17-1812
TAX TYPE: INCOME TAX
TAX YEAR: 2015
DATE SIGNED: 08/29/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 17-1812 Account No. ##### Tax Type: Income Tax Year: 2015 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1, Taxpayer (by telephone)
TAXPAYER-2, Taxpayer (by telephone)
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, 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 August 1, 2018.

TAXPAYERS ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessment of additional Utah individual income taxes for the 2015 tax year. On October 18, 2017, the Division issued a Notice of Deficiency and Audit Change ("First Statutory Notice") to the taxpayers, in which it imposed additional tax and interest (calculated as of November 17, 2017),[1] as follows:

Year	Tax	Penalties	Interest	Total
2015	$$$$$	$0.00	$$$$$	$$$$$

1 Interest continues to accrue until any tax liability is paid. No penalties were imposed.

The taxpayers are a married couple who, for the 2015 tax year, filed a federal return with a status of married filing jointly. The taxpayers lived in Utah until August 2014, when they moved to STATE-1 where TAXPAYER-2 had accepted a job with the City of CITY-1, STATE-1 ("CITY-1"). The taxpayers lived in STATE-1 until shortly before TAXPAYER-2 was deployed to COUNTRY with the Utah National Guard (which he had joined in 2009). Specifically, on August 28, 2015, the taxpayers left STATE-1 and moved in with TAXPAYER-1's parents in Utah, where TAXPAYER-2 lived until he was deployed to COUNTRY on October 4, 2015, and where TAXPAYER-1 lived until TAXPAYER-2 returned from COUNTRY in August 2016. When TAXPAYER-2 returned from COUNTRY in August 2016, he and TAXPAYER-1 moved back to STATE-1, where TAXPAYER-2 went back to work for CITY-1 and where both taxpayers still live.

For the 2015 tax year, the taxpayers filed a joint STATE-1 part-year resident return and a joint Utah part-year resident return. On their 2015 STATE-1 return, the taxpayers declared that each of them was a STATE-1 part-year resident beginning in January 2015 and ending in August 2015,[2] and they allocated to STATE-1 $$$$$ of their total 2015 federal adjusted gross income ("FAGI") of $$$$$. TAXPAYER-1 did not work during 2015. The $$$$$ of income that the taxpayers allocated to STATE-1 is the income that TAXPAYER-2 received from CITY-1 from January 1, 2015 to October 3, 2015 (until he was deployed to COUNTRY).[3]

On Form TC-40B of the taxpayers' 2015 Utah part-year resident return, the taxpayers checked the "part-year resident" box and reported the dates of the Utah residency to be August 28, 2015 to December 31, 2015.[4] On the Form TC-40B, the taxpayers also allocated to Utah the remaining $$$$$ of their 2015 FAGI

2 On the 2015 STATE-1 return, a STATE-1 part-year resident is instructed to indicate the "months," not the "dates," in 2015 that the individual's STATE-1 residency began and ended. The 2015 STATE-1 return also provides separate spaces for an individual and the individual's spouse to show the months that each of them was a STATE-1 resident.

3 The taxpayers proffered that TAXPAYER-2 was able to use leave time he had accrued with CITY-1 so that he could continue to receive his salary from the city for the August 28, 2015 to October 3, 2015 period that he was living in Utah before his deployment to COUNTRY.

4 At the hearing, the taxpayers indicated that they filled out the Form TC-40B in this manner to show

(i.e., that portion of their total 2015 FAGI of $$$$$ that they had not allocated to STATE-1 on their 2015 STATE-1 return). The taxpayers explained that the $$$$$ of income that they allocated to Utah is the income that TAXPAYER-2 received for being a member of the Utah National Guard from January 1, 2015 to October 3, 2015 (prior to his deployment to COUNTRY on October 4, 2015). The taxpayers concede that this $$$$$ of income is Utah source income that is subject to Utah taxation.[5]

The Division, however, determined that both taxpayers were domiciled in Utah for all of 2015 and, thus, were 2015 Utah full-year resident individuals. As a result, the Division changed the taxpayers' 2015 Utah part-year resident return to a 2015 Utah full-year resident return and assessed Utah income taxes on all taxable income that the taxpayers received during 2015, including the income that TAXPAYER-2 received from CITY-1. The Division's assessment, as reflected on the First Statutory Notice, allowed a credit of $$$$$ for 2015 income taxes that the taxpayers paid to STATE-1.[6]

At the hearing, the Division stated that since it issued its original assessment, it has discovered that the taxpayers were eligible for an even larger credit for 2015 income taxes paid to STATE-1, specifically a credit of $$$$$. As a result, on August 1, 2018 (the day of the Initial Hearing), the Division issued a revised Notice of Deficiency and Audit Change ("Second Statutory Notice"), in which it imposed additional tax and interest (calculated as of August 31, 2018),[7] as follows:

Year	Tax	Penalties	Interest	Total

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that TAXPAYER-1 was a Utah resident individual from August 28, 2015 to December 31, 2015, and to show that TAXPAYER-2 was not a Utah resident individual for any portion of 2015. The 2015 Utah return, unlike the 2015 STATE-1 return, does not provide separate spaces for each married individual to report the dates of that individual's Utah residency.

5 Noticeably absent from the 2015 FAGI that the taxpayers reported on their 2015 federal and state returns is the income that TAXPAYER-2 received between October 4, 2015 and December 31, 2015, while he was deployed to COUNTRY. Both parties agree that in accordance with federal law, the income that TAXPAYER-2 received while deployed to COUNTRY is excluded from FAGI and, thus, is not subject to federal or state taxation. As a result, neither taxpayer earned any *taxable* income for the October 4, 2015 to December 31, 2015 portion of 2015 that TAXPAYER-2 was deployed to COUNTRY and that TAXPAYER-1 was living in Utah.

6 *See* Utah Code Ann. §59-10-1003 (2015).

2015	$$$$$	$0.00	$$$$$	$$$$$

The taxpayers, however, also disagree with the Division's revised assessment. They contend that no portion of the income that TAXPAYER-2 received from CITY-1 is subject to Utah taxation because TAXPAYER-2 was not a Utah resident for any portion of 2015. The taxpayers assert that the income that TAXPAYER-2 received from CITY-1 between January 1, 2015 to August 27, 2015 (before the taxpayers moved into TAXPAYER-1's parents' home in Utah) is not subject to Utah taxation because TAXPAYER-2 received it while working and living in STATE-1 and because TAXPAYER-2's "Home of Record" with the Utah National Guard was in STATE-1 for all of 2015. In addition, the taxpayers assert that the income that TAXPAYER-2 received from CITY-1 during the August 28, 2015 to October 3, 2015 period that he was "staying" in Utah before his deployment to COUNTRY is not subject to Utah taxation because federal law, specifically the Servicemembers Civil Relief Act (the "SCRA"), precludes Utah from taxing the income that TAXPAYER-2 received from CITY-1 while he was "present" in Utah.

For these reasons and because TAXPAYER-1 did not earn any income during 2015, the taxpayers contend that they properly filed their 2015 Utah return as a part-year resident return and that they properly allocated to Utah only the $$$$$ of income that TAXPAYER-2 received for being a member of the Utah National Guard from January 1, 2015 to October 3, 2015 (before his deployment to COUNTRY). As a result, the taxpayers ask the Commission to accept their 2015 Utah part-year resident return and to reverse the Division's revised assessment, as reflected in the Second Statutory Notice, in its entirety.

Because the taxpayers did not receive any *taxable* 2015 income during the October 4, 2015 to December 31, 2015 period that TAXPAYER-2 was deployed to COUNTRY, the Division proffered that the Commission can resolve this appeal without determining whether the taxpayers were domiciled in Utah for the October 4, 2015 to December 31, 2015 portion of 2015. The Division, however, contends that both taxpayers were domiciled in Utah for the January 1, 2015 to October 3, 2015 period during which TAXPAYER-2

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

received all of the taxpayers' 2015 taxable income. As will be explained in more detail later, the Division admits that based on recently discovered evidence, it cannot point to a single provision of Utah Code Ann. §59-10-136 that provides that either taxpayer would be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015. However, the Division stated that it cannot recommend a position that is different from its original position without first receiving approval from Division management. As a result, the Division asks the Commission to sustain its initial determination that both taxpayers were domiciled in Utah for the January 1, 2015 to October 3, 2015 portion of 2015 that remains at issue and, thus, sustain its revised assessment, as reflected in the Second Statutory Notice, in its entirety.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2015)[8], "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 2015 tax year 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

8 All substantive law citations are to the 2015 version of Utah law, unless otherwise noted.

(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

(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 2015 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:

. . . .

(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 is found at 50 U.S.C. §§3901 et seq.[9] Section 3902 of the SCRA provides that the Act's "purposes" are, as follows:

> The purposes of this chapter are—
> (1) to provide for, strengthen, and expedite the national defense through protection extended by this chapter 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 3912 of the SCRA provides for the Act's jurisdiction and applicability, as follows in pertinent part:

> (a) Jurisdiction
> This chapter 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 chapter applies to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this chapter. This chapter does not apply to criminal proceedings.
> . . . .

9 Prior to the 2015 tax year, the SCRA was cited 50 U.S.C. App. §§501 et seq.

7. Section 4001 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) (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 January 1, 2015 to October 3, 2015 portion of 2015 before TAXPAYER-2 was deployed to COUNTRY (the "period at issue"). The Division contends that both taxpayers were Utah resident individuals for the period at issue. The taxpayers concede that TAXPAYER-1 was a Utah resident individual for the August 28, 2015 to October 3, 2015 portion of the period at issue, but contend that she was not a Utah resident individual from January 1, 2015 to August 27, 2015. In addition, the taxpayers contend that TAXPAYER-2 was not a Utah resident individual for any portion of the January 1, 2015 to October 3, 2015 period at issue. For the 2015 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 either taxpayer is a Utah resident individual for the January 1, 2015 to October 3, 2015 period at issue under the 183 day test. Instead, the Division asserts that both taxpayers are Utah resident individuals for this period 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 2015 tax year) to determine whether the taxpayers would be considered to be domiciled in Utah under this statute for any portion of the period at issue. Second, if the Commission determines that one or both taxpayers would be considered to be domiciled in Utah for any portion of the January 1, 2015 to October 3, 2015 period at issue when Section 59-10-136 alone is considered, the Commission will then determine whether finding the taxpayer(s) to be domiciled in

Utah for income tax purposes for this portion of the period at issue is contrary to and, thus, preempted by federal law (i.e., by the SCRA).

I. Additional Facts.

Both taxpayers were born and raised in Utah, and they were married in Utah in March 2013. After the taxpayers married, they initially rented a two-bedroom, one-bath home in CITY-2, Utah. The taxpayers lived in the CITY-2 home until August 2014, when they moved to STATE-1, where TAXPAYER-2 had accepted a job with CITY-1. In CITY-1, the taxpayers rented a two-bedroom, one-bath apartment. The taxpayers lived in the CITY-1 apartment until late August 2015, when they moved into TAXPAYER-1's parents' home in CITY-3, Utah. The taxpayers did not own any real estate during 2015.

During 2015, the taxpayers were not legally separated or divorced, and neither of them attended an institution of higher education. The taxpayers' first child, a daughter, was born on August 18, 2015, shortly before the taxpayers moved from STATE-1 into TAXPAYER-1's parents' home in Utah. Although the taxpayers claimed their daughter as a dependent on their 2015 federal return, their daughter did not attend any type of school during 2015.

TAXPAYER-2 has been a member of the Utah National Guard since 2009, including the August 2014 to August 2015 period that the taxpayers lived in STATE-1. The taxpayers explained that a member of the Utah National Guard can live outside of Utah as long as he or she is able to fulfill his or her duties, which involves participating in a drill in Utah once a month for three or four days and completing two weeks of training in Utah once a year. In late 2014 (after the taxpayers moved to STATE-1), they proffer that TAXPAYER-2 was informed that he would be deployed with the Utah National Guard to COUNTRY in late 2015. Also in late 2014 or early 2015, the taxpayers found out that they were going to have their first child. This led to the taxpayers deciding that during TAXPAYER-2's deployment to COUNTRY, TAXPAYER-1

should live in Utah where she had family members who could help her with the taxpayer's infant child. TAXPAYER-2 returned from COUNTRY on August 22, 2016, at which time the taxpayers immediately moved back to STATE-1 so that TAXPAYER-2 could again work for CITY-1.[10] As of the date of the Initial Hearing, the taxpayers continue to live in STATE-1.

The taxpayers proffered a Certificate of Release or Discharge from Active Duty ("Certificate of Release"), which TAXPAYER-2 received in August 2016 upon returning from his deployment in COUNTRY. This document indicates that the orders calling TAXPAYER-2 to active duty in COUNTRY were issued under Title 10 of the United States Code. The Certificate of Release also shows that TAXPAYER-2's "Home of Record" at the time of his entry into active duty was STATE-1. The taxpayers claim that TAXPAYER-2 submitted a form to the Utah National Guard to change his "Home of Record" from Utah to STATE-1 in 2014 (when they first moved to STATE-1) and that TAXPAYER-2 has not changed his "Home of Record" to any other state since 2014. Although the taxpayers assert that TAXPAYER-2 was informed in late 2014 that he was being called to active duty in COUNTRY in late 2015, they did not provide any document (such as a "mobilization order") to show the date on which he was "called" to active duty under Title 10 of the United States Code. The Certificate of Release does not show the date when TAXPAYER-2 was informed that he was being called to active duty.

Prior to moving to STATE-1 on August 1, 2014, the taxpayers had Utah driver's licenses and were registered to vote in Utah. On August 7, 2014, both taxpayers obtained STATE-1 driver's licenses and registered to vote in STATE-1. Since that date, TAXPAYER-2 has always had a STATE-1 driver's license and been registered to vote in STATE-1. On the other hand, soon after the taxpayers moved into TAXPAYER-1's parents' Utah home in late August 2015, TAXPAYER-1 obtained a Utah driver's license on September 1, 2015, and she registered to vote in Utah on September 9, 2015. When the taxpayers moved back

10 The taxpayers explained that CITY-1 "held" TAXPAYER-2's job for him while he was deployed to COUNTRY.

to STATE-1 in August 2016, TAXPAYER-1 again obtained a STATE-1 driver's license and registered to vote in STATE-1.

At the time the taxpayers moved to STATE-1 in August 2014, they owned one motor vehicle, which they immediately registered in STATE-1. In October 2014, the taxpayers purchased a second motor vehicle, which they also registered in STATE-1. Prior to moving from STATE-1 to TAXPAYER-1's parents' Utah home on August 28, 2015, the taxpayers sold one of their motor vehicles. TAXPAYER-1 registered their remaining motor vehicle in Utah on or around the September 1, 2015 date that she obtained a Utah driver's license. TAXPAYER-1 proffered that she changed her driver's license and their motor vehicle's registration to Utah in September 2015 because she knew that she would be living in Utah for approximately one year while TAXPAYER-2 was deployed to COUNTRY.

The taxpayers were both members of a church during 2015. When the taxpayers moved to STATE-1 in August 2014, their church records were moved to a STATE-1 unit of their church. In late August 2015 (after the taxpayers moved into TAXPAYER-1's parents' Utah home), the taxpayers' church records were moved to a Utah unit of their church. When the taxpayers moved back to STATE-1 in August 2016, the taxpayers' church records were moved back to a STATE-1 unit of their church. The taxpayers were not members of any other club or organization during 2015.

While the taxpayers were living in STATE-1 from January 1, 2015 to August 27, 2015, they received most, if not all, of their mail in STATE-1. In addition, in early 2015, the taxpayers used a STATE-1 address to file their 2014 federal, STATE-1, and Utah income tax returns. However, beginning on August 28, 2015 (when the taxpayers moved into TAXPAYER-1's parents' home), the taxpayers received most of their mail at a Utah address. In early 2016, one of TAXPAYER-2's Form W-2's was sent to a Utah address, while another one was sent to a STATE-1 address. Also in early 2016 (while TAXPAYER-1 was living at her parents' home

and TAXPAYER-2 was deployed to COUNTRY), the taxpayers used a Utah address to file their 2015 federal, STATE-1, and Utah income tax returns.

II. Are the Taxpayers Considered to be Domiciled in Utah for Any Portion of the January 1, 2015 to October 3, 2015 Period at Issue 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 2015 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)).[11]

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 2015 because the taxpayers were not legally separated or divorced during 2015 and because they filed a joint 2015 federal return. Accordingly, for the 2015 tax year, each taxpayer is considered to have a spouse for purposes of Section 59-10-136.

B. Subsection 59-10-136(4). The taxpayers do not argue that they are *not* considered to be Utah domiciliaries for any of the January 1, 2015 to October 3, 2015 period at issue under Subsection 59-10-136(4). This subsection applies to individuals who are "absent from the state" for at least 761 consecutive days, if a

11 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

number of listed conditions are all met. The taxpayers had not been absent from Utah for at least 761 days when they moved into TAXPAYER-1's parents' Utah home on August 28, 2015. In addition, both taxpayers were present in Utah for more than 30 days during 2015. As a result, the taxpayers do not meet all of the conditions necessary for them *not* to be considered to be domiciled in Utah during 2015 under Subsection 59-10-136(4).

Accordingly, the Commission must analyze whether the taxpayers *are* considered to be domiciled in Utah for the January 1, 2015 to October 3, 2015 period at issue 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 be considered to be domiciled in Utah for any portion of the January 1, 2015 to October 3, 2015 period at issue under Subsection 59-10-136(1) or Subsection 59-10-136(2)(a).[12] Of the three remaining subsections of Section 59-10-136 to be discussed (Subsections 59-10-136(2)(b), (2)(c), and (3)), the Commission will begin its analysis with Subsection 59-10-136(2)(c).

C. Subsection 59-10-136(2)(c). This subsection 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 income tax return. On their 2015 Utah part-year resident return, the taxpayers asserted that at least one of them was a Utah resident individual from August 28, 2015 to December 31, 2015. As a result, for the January 1, 2015 to October 3, 2015 period that remains at issue, the Subsection 59-10-136(2)(c) presumption has arisen for the

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reference to domicile and to the Rule 52 factors.

12 Because neither taxpayer attended an institution of higher education during 2015 and because the only dependent that the taxpayers claimed on their 2015 federal return did not attend any type of school during 2015, the taxpayers would not be considered to be domiciled in Utah during any portion of 2015 under Subsection 59-10-136(1). In addition, because the taxpayers did not own any real estate during 2015, they did not claim the Utah residential exemption from property taxes on a primary residence for the 2015 tax year. As a result, they would not be considered to be domiciled in Utah during any portion of 2015 under Subsection 59-10-136(2)(a).

August 28, 2015 to October 3, 2015 portion of this period. On the other hand, the taxpayers did not assert that either of them was a Utah resident individual for the January 1, 2015 to August 27, 2015 portion of the period at issue. As a result, under Subsection 59-10-136(2)(c), neither taxpayer would be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015.

As to the August 28, 2015 to October 3, 2015 period for which the Subsection 59-10-136(2)(c) presumption has arisen, the taxpayers claim that TAXPAYER-1 is the only one of the taxpayers to have asserted Utah residency on their 2015 Utah return. However, even if TAXPAYER-1 is the only one of the taxpayers to have asserted Utah residency on the taxpayers' 2015 Utah return, the presumption arises for *both* taxpayers because Subsection 59-10-136(2)(c) provides that an *individual* is considered to be domiciled in Utah if *the individual or the individual's spouse* asserts residency in Utah on a Utah income tax return.[13] As a result, under Subsection 59-10-136(2)(c), both taxpayers would be considered to be domiciled in Utah for the August 28, 2015 to October 3, 2015 portion of the period at issue, unless the taxpayers are able to rebut this presumption.

Because Subsection 59-10-136(2)(c) 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.[14] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-

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13 This conclusion is also supported by Subsection 59-10-136(5)(a), which provides that "[i]f an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state."

14 The Legislature did not provide that asserting Utah residency on a Utah income tax return is an "absolute" indication of domicile (as it did in Subsection 59-10-136(1) for an individual who is enrolled as a resident student in a Utah institution of higher education or, with certain exceptions, has a dependent enrolled in a Utah public kindergarten, elementary, or secondary school).

136(2)(a) presumption. As a result, it is left to the Commission to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

The Commission has previously found that married individuals who have spouses for purposes of Section 59-10-136 may rebut the Subsection 59-10-136(2)(c) presumption if: 1) they filed their Utah income tax return because only one of them was a Utah resident individual under the 183 day test; and 2) neither of them satisfies another of the domicile subsections of Section 59-10-136.[15] In the instant case, however, neither taxpayer is a Utah resident individual for any portion of 2015 under the 183 day test. In addition, as will be explained later in the decision, other domicile subsections of Section 59-10-136 are satisfied because of TAXPAYER-1's actions for all or a portion of the August 28, 2015 to October 3, 2015 period for which the Subsection 59-10-136(2)(c) presumption has arisen. Accordingly, the taxpayers have not met these particular circumstances to rebut the Subsection 59-10-136(2)(c) presumption.

The Commission has also 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" 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.[16]

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

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15 *See, e.g., USTC Appeal No. 16-1804* (Initial Hearing Order May 10, 2018). This and other Commission decisions can be reviewed in a redacted format on the Commission's website at https://tax.utah.gov/commission-office/decisions.

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

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).[17]

As mentioned earlier, the Commission will address the taxpayers' argument concerning the SCRA later in the decision. Prior to any consideration of the SCRA, however, the taxpayers have not proffered any convincing arguments to rebut the Subsection 59-10-136(2)(c) presumption that has arisen for the August 28, 2015 to October 3, 2015 portion of the period at issue. Accordingly, both taxpayers will be considered to be domiciled in Utah from August 28, 2015 to October 3, 2015 under Subsection 59-10-136(2)(c) (unless the SCRA precludes such a finding for one or both of the taxpayers).

On the other hand, under Section 59-10-136(2)(c), neither of the taxpayers would be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015. As a result, the Commission must analyze the remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(b) and (3)) to determine whether the taxpayers would be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015 (prior to any consideration of the SCRA).

D. Subsection 59-10-136(2)(b). This subsection provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah. Both of the taxpayers registered to vote in STATE-1 immediately upon moving there in 2014. After the taxpayers moved into TAXPAYER-1's parents' Utah home in August 2015, only TAXPAYER-1 registered to vote in Utah, while TAXPAYER-2 remained registered to vote in STATE-1. Specifically, TAXPAYER-1 registered to vote in Utah on September 9, 2015, and she remained registered to vote in Utah through the remainder of the period of issue. As a result, the Subsection 59-10-136(2)(b) presumption has

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solely from the factors found in Rule 52.

17 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.

arisen for both taxpayers for the September 9, 2015 to October 3, 2015 portion of the period at issue, unless the taxpayers are able to rebut the presumption.

Earlier, the Commission found that under Subsection 59-10-136(2)(c) (prior to any consideration of the SCRA), the taxpayers would be considered to be domiciled in Utah from August 28, 2015 to October 3, 2015, which includes all of the September 9, 2015 to October 3, 2015 period for which the Subsection 59-10-136(2)(b) presumption has arisen. As a result, it is unnecessary for the Commission to determine whether the taxpayers have rebutted the Subsection 59-10-136(2)(b) presumption that has arisen for both of them from September 9, 2015 to October 3, 2015.[18] Even if the taxpayers were able to rebut the Subsection 59-10-136(2)(b) presumption, they would still be considered to be domiciled in Utah from August 28, 2015 to October 3, 2015 under Subsection 59-10-136(2)(c) (prior to the SCRA being considered).

Earlier, the Commission also found that the taxpayers would not be considered to be domiciled in Utah under Subsection 59-10-136(2)(c) for the January 1, 2015 to August 27, 2015 portion of the period at issue. Similarly, the Subsection 59-10-136(2)(b) presumption has not arisen for this portion of the period at issue. As a result, under Subsection 59-10-136(2)(b), the taxpayers would also not be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015. Accordingly, the Commission must analyze the last remaining subsection of Section 59-10-136 (i.e., Subsection 59-10-136(3)) to determine whether the taxpayers would be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015.

E. Subsection 59-10-136(3). Even if an individual is not considered to be domiciled in Utah under Subsection (1), (2)(a), (2)(b), or (2)(c), 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-

18 That being said, the Commission notes that it has previously found that an individual has not rebutted the Subsection 59-10-136(2)(b) presumption by showing that he or she did not vote in Utah while being registered to do so. The Commission has reached this conclusion because the Utah Legislature has elected to base domicile on voter registration, not actual voting. *See, e.g., USTC Appeal No. 15-720* (Initial Hearing Order May 6, 2016).

136(3)(b). At the hearing, the Division proffered that the taxpayers would meet a preponderance of these factors once they moved into TAXPAYER-1's parents' Utah home on August 28, 2015, but admitted that the taxpayers would not meet a preponderance of the factors from January 1, 2015 to August 27, 2015. The Division's proffer appears to be correct because for the January 1, 2015 to August 27, 2015 portion of the period at issue, many of the applicable Subsection 59-10-136(3)(b) factors indicate a domicile in STATE-1, but none indicate a domicile in Utah. Accordingly, under Subsection 59-10-136(3), the taxpayers would also not be considered to be domiciled in Utah from January 1, 2015 to August 27, 2015.

For the August 28, 2015 to October 3, 2015 portion of the period at issue, the Commission has already found that the taxpayers would be considered to be domiciled in Utah (prior to any consideration of the SCRA). As a result, it is unnecessary for the Commission to determine whether the taxpayers would also be considered to be domiciled in Utah for this portion of the period at issue under Subsection 59-10-136(3). Nevertheless, a cursory review of the 12 Subsection 59-10-136(3)(b) factors suggests that a slight preponderance of the applicable factors would show a Utah domicile from August 28, 2015 to August 31, 2015, and that an even greater preponderance of the applicable factors would show a Utah domicile from September 1, 2015 (the date TAXPAYER-1 obtained a Utah driver's license and registered her vehicle in Utah) to October 3, 2015.[19] Accordingly, even if the Commission had not already found both taxpayers to be domiciled in Utah from August 28, 2015 to October 3, 2015, it is likely that both taxpayers would be considered to be domiciled in Utah for this portion of the period at issue under Subsection 59-10-136(3) (prior to considering the SCRA).

19 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-2 did not have a Utah driver's license during any portion of 2015, TAXPAYER-1 obtained a Utah driver's license on September 1, 2015. 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 the September 1, 2015 to October 3, 2015 portion of the period at issue.

F. 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 the August 28, 2015 to October 3, 2015 portion of the period at issue (unless such a finding is precluded by the SCRA for one or both of the taxpayers). On the other hand, under Section 59-10-136, neither taxpayer is considered to be domiciled in Utah from January 1, 2015 to August 27, 2015.

III. Does the SCRA Preclude the Commission from Finding that the Taxpayers are Domiciled in Utah for Income Tax Purposes from August 28, 2015 to October 3, 2015?

The SCRA provides a number of protections for servicemembers during their military service, one of which is prescribing when a taxing jurisdiction can and cannot impose its income tax laws on a servicemember and a servicemember's spouse. This is the only SCRA protection that the Commission will be addressing in this appeal.

A. Utah and Federal Laws Specific to Servicemembers. Neither party referred to a specific provision of the SCRA when the taxpayers proffered that Utah's attempt to tax the income that TAXPAYER-2 received from CITY-1 would violate the SCRA and when the Division proffered that Utah's taxation of this income would not violate the SCRA. As a result, it may be helpful to examine the SCRA provisions that address when a taxing jurisdiction can and cannot impose its income tax laws on a servicemember and a servicemember's spouse (as found in Section 4001 of the SCRA) and how these provisions relate to the Utah income tax provisions that are specific to servicemembers (as found in Rule 2(2)).

Rule 2(2)(a) restates some of the guidance that is found in Subsection 4001(a)(1) of the SCRA, specifically in regards to whether a servicemember loses or acquires a residence or domicile for income tax purposes by reason of being absent or present in a tax jurisdiction solely in compliance with military orders.[20]

20 If a servicemember who was domiciled in Utah is subsequently assigned to active duty in a second state, the servicemember might argue (pursuant to Subsection 4001(a)(1) of the SCRA) that he or she has not lost his or her Utah domicile if the second state attempts to tax the servicemember as a resident of the second state. However, where a servicemember does not concede in a Tax Commission appeal that he or she is domiciled in Utah and where the servicemember is not considered to be domiciled in Utah under any provision

Rule 2(2)(b) appears to acknowledge a ruling of the United States District Court for the District of Minnesota in *United States v. Minnesota*, 97 F. Supp. 2d 973 (D. Minn. 2000). In *Minnesota*, the State of Minnesota had found that a number of servicemembers who were stationed in Minnesota were domiciled in Minnesota for income tax purposes, in part, because their spouses were domiciled in Minnesota. The Court found otherwise and summarized its decision, as follows:

> the Court is convinced that the State of Minnesota cannot, as a matter of law, presume [that servicemembers protected by the [Soldiers' and Sailors' Civil Relief Act ("SSCRA") (the precursor of the SCRA)] 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.[21]

As a result, Rule 2(2)(b) provides that a servicemember who satisfies the conditions of Utah's domicile law (i.e., Section 59-10-136) may be considered to be domiciled in Utah only if such a finding is not contrary to and preempted by federal law (i.e., by the SCRA).[22]

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of Utah income tax law (i.e., under any provision of Section 59-10-136), the Commission would not be inclined to find that the servicemember is domiciled in Utah, regardless of any statements that the servicemember may have made to or on certificates of residency filed with federal authorities or to another tax jurisdiction. In other words, the Commission will not find that a servicemember who would not be considered to be domiciled in Utah under Section 59-10-136 is, nevertheless, a Utah domiciliary under the SCRA.

21 The Court found that the presumptions and factors set forth in Minnesota domicile law were "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. However, the Court also denied the United States' request to find that certain factors (such as the location of a home, the state which issued a driver's license, the state in which a person's car is registered, and the location of organizations and clubs to which a person belongs) conflicted with SSCRA. It denied this request because these "factors" were not "presumptions." The Court stated that a "'presumption' is obviously strong medicine and carries a much greater risk of frustrating the purposes of the SSCRA than one of twenty-six indicia of domicile" that are also considered under Minnesota domicile law. 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."

22 Rule 2(2)(b) does not mean that any servicemember who is stationed in Utah and who satisfies the conditions of Section 59-10-136 will automatically be considered to be domiciled in Utah for income tax purposes without any consideration of the SCRA. Such an interpretation would ignore the "subject to federal law" phrase that prefaces Rule 2(2)(b). Furthermore, even if Rule 2(2)(b) were ambiguous in this regard, the Court in *Minnesota* points out that the United States Supreme Court "has held that the SSCRA should be

Rule 2(2)(c) provides that a Utah nonresident individual servicemember is exempt from Utah income tax only on his or her active service pay and that all other income received by the nonresident individual servicemember is subject to Utah taxation. Rule 2(2)(c) appears to relate, at least in part, to Subsection 4001(e) of the SCRA, which refers to the taxation of non-military compensation earned by a nonresident servicemember or spouse.

Some of the income tax provisions found in Section 4001 of the SCRA, however, are not restated or referenced in Rule 2(2). While Rule 2(2) does not address the income tax residency or domicile of a servicemember's spouse, Subsection 4001(a)(2) of the SCRA addresses whether a servicemember's spouse loses or acquires an income tax residence or domicile by reason of being absent or present in a tax jurisdiction solely to be with the servicemember in compliance with the servicemember's military orders. In addition, Subsection 4001(c) of the SCRA addresses certain income for services performed by a nonresident spouse of a servicemember. Lastly, Rule 2(2) does not appear to restate or reference Subsection 4001(b) of the SCRA, which addresses military service compensation received by a nonresident servicemember.

B. Application of the SCRA to a National Guard Member Such as TAXPAYER-2. At the hearing, neither party addressed whether the protections of the SCRA apply differently to National Guard members than to active duty members of the United States Armed Forces. As a result, the Commission has reviewed information on the internet to better understand how the SCRA applies to National Guard members. While this internet information is not critical to the Commission's decision in this case, it does provide some background information about the SCRA and its unique application to National Guard members.[23] This

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interpreted liberally, with ambiguities resolved 'with an eye friendly to those who dropped their affairs to answer the country's call'" (citation omitted). As a result, a servicemember who is stationed in Utah and who meets the criteria of Subsection 59-10-136 will only be deemed to be domiciled in Utah for income tax purposes if such a result is not contrary to and preempted by the SCRA.

23 The following internet sites were reviewed:
1)https://www.servicememberscivilreliefact.com/blog/national-guard-and-reservists/;
2)https://www.bankersonline.com/articles/106892;

information indicates that while active duty members of the United States Armed Forces receive automatic SCRA protections, National Guard members do not qualify for SCRA protections until they are ordered to federal-level active duty for federal-level missions under Title 10 or Title 32 of the United States Code (at which time funding comes from the federal government and not a state government). However, once a National Guard member has been activated to federal-level active duty, the National Guard member receives the same SCRA protections as an active duty member of the United Stated Armed Forces. It also appears that the SCRA protections for a National Guard member who is called to federal-level active duty begin on the date that he or she receives a "mobilization order" (i.e., is called to federal-level active duty), not the date that he or she actually reports to federal-level active duty.[24]

Because the orders deploying TAXPAYER-2 to COUNTRY were issued under Title 10 of the United States Code, it appears that TAXPAYER-2 was activated to federal-level active duty. If so, it appears that TAXPAYER-2 and his spouse would receive the protections found in Section 4001 of the SCRA not only from the October 4, 2015 date that TAXPAYER-2 reported to duty, but also from the date that TAXPAYER-2 was called to federal-level active duty. The taxpayers assert that TAXPAYER-2 received orders activating him to federal-level active duty sometime in late 2014, but they provided no documentation to show the exact date of these orders. As a result, the taxpayers, who have the burden of proof, have not proffered sufficient information to show exactly when in 2014 or 2015 that their SCRA protections first took effect.

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3)https://www.americanbar.org/portals/public_resources/aba_home_front/information_center/servicemembers_civil_relief_act/overview.html; and
4)http://www.moaa.org/Content/Publications-and-Media/MOAA-Blog/Your-Benefits--Title-10-vs-Title-_32-vs--the-State.aspx.

24 It appears that there is traditionally a period between receipt of the mobilization order and the order's report date to allow mobilized servicemembers to get their affairs in order; and that even though the servicemember may not be in a paid status or have reported for duty, SCRA protections apply during this period.

Regardless, even if the taxpayers' SCRA protections began in late 2014, they would not preclude the Commission from finding that both taxpayers are considered to be domiciled in Utah from August 28, 2015 to October 3, 2015. Subsections 4001(a)(1) and (a)(2) of the SCRA provide that a servicemember shall neither lose or acquire an income tax residence or domicile by being present in Utah solely in compliance with military orders and that a servicemember's spouse shall neither lose or acquire an income tax residence or domicile by being present in Utah solely to be with the servicemember in compliance with the servicemember's military orders. The taxpayers, however, have not shown that TAXPAYER-2 received military orders that required him to be present in Utah from August 28, 2015 to October 3, 2015. Instead, it appears that TAXPAYER-2 could have lived anywhere between the date that he was called to federal-level active duty and the October 4, 2015 date that he reported for duty. From late 2014 (when the taxpayers contend that TAXPAYER-2 first received his orders) to August 27, 2015, the taxpayers lived in STATE-1.

As a result, for the August 28, 2015 to October 3, 2015 portion of the period at issue (during which the taxpayers would be considered to be domiciled in Utah under Section 59-10-136), it appears that both taxpayers were present in Utah of their own choosing, not because of military orders requiring TAXPAYER-2 to be present in Utah. Accordingly, Subsections 4001(a)(1) and (a)(2) of the SCRA do not preclude the Commission from finding that both taxpayers are considered to be domiciled in Utah for income tax purposes from August 28, 2015 to October 3, 2015. Because both taxpayers are considered to be domiciled in Utah for the August 28, 2015 to October 3, 2015 portion of the January 1, 2015 to October 3, 2015 period at issue, Section 59-10-103(1)(q)(i)(A) provides that both taxpayers are Utah resident individuals for this portion of the period at issue.

Furthermore, the other income tax protections of Section 4001 of the SCRA do not preclude Utah from taxing the income that TAXPAYER-2 received from CITY-1 from August 28, 2015 to October 3, 2015, while both taxpayers are considered to be Utah resident individuals. First, Subsection 4001(c) of the SCRA involves

income for services performed by a servicemember's spouse. This subsection is not applicable because TAXPAYER-1 did not receive any income for services performed during 2015. Second, Subsection 4001(b) of the SCRA provides that "[c]ompensation 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" (emphasis added). This protection does not apply to the income that TAXPAYER-2 received from CITY-1 from August 28, 2015 to October 3, 2015, not only because that income is not military service compensation, but also because TAXPAYER-2 is a Utah resident individual during this period.[25]

Third, Subsection 4001(e) of the SCRA provides that "[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." The income that TAXPAYER-2 received from CITY-1 from August 28, 2015 to October 3, 2015, was received while TAXPAYER-2 was a Utah resident individual, not while he was a Utah nonresident individual. As a result, the protection provided in Subsection 4001(e) of the SCRA also does not appear to apply to this income.

IV. Conclusion.

Pursuant to Section 59-10-136, both taxpayers are considered to be domiciled in Utah and, thus, are Utah resident individuals only for the August 28, 2015 to October 3, 2015 portion of the period at issue. In addition, the SCRA does not preclude the Commission from finding that both taxpayers are Utah resident individuals from August 28, 2015 to October 3, 2015, nor does it preclude the Commission from taxing the

25 The taxpayers concede that all income that TAXPAYER-2 received from the Utah National Guard during the January 1, 2015 to October 3, 2015 period at issue is Utah source income that is subject to Utah taxation. As a result, the Commission need not address whether the portion of this income that TAXPAYER-2 received while he was a Utah nonresident individual (i.e., the income received from January 1, 2015 to August 27, 2015) is military service compensation that is protected from Utah taxation under Subsection 4001(b) of the SCRA.

income that TAXPAYER-2 received from CITY-1 while he was a Utah resident individual from August 28, 2015 to October 3, 2015.

For these reasons and because the taxpayers concede that all of the Utah National Guard income that TAXPAYER-2 received from January 1, 2015 to October 3, 2015 is subject to Utah taxation, the Commission should order the Division to revise its assessment so that: 1) all income that the taxpayers received from August 28, 2015 to October 3, 2015 is subject to Utah taxation; and 2) the only income that the taxpayers received from January 1, 2015 to August 27, 2015, that is subject to Utah taxation is the income that TAXPAYER-2 received from the Utah National Guard.

_____
Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission orders the Division to revise its assessment so that: 1) all income that the taxpayers received from August 28, 2015 to October 3, 2015 is subject to Utah taxation; and 2) the only income that the taxpayers received from January 1, 2015 to August 27, 2015, that is subject to Utah taxation is the income that TAXPAYER-2 received from the Utah National Guard.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

or emailed to:

taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

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