utah election, specifically in the 2016 Utah General Election (where she voted by mail). TAXPAYER-2 proffers that in the 2016 Utah General Election; she only voted in the presidential race and did not vote in any Utah race. In contrast, TAXPAYER-2 contends that she had voted in numerous local races in STATE when she was registered to vote in STATE for years other than 2014, 2015, and 2016.

TAXPAYER-2 also contends that when she moved back to CITY-1 in 2013, she wanted to change her driver's license, voter registration, and motor vehicle registration from Utah to STATE, but could not do so because the title to her motor vehicle was lost by the State of Utah when she sent in a lien release letter for the vehicle in 2014. TAXPAYER-2 proffered that throughout 2015 and 2016, clerks at the Utah Division of Motor Vehicles could not figure out how to issue a duplicate title for her vehicle. TAXPAYER-2 explained that without a duplicate title for her motor vehicle from the State of Utah, she could not register the vehicle in STATE.

TAXPAYER-2 further proffers that because her motor vehicle was registered in Utah, she could not obtain a new STATE driver's license or change her voter registration to STATE. TAXPAYER-2 did not know why her motor vehicle being registered in Utah precluded her from obtaining a new STATE driver's license or from registering to vote in STATE. However, she asks the Commission to consider that after she moved back

Appeal No. 17-1748

to STATE in 2013, she also suffered health issues and started taking care of a grandchild, all of which interfered with her ability to resolve the title issue so that she could obtain an STATE driver's license and register to vote in STATE.

The taxpayers did not know how many days of 2014, 2015, or 2016 that they were present in Utah. However, they proffered that they did not spend more than 30 days of 2014 at the 1<sup>st</sup> Utah home and/or the 2<sup>nd</sup> Utah home or more than 30 days of 2015 or 2016 at the 2<sup>nd</sup> Utah home. It is unclear if the taxpayers were present in Utah for any days of 2014, 2015, or 2016 that they did not spend at the 1<sup>st</sup> Utah home and/or the 2<sup>nd</sup> Utah home. The taxpayers proffer that they were both members of a church in STATE during the 2014, 2015, and 2016 tax years and that any other organization or club of which they were a member during these years would have also been located in STATE.

Most of the taxpayers' mail was sent to their STATE home during the 2014, 2015, and 2016 tax years. For these three years, the taxpayers filed their joint federal returns using an STATE address. The taxpayers also used an STATE address for purposes of filing their 2015 and 2016 joint STATE resident returns and joint Utah nonresident returns. TAXPAYER-2 used a Utah address when she originally filed her separate 2014 Utah resident return and her separate 2014 STATE nonresident return, while TAXPAYER-1 used an STATE address to file his separate 2014 STATE resident return. When the taxpayers filed an amended joint 2014 Utah nonresident return in 2017, they used an STATE address.

TAXPAYER-2 proffers that she should have never filed a 2014 Utah resident return because she was not a Utah resident individual during 2014. However, she stated that she relied on the professional advice of the taxpayers' former CPA who prepared their 2014 returns. TAXPAYER-2 proffered that due to a number of mistakes that their former CPA made; they decided to hire a new CPA before their 2015 tax returns were prepared. On the various Utah returns that one or both of the taxpayers filed for the 2014, 2015, and 2016 tax years, the taxpayers did not declare on any of these returns that TAXPAYER-2 no longer qualified to receive

the residential exemption on the 1<sup>st</sup> Utah home or that the taxpayers no longer qualified to receive the residential exemption on the 2<sup>nd</sup> Utah home.<sup>9</sup>

**II. Domicile Test for the 2014, 2015, and 2016 Tax Years.**

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 2014, 2015, and 2016 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)).<sup>10</sup>

A. Subsection 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 considered to have a spouse for purposes of Section 59-10-136 unless the individual is legally separated or divorced from the individual’s spouse or if “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.” All parties agree that the taxpayers were not legally separated or divorced during 2014, 2015, or 2016. In addition, for reasons explained earlier, the Commission has found that the taxpayers claimed a filing status of married filing jointly for purposes of filing their 2014,

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<sup>9</sup> On page 3 of the Utah tax return (i.e., Form TC-40) for each of the 2014, 2015, and 2016 tax years, Part 7 (Property Owner’s Residential Exemption Termination Declaration) provides a property owner the opportunity to declare that he or she no longer qualifies to receive the Utah residential exemption on the property owner’s primary residence.

<sup>10</sup> 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.

2015, and 2016 federal returns. Accordingly, for all of the 2014, 2015, and 2016 tax years at issue, each of the taxpayers is considered to have a spouse for purposes of Section 59-10-136.<sup>11</sup>

B. Subsection 59-10-136(4). The taxpayers do not argue that they are *not* considered to be Utah domiciliaries under Subsection 59-10-136(4) for any of the periods at issue. 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, if a number of listed conditions are also met. Although both taxpayers appear to have been absent from Utah for at least 761 days since TAXPAYER-2 moved back to STATE in 2013, they do not meet all of the conditions listed in Subsection 59-10-136(4)(a)(ii) for a 761-day period that includes any of the 2014, 2015, and 2016 tax years at issue.

Specifically, the taxpayers have not met the Subsection 59-10-136(4)(a)(ii)(D) condition for a 761-day period that includes 2014, 2015, or 2016.<sup>12</sup> An individual does not meet the Subsection 59-10-136(4)(a)(ii)(D) condition if the individual or the individual's spouse claims a Utah residential exemption for that individual's or individual's spouse's primary residence. As already discussed, neither of the taxpayers owned a Utah home that received the residential exemption from November 6, 2014 to December 31, 2014. However, for reasons

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11 As discussed earlier, IRS transcripts indicate that the taxpayers submitted to the IRS a 2014 federal return with a status of married filing jointly. In addition, if each of the taxpayers has since submitted an individual 2014 federal return with a status of married filing separately, no information was proffered to show that the IRS had accepted these individual 2014 returns. The taxpayers are considered to have claimed a filing status of married filing jointly for 2014 federal income tax purposes until such time that the IRS accepts each of the individual 2014 returns with a status of married filing separately. This conclusion is consistent with the Commission's prior decision in *USTC Appeal No. 16-356* (Initial Hearing Order Jan. 8, 2018). Redacted copies of this and other selected Commission decisions can be reviewed on the Commission's website at <https://tax.utah.gov/commission-office/decisions>.

12 It is also unclear whether the taxpayers have met Subsection 59-10-136(4)(a)(ii)(A), another condition that provides that "neither the individual nor the individual's spouse . . . return to this state for more than 30 days in a calendar year." The taxpayers do not know the exact days that they were in Utah during 2014, 2015, or 2016, but contend that they did not stay at the 1<sup>st</sup> Utah home and/or the 2<sup>nd</sup> Utah home for more than 30 days during any of these years. Because the Division did not assert that the taxpayers failed to meet the Subsection 59-10-136(4)(a)(ii)(A) condition and because the Commission is finding that the taxpayers have not met the Subsection 59-10-136(4)(a)(ii)(D) condition, the Commission will not discuss the Subsection 59-10-136(4)(a)(ii)(A) condition any further in this decision.

to be discussed below, one or both taxpayers claimed the Utah residential exemption for a primary residence for the remainder of 2014 (i.e., from January 1, 2014 to November 5, 2014) and for all of 2015 and 2016. As a result, even though the taxpayers meet the Subsection 59-10-136(4)(a)(ii)(D) condition for a small portion of 2014, they do not meet the Subsection 59-10-136(4)(a)(ii)(D) condition for a 761-day or more period that includes any of the 2014, 2015, or 2016 tax years at issue.

*2014 Tax Year.* For the 1<sup>st</sup> Utah home, the taxpayers admit that TAXPAYER-2 claimed the residential exemption for the property for the January 1, 2014 to November 5, 2014 period that she owned it.<sup>13</sup> In addition, for purposes of Section 59-10-136, the 1<sup>st</sup> Utah home is considered to be TAXPAYER-2's "primary residence" for the January 1, 2014 to November 5, 2014 portion of 2014 that she owned it, regardless of whether she was living in STATE during this period. When Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a Utah property on which an individual or an individual's spouse claims the residential exemption is considered a "primary residence" unless the property owner takes 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.

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13 Subsection 59-10-136(6) provides that claiming a residential exemption may not be considered in determining domicile if the property for which the exemption is claimed is the primary residence of a tenant. TAXPAYER-2 occasionally allowed friends or family members to stay at the 1<sup>st</sup> Utah home while she owned it. However, even for those periods when someone other than TAXPAYER-2 was living in the 1<sup>st</sup> Utah home, it does not appear that TAXPAYER-2 relinquished her rights to also use the home. As a result, the Commission would not consider the 1<sup>st</sup> Utah home to be the primary residence of a tenant for any portion of the January 1, 2014 to November 5, 2014 period that TAXPAYER-2 owned it, and the Subsection 59-10-136(6) exception would not apply when determining whether the taxpayers are considered to be domiciled in Utah during this portion of 2014. This conclusion is consistent with the Commission's prior decisions in *USTC Appeal No. 16-117* (Initial Hearing Order Jan. 18, 2017) and *USTC Appeal 17-758* (Initial Hearing Order Jan. 26, 2018).

While TAXPAYER-2 owned the 1<sup>st</sup> Utah home, she did not file a written statement with COUNTY indicating that the 1<sup>st</sup> Utah home did not qualify for the residential exemption, nor did she indicate on a Utah income tax return that the 1<sup>st</sup> Utah home no longer qualified to receive the residential exemption. Because TAXPAYER-2 did not take both of these steps in regards to the 1<sup>st</sup> Utah home, this property is considered to be her “primary residence” for purposes of Section 59-10-136 for the January 1, 2014 to November 5, 2014 period that she owned it. For these reasons, the taxpayers do not meet the Subsection 59-10-136(4)(a)(ii)(D) condition for the January 1, 2014 to November 5, 2014 portion of 2014.<sup>14</sup>

*2015 and 2016 Tax Years.* In regards to the 2<sup>nd</sup> Utah home that both taxpayers owned for all of 2015 and 2016, the taxpayers claimed the residential exemption on the home at the time that its 2015 and 2016 taxes were originally assessed and paid.<sup>15</sup> The taxpayers may be suggesting that the actions they took in 2017 to have COUNTY retroactively remove the residential exemption for 2015 and 2016 is sufficient to show that they did not claim the exemption for the 2<sup>nd</sup> Utah home for these two years. The Commission, however, is not persuaded that the “corrective” actions the taxpayers took after the Division began its audit are sufficient to negate their receiving the residential exemption on the 2<sup>nd</sup> Utah home at the time the 2015 and 2016 taxes were

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14 For the January 1, 2014 to November 5, 2014 portion of 2014, TAXPAYER-2 was the only one of the taxpayers who owned the 1<sup>st</sup> Utah home and who claimed the residential exemption for it. However, Subsection 59-10-136(4)(a)(ii) provides that an individual does not satisfy the Subsection 59-10-136(4) domicile exception unless “neither the individual nor the individual’s spouse . . . (D) claim a [Utah residential exemption] for that individual’s or individual’s spouse’s primary residence” (emphasis added). Because TAXPAYER-1’s spouse claimed the Utah residential exemption for a property that was considered to be her primary residence from January 1, 2014 to November 5, 2014, TAXPAYER-1 also does not satisfy the Subsection 59-10-136(4)(a)(ii)(D) condition for this period.

15 For reasons similar to those discussed in regards to the 1<sup>st</sup> Utah home, the Subsection 59-10-136(6) tenant exception does not appear to apply to the 2<sup>nd</sup> Utah home for any portion of 2015 or 2016. The taxpayers argue that they can “rebut” their claiming the residential exemption on the 2<sup>nd</sup> Utah home for the 2015 and 2016 tax years because of erroneous advice TAXPAYER-2 received from a COUNTY employee when applying for the exemption. The residential exemption condition found in Subsection 59-10-136(4)(a)(ii)(D), however, is not a presumption that can be rebutted (unlike the residential exemption presumption found in Subsection 59-10-136(2)(a), which can be rebutted and which will be discussed in more detail later in the decision). Where a taxpayer receives the residential exemption for a property that is not the primary residence of a tenant, the Subsection 59-10-136(4)(a)(ii)(D) condition is not met, regardless of the circumstances that led to the taxpayers’ receiving the exemption.

Appeal No. 17-1748

assessed and paid. The taxpayers have not proffered any statute or court precedent to show that the taxpayers' "corrective" actions have the legal effect of nullifying or voiding the prior events that occurred in regards to the residential exemption. Accordingly, for purposes of Section 59-10-136, the taxpayers are considered to have claimed the residential exemption on their Utah home for the 2015 and 2016 tax years at issue.<sup>16</sup>

For reasons similar to those previously discussed in regards to the 1<sup>st</sup> Utah home, the 2<sup>nd</sup> Utah home that the taxpayers both owned is considered to be the "primary residence" of both taxpayers during all of 2015 and 2016, regardless of whether they were living in STATE during these years. After TAXPAYER-2 submitted the October 17, 2014 Application to COUNTY that led to the 2<sup>nd</sup> Utah home being changed to a primary residence that received the residential exemption, the taxpayers did not notify COUNTY in writing during 2015 or 2016 that they no longer qualified to receive the residential exemption for the 2<sup>nd</sup> Utah home. In addition, the taxpayers never declared on a Utah income tax return that they no longer qualified to receive the residential exemption for the 2<sup>nd</sup> Utah home. Because the taxpayers did not take both of these steps in regards to the 2<sup>nd</sup> Utah home, this property is considered to be their "primary residence" for purposes of Section 59-10-136 for all of 2015 and 2016. For these reasons, the taxpayers do not meet the Subsection 59-10-136(4)(a)(ii)(D) condition for any portion of 2015 or 2016.

*Subsection 59-10-136(4) Summary.* The taxpayers do not meet the Subsection 59-10-136(4)(a)(ii)(D) condition from January 1, 2014 to November 5, 2014 of the 2014 tax year or for any portion of 2015 or 2016. As a result, the taxpayers have not met all the necessary conditions of Subsection 59-10-136(4)(a) for a 761-day period that includes 2014, 2015, or 2016. As a result, neither of the taxpayers is not considered to be

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<sup>16</sup> This conclusion is consistent with the Commission's prior decision in *USTC Appeal No. 15-1582* (Initial Hearing Order Aug. 26, 2016), in which the Commission found that the "corrective" actions a taxpayer took in regards to the residential exemption after an audit had begun did not negate the actions that the taxpayer had or had not taken during the prior tax years that were at issue.

domiciled in Utah under Subsection 59-10-136(4) for any portion of the 2014, 2015, and 2016 tax years at issue.

Accordingly, the Commission must analyze whether the taxpayers *are* considered to have domicile in Utah for 2014, 2015, and 2016 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. For this case, the Commission will begin its analysis with a discussion of the rebuttable presumption found in 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 for all of 2014, 2015, and 2016. As a result, the Subsection 59-10-136(2)(b) presumption has arisen in regards to both taxpayers, and both taxpayers will be considered to be domiciled in Utah for all of 2014, 2015, and 2016 under Subsection 59-10-136(2)(b), unless the presumption is rebutted in regards to both taxpayers.<sup>17</sup>

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 who is registered to vote in Utah *is* considered to have domicile in Utah, but also for there to be circumstances where an individual who is registered to vote in Utah *is not* considered to have domicile in Utah.<sup>18</sup> However, the Legislature has not

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17 The Commission acknowledges that TAXPAYER-1 was not registered to vote in Utah during any portion of the 2014, 2015, and 2016 tax years. Regardless, the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers because this subsection 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. 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. These conclusions are supported by Subsection 59-10-136(5)(a), which provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah.

18 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

provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-136(2)(b) presumption (i.e., what circumstances will be or will not be sufficient to rebut being registered to vote in Utah). 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 found that an individual cannot rebut 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” 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.<sup>19</sup>

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).<sup>20</sup>

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institution of higher education or, with certain exceptions, has a dependent enrolled in a Utah public kindergarten, elementary, or secondary school).

19 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 by weighing the factors found in Rule 52.

20 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, Subsection 59-10-136(3)(b) only comes into play if Subsection 59-10-136(1) or one of the presumptions of Subsection 59-10-136(2) does not apply. Again, however, the Commission is not precluded from considering certain factors that might be described in Subsection 59-10-136(3) when determining whether a Subsection 59-10-136(2) presumption has been effectively rebutted. Nevertheless, the Commission will not determine whether a Subsection 59-10-136(2) presumption has been rebutted solely by determining whether an individual is considered to be domiciled in Utah under Subsection 59-10-136(3).

The Commission has previously found that registering to vote in another state for the period at issue may be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. However, subsequent to TAXPAYER-2's registering to vote in Utah in 2013, she did not register to vote in any other state during the 2014, 2015, and 2016 tax years at issue.

The taxpayers proffer that TAXPAYER-2 wanted to register to vote in STATE upon moving back to STATE in 2013, but could not do so because she could not obtain a duplicate title from the Utah Division of Motor Vehicles so that she could register her motor vehicle in STATE. Based on the limited information provided at the Initial Hearing, the Commission does not find this to be a convincing argument with which to rebut the Subsection 59-10-136(2)(b) presumption. First, the taxpayers provided no information as to the date or dates that TAXPAYER-2 tried to register to vote in STATE, but was prevented from doing so. Second, the taxpayers have not cited any STATE statute or rule that shows that a person whose motor vehicle is registered in a state other than STATE may not register to vote in STATE. Third, it is unclear whether it took approximately three years for TAXPAYER-2 to obtain a duplicate title for her motor vehicle due to the ineffectiveness of Utah State employees or due to her own health and family issues. For these reasons, the Commission is not convinced that TAXPAYER-2 had no choice but to remain registered to vote in Utah during the 2014, 2015, and 2016 tax years at issue.

The taxpayers also ask the Commission to consider that TAXPAYER-2 only voted in Utah once during the 2014, 2015, and 2016 tax years at issue and that she only voted in the presidential race when she voted in the 2016 Utah General Election. Other taxpayers who have been registered to vote in Utah have argued that they should be able to rebut the Subsection 59-10-136(2)(b) presumption by showing that they did not vote during the period at issue. In *USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016), the Commission found that not voting in Utah despite being registered to do so is not sufficient to rebut the Subsection 59-10-136(2)(b) presumption because “[h]ad 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.” In the instant case, TAXPAYER-2 was not only registered to vote in Utah, but she also voted in Utah in late 2016, near the end of the three tax years at issue. As a result, the taxpayers’ arguments about TAXPAYER-2’s Utah voting history are also insufficient to rebut the Subsection 59-10-136(2)(b) presumption.

Because the taxpayers have not rebutted the Subsection 59-10-136(2)(b) presumption that has arisen in regards to both of them for the 2014, 2015, and 2016 tax years, both taxpayers are considered to be domiciled in Utah during these years. Because both taxpayers are considered to be domiciled in Utah for all of 2014, 2015, and 2016 under Subsection 59-10-136(2)(b), the Commission need not discuss the remaining subsections of Section 59-10-136 to resolve this appeal. However, it may be helpful to make some comments about the remaining subsections.

D. Other Subsections of Section 59-10-136. Subsection 59-10-136(1)(a) 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 apply to the taxpayers during 2014, 2015, or 2016. Accordingly, under this subsection, the taxpayers would not be considered to be domiciled in Utah for the tax years at issue.

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 primary residence, unless the presumption is rebutted. For the presumption to arise in this case, two elements must exist. 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(4). For reasons discussed earlier in regards to Subsection 59-10-136(4)(a)(ii)(D), both of these elements exist for most of 2014 (i.e., from January 1, 2014 to November 5, 2014) and for all of 2015 and 2016. Accordingly, the Subsection 59-10-136(2)(a) presumption has arisen for both taxpayers for the January 1, 2014 to November 5, 2014 portion of 2014 and for all of 2015 and 2016; and the taxpayers would be considered to be domiciled in Utah for these periods, unless they are able to rebut the presumption for all or a portion of these periods.<sup>21</sup>

The taxpayers do not attempt to rebut the Subsection 59-10-136(2)(a) presumption that has arisen for the January 1, 2014 to November 5, 2014 portion of 2014 that TAXPAYER-2 owned the 1<sup>st</sup> Utah home except to argue that TAXPAYER-2 was living in STATE during all of 2014. As a result, it appears that the taxpayers may be arguing that the Subsection 59-10-136(2)(a) should be rebutted for the 2014 portion of the appeal if the taxpayers show that most of TAXPAYER-2's contacts were with STATE, not Utah, during 2014. As explained earlier in the discussion for Subsection 59-10-136(2)(b), however, the Commission has found that a Subsection 59-10-136(2) presumption cannot be rebutted by showing that an individual would not be considered to be domiciled in Utah under Rule 52 (which was used to determine income tax domicile prior to 2012) or under the 12 factors listed in Subsection 59-10-136(3)(b). As a result, the taxpayers have not sufficiently rebutted the Subsection 59-10-136(2)(a) presumption for the January 1, 2014 to November 5, 2014 portion of 2014 that the presumption has arisen in regards to both of them.

For the 2015 and 2016 tax years during which the taxpayers owned the 2<sup>nd</sup> Utah home, the taxpayers make an additional argument as to why the Subsection 59-10-136(2)(a) presumption should be considered rebutted for these two years. The taxpayers contend that they claimed the residential exemption for the 2<sup>nd</sup>

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21 For reasons similar to those discussed earlier in regards to Subsection 59-10-136(4), the Subsection 59-10-136(2)(a) presumption would not arise for periods in which the property was the primary residence of a tenant (pursuant to Subsection 59-10-136(6)). Again, however, Subsection 59-10-136(6) would not apply where the taxpayers reserved the right to use the 1<sup>st</sup> Utah home and/or the 2<sup>nd</sup> Utah home during those periods of 2014, 2015, and 2016 that the taxpayers allowed friends or family to stay in the homes.

Appeal No. 17-1748

Utah home for the 2015 and 2016 tax years only because TAXPAYER-2 received erroneous advice from an employee of COUNTY when she submitted the October 17, 2014 Application to change this property's exemption status.

However, it does not appear that either of the taxpayers' daughters had been living at the 1<sup>st</sup> Utah home during 2014 or would be living at the 2<sup>nd</sup> Utah home at the beginning of 2015. In addition, there is no evidence to suggest that any other person would be living at the 2<sup>nd</sup> Utah home at the beginning of 2015. The Commission finds it odd that a COUNTY employee would advise TAXPAYER-2 that a home that a tenant would not be using as his or her primary residence and that the taxpayers would be using as a secondary residence as of January 1, 2015, would qualify for the residential exemption. For these reasons and because TAXPAYER-2 does not remember with much specificity the questions that she asked the COUNTY employee and the answers that she received, the Commission would also find that the taxpayers have not rebutted the Subsection 59-10-136(2)(a) presumption for the 2015 and 2016 tax years. In summary, under Subsection 59-10-136(2)(a), the taxpayers would be considered to be domiciled in Utah from January 1, 2014 to November 5, 2014 of the 2014 tax year and for all of 2015 and 2016.

Subsection 59-10-136(2)(c) provides that 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 2015 or 2016 Utah return. Accordingly, neither taxpayer would be considered to be domiciled in Utah during 2015 or 2016 under this subsection. However, the Subsection 59-10-136(2)(c) presumption arises for both taxpayers for the 2014 tax year because TAXPAYER-2 submitted a 2014 Utah return on which she asserted that she was a Utah resident individual for all of this year. For reasons similar to those discussed earlier, the Commission is hesitant to find that the Subsection 59-10-136(2)(c) presumption does not arise where a taxpayer retroactively submits a Utah nonresident return after the Division has begun its audit. As a result, the Commission would also consider both taxpayers to be domiciled in Utah for the 2014 tax year under

Appeal No. 17-1748

Subsection 59-10-136(2)(c), unless the Commission were to find that the professional advice the taxpayers received from their former CPA for the 2014 tax year was sufficient to rebut the presumption.

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). Neither party addressed these 12 factors. However, a cursory review of the factors suggests that a slight preponderance of the relevant factors would not show a Utah domicile. As a result, if both taxpayers had not already been found to be domiciled in Utah for the 2014, 2015, and 2016 tax years under another subsection of Section 59-10-136, it is possible that they would not have been found to be domiciled in Utah for these years under Subsection 59-10-136(3).

E. Domicile Summary. For reasons discussed above, both taxpayers are considered to be domiciled in Utah for all of 2014, 2015, and 2016. As a result, both taxpayers are Utah resident individuals for all of 2014, 2015, and 2016, and all income that they received for these years is subject to Utah taxation (subject to a credit for income taxes paid to another state).

### **III. Other Arguments.**

The taxpayers suggest that Utah should not tax the income that the taxpayers earned in STATE where they lived. Pursuant to Subsection 59-10-104(1) and Subsection 59-10-103(1)(w), however, 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[.]" In accordance with Subsection 59-10-117(1) and Utah Code Ann. §59-10-116, however, Subsection 59-10-117(2)(c) only applies to a Utah nonresident individual. Because both taxpayers have been found to be Utah resident individuals for all of

Appeal No. 17-1748

2014, 2015, and 2016, Subsection 59-10-117(2)(c) does not apply to either of them for these years. Accordingly, all of the taxpayers' 2014, 2015, and 2016 income is subject to Utah taxation, even if it was earned outside of Utah.

The taxpayers also contend that the Commission should not find that individuals such as themselves are domiciled in Utah, regardless of whether they are considered to be domiciled in Utah under a provision of Section 59-10-136. The taxpayers may be suggesting Section 59-10-136, as written, results in bad tax policy in certain situations. While the Commission is tasked with the duty of implementing laws enacted by the Legislature, the Commission is not authorized to amend these laws to achieve what the taxpayers may consider to be a better tax policy. That is the role of the Legislature. As a result, these additional arguments are insufficient for the Commission to find that the taxpayers are not considered to be domiciled in Utah for all of 2014, 2015, and 2016.

#### **IV. Conclusion.**

Based on the foregoing, the taxpayers are Utah resident individuals for all of 2014, 2015, and 2016. As a result, the Commission should sustain the assessments that the Division has imposed in its First Statutory Notice for the 2014 tax year and in its Second Statutory Notices for the 2015 and 2016 tax years.

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Kerry R. Chapman  
Administrative Law Judge

Appeal No. 17-1748

DECISION AND ORDER

Based on the foregoing, the Commission sustains the assessments that the Division has imposed in its First Statutory Notice for the 2014 tax year and in its Second Statutory Notices for the 2015 and 2016 tax years. 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-1, 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.