17-2004
TAX TYPE: INCOME TAX
TAX YEAR: 2014 & 2015
DATE SIGNED: 11/21/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 17-2004 Account No. ##### Tax Type: Income Tax Years: 2014 & 2015 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYERS-1, CPA
Representative REPRESENTATIVE FOR TAXPAYERS-2
TAXPAYER-1, Taxpayer
TAXPAYER-2, Taxpayer
For Respondent: REPRESENTATIVE FOR RESPONDENT-1, from Auditing Division
REPRESENTATIVE FOR RESPONDENT-2, from Auditing Division
REPRESENTATIVE FOR 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 September 25, 2018.

TAXPAYERS ("Petitioners" or "taxpayers") have appealed Auditing Division's ("Respondent" or "Division") assessments of Utah individual income taxes for the 2014 and 2015 tax years. On December 6, 2017, the Division issued Notices of Deficiency and Audit Change ("Statutory Notices") to the taxpayers, in which it imposed additional taxes and interest (calculated as of January 5, 2018),[1] as follows:

Year	Tax	Penalties	Interest	Total
2014	$$$$$	$0.00	$$$$$	$$$$$
2015	$$$$$	$0.00	$$$$$	$$$$$

The taxpayers married in 1973 and remained married until they divorced in 2018. During the 2014 and 2015 tax years at issue, the taxpayers were married but lived in different states. TAXPAYER-2 lived in Utah, while TAXPAYER-1 lived in STATE-1. For the 2014 and 2015 tax years, the taxpayers filed joint federal returns, joint Utah part-year resident returns, and joint STATE-1 returns. On their 2014 and 2015 STATE-1 returns, the taxpayers reported that TAXPAYER-1 was a resident of STATE-1 for these years and that TAXPAYER-2 was a nonresident of STATE-1 for these years.[2]

On the Forms TC-40B that accompanied the taxpayers' 2014 and 2015 Utah returns, the taxpayers checked the part-year resident "box" and indicated that they were Utah part-year residents from January 1, 2014 to December 31, 2014 (on the 2014 return) and from January 1, 2015 to December 31, 2015 (on the 2015 return).[3] On their 2014 Utah return, the taxpayers allocated to Utah $$$$$ of their total 2014 federal adjusted gross income ("FAGI") of $$$$$. On their 2015 Utah part-year resident return, the taxpayers allocated to Utah $$$$$ of their total 2015 FAGI of $$$$$ to Utah.[4]

The Division, however, determined that both taxpayers were domiciled in Utah for all of the 2014 and 2015 tax years. As a result, the Division changed the taxpayers' 2014 and 2015 Utah part-year resident returns

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

2 The STATE-1 return provides separate spaces for each married individual to indicate whether he or she is a STATE-1 resident or nonresident.

3 As a result, the taxpayers reported that they were Utah part-year resident individuals for all of 2014 and 2015. The taxpayers explained that they completed the Forms TC-40B in this manner to show that TAXPAYER-2 was a Utah resident individual for all of 2014 and 2015 and that TAXPAYER-1 was a Utah nonresident individual for all of 2014 and 2015. The Utah return does not provide separate spaces for each married individual to indicate whether he or she is a Utah resident or nonresident.

4 The taxpayers explained that they only allocated to Utah the 2014 and 2015 income that TAXPAYER-

to Utah full-year resident returns and, thus, imposed Utah tax on all income that both taxpayers received for these years.[5] The Division asks the Commission to find that both taxpayers are considered to be domiciled in Utah for all of 2014 and 2015 and to sustain its assessments for these years.

The taxpayers admit that TAXPAYER-2 was a Utah resident individual for all of 2014 and 2015. They contend, however, that TAXPAYER-1 was not a Utah resident individual for any portion of 2014 or 2015. In addition, the taxpayers argue that if TAXPAYER-1 is considered to be domiciled in Utah under Utah Code Ann. §59-10-136 (2014-2015) (the Utah domicile law in effect for 2014 and 2015), the law may be unconstitutional. The taxpayers proffer that the law "overreaches" by prescribing how married individuals are to file their federal returns in order not to have a "spouse" for purposes of Section 59-10-136. Furthermore, the taxpayers argue that it would be unfair for the Commission to find that TAXPAYER-1 is domiciled in Utah during 2014 and 2015 because she lived and worked in STATE-1 during these years and because she changed her contacts from Utah to STATE-1 upon moving to STATE-1 on January 1, 2014. For these reasons, the taxpayers ask the Commission to accept the 2014 and 2015 Utah part-year resident returns that they filed and to overturn the Division's assessments for these years.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2015)[6], "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:

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2 earned (i.e., they did not allocate to Utah any of the 2014 and 2015 income that TAXPAYER-1 earned).

5 Pursuant to Utah Code Ann. §59-10-1003 (2014-2015), the Division allowed credits against the taxpayers' Utah tax liabilities for the 2014 and 2015 income taxes that the taxpayers paid to STATE-1, specifically a credit of $$$$$ for the 2014 tax year and $$$$$ for the 2015 tax year.

6 All substantive law citations are to the 2015 version of Utah law. Unless otherwise noted, the substantive law remained the same during the 2014 and 2015 tax years.

(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 2014 and 2015 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

(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 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. The parties agree that TAXPAYER-2 was a Utah resident individual for all of 2014 and 2015. The parties, however, disagree as to whether TAXPAYER-1 was a Utah resident individual for these two years. While the Division contends that TAXPAYER-1 was a Utah resident individual for all of 2014 and 2015, the taxpayers contend that she was not a Utah resident individual for any portion of these years. For the 2014 and 2015 tax years, Subsection 59-10-103(1)(q)(i) provides that a person is a Utah resident individual under either of two scenarios: 1) if the person is domiciled in Utah (the "domicile test"); or 2) if the person maintains a place of abode in Utah and spends 183 or more days of the taxable year in Utah (the "183 day test").

The Division does not argue that TAXPAYER-1 was a Utah resident individual for 2014 or 2015 under the 183 day test. Instead, the Division asserts that she is a Utah resident individual for all of 2014 and

2015 under the domicile test. As a result, the Commission will apply the facts to the Utah domicile law in effect for 2014 and 2015 to decide whether both taxpayers are considered to be domiciled in Utah for these years (as the Division contends); or whether TAXPAYER-2 is the only one of the taxpayers to be considered to be domiciled in Utah for these years (as the taxpayers contend).

I. Additional Facts.

The taxpayers married in 1973. TAXPAYER-1 filed for divorce in August 2018, and a Utah court granted the taxpayers' divorce in September 2018. Although the taxpayers did not divorce until 2018, they have not lived together since 2011. However, the taxpayers admit that no court entered a decree of separate maintenance or temporary separation or any other similar decree during the 2011 to 2018 period that they were married and living separately.

After the taxpayers decided to live separately in 2011, TAXPAYER-2 lived in a home that he owned alone in CITY-1, Utah (the "CITY-1 home"), while TAXPAYER-1 lived in a home that she owned alone in CITY-2, Utah (the "CITY-2 home"). As of the date of the Initial Hearing, TAXPAYER-2 continues to live in the CITY-1 home that he owns alone. TAXPAYER-2 stated that his CITY-1 home received the residential exemption from property taxation for each of the 2014 and 2015 tax years at issue, which was supported by evidence proffered by the Division.[7]

In 2013, TAXPAYER-1 decided to move from Utah to STATE-1 to work as a registered nurse and certified nurse practitioner at the MEDICAL CENTER in CITY-3, STATE-1. In late 2013, TAXPAYER-1

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7 Utah Code Ann. §59-2-103(2) (2015) provides that ". . . the fair market value of residential property located within the state is allowed a residential exemption equal to a 45% reduction in the value of the property[,]" while Utah Code Ann. §59-2-102(35)(a) (2015) defines "residential property" to mean, in part, "any property used for residential purposes as a primary residence." As a result, for property tax purposes, a home that is used as a person's primary residence is only taxed on 55% of its fair market value, while a home that is not a person's primary residence (such as a vacation home) is taxed on 100% of its fair market value.

Subsections 59-2-103(2) and 59-2-102(35)(a) were amended and/or renumbered during the tax years at issue (specifically for tax year 2015). However, any amendment to the language cited in the prior paragraph was nonsubstantive.

contracted with a real estate broker to list her CITY-2 home for sale. TAXPAYER-1 moved to STATE-1 on January 1, 2014, and she remained in STATE-1 until January 6, 2017, when she retired and moved back to Utah. As of the date of the Initial Hearing, TAXPAYER-1 continues to live in Utah.

TAXPAYER-1's CITY-2 home was vacant from January 1, 2014 (when TAXPAYER-1 moved to STATE-1) though February 16, 2014 (when it sold). TAXPAYER-1 asserts that the CITY-2 home did not receive the residential exemption from property taxation for that portion of 2014 that she owned it. The Division did not contest this assertion. After the CITY-2 home sold, TAXPAYER-1 purchased a home in CITY-3, STATE-1 that she owned alone (the "STATE-1 home"). TAXPAYER-1 purchased her STATE-1 home on or around April 9, 2014, and she sold it in early 2017 around the time that she moved back to Utah.[8]

The taxpayers have three children and several grandchildren. All of the taxpayers' children and grandchildren lived in CITY-2, Utah during the 2014 and 2015 tax years, and TAXPAYER-1 did not have any relatives who lived in STATE-1 during these years. As of the 2014 and 2015 tax years, the taxpayers' children were all grown, and the taxpayers did not claim any dependents on their joint 2014 and 2015 federal, STATE-1, and Utah income tax returns. In addition, neither of the taxpayers attended a Utah institution of higher education during 2014 or 2015. During the January 1, 2014 to January 6, 2017 period that TAXPAYER-1 lived in STATE-1, she only returned to Utah for one week each calendar year to visit her family.

During 2014 and 2015, TAXPAYER-2 had a Utah driver's license. TAXPAYER-1, however, obtained a STATE-1 driver's license on May 29, 2014. As a result, she only had a Utah driver's license from January 1, 2014 to May 28, 2014 of the 2014 and 2015 tax years at issue. TAXPAYER-2 was registered to vote in Utah during all of 2014 and 2015, and he voted in Utah during each of these years. TAXPAYER-1 registered to vote in STATE-1 on May 29, 2014 (at the same time she obtained a STATE-1 driver's license),

8 During the 2014 and 2015 tax years, the only real property in Utah in which TAXPAYER-1 had an interest was a rental property that she did not own in her name. It appears that this rental property was owned by a separate entity in which both she and TAXPAYER-2 had an interest.

and she voted in STATE-1 later that year. As a result, it appears that TAXPAYER-1 was only registered to vote in Utah from January 1, 2014 to May 28, 2014 of the 2014 and 2015 tax years at issue.

During the 2014 and 2015 tax years, each taxpayer owned a motor vehicle in that taxpayer's name only. Throughout these years, TAXPAYER-2 registered his motor vehicle in Utah. At the time that TAXPAYER-1 moved to STATE-1 on January 1, 2014, her motor vehicle was registered in Utah. TAXPAYER-1's motor vehicle was registered in Utah until sometime in July 2014, when she purchased and registered a new motor vehicle in STATE-1.

Neither of the taxpayers was a member of a church during the 2014 and 2015 tax years at issue. In addition, TAXPAYER-2 was not a member of a club or other similar organization during these years. During 2014 and 2015, however, TAXPAYER-1 was a member of several professional organizations in STATE-1, where she was licensed as a registered nurse and certified nurse practitioner and held a license to issue controlled substances. After moving to STATE-1, TAXPAYER-1 also obtained a STATE-1 concealed handgun license.

During 2014 and 2015, TAXPAYER-2 received his mail at a Utah address, while TAXPAYER-1 received her mail at a STATE-1 address. The taxpayers used a Utah address to file their 2014 and 2015 federal, STATE-1, and Utah income tax returns.

II. Domicile Test for the 2014 and 2015 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 and 2015 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)).[9]

A. Section 59-10-136(5)(b). For a married individual, it is often necessary, as in this case, to first 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: 1) the individual is legally separated or divorced from the individual's spouse; or 2) if the individual and the individual's spouse file federal income tax returns with a status of married filing separately. The taxpayers filed 2014 and 2015 federal returns with a status of married filing jointly, not married filing separately. As a result, each taxpayer will be considered to have a spouse for all of 2014 and 2015, unless the taxpayers are considered to be "legally separated or divorced" during these years, pursuant to Subsection 59-10-136(5)(b)(i).

The taxpayers admit that they were not divorced during the 2014 and 2015 tax years. Remaining at issue is whether the taxpayers were "legally separated" during 2014 and 2015, where they were separated and living in different states. The term "legally separated" is not defined in Utah law. However, being separated does not constitute being "legally separated." First, to interpret the term "legally separated" in this manner would impermissibly give no effect or meaning to the word "legally."[10] Second, had the Utah Legislature

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9 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.

10 In *Warne v. Warne*, 275 P.3d 238, 2012 UT 13 (Utah 2012), the Utah Supreme Court ruled that "[u]nder our rules of statutory construction, we must give effect to every provision of a statute and avoid an interpretation that will render portions of a statute inoperative" (*citing Hall v. Utah State Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958). In *Hall v. Utah State Dept. of Corrections*, 24 P.3d 958, 2001 UT 34 (Utah 2001), the Court also stated that "our primary goal when construing statutes is to evince 'the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.'" (*citing Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984)). The Court further stated that "[i]n doing so, we seek 'to render all parts thereof relevant and meaningful' . . . and we accordingly avoid interpretations that will render portions of

intended Subsection 59-10-136(5)(b)(i) to be satisfied merely by living separately, it could have easily stated so in the statute, but it did not. Instead, the Legislature used language that clearly provides that a married person must be either legally separated or divorced before he or she is not considered to have a spouse under Subsection 59-10-136(5)(b)(i).

Third, an informational website about divorce and legal separation in Utah indicates that "[p]arties are legally separated only when a court enters a decree of separate maintenance. To obtain a decree of separate maintenance in Utah, the parties go through an action like a divorce."[11] This information appears to be consistent with Utah laws concerning "separate maintenance," which are found in Title 30, Chapter 4 of the Utah Code. Utah Code Ann. §30-4-1 provides that upon one party to a marriage filing a petition for separate maintenance, the court may enter a decree of separate maintenance. The taxpayers admit that they did not obtain a decree of separate maintenance prior to or during the 2014 and 2015 tax years at issue.

However, there may be ways to be considered "legally separated" other than obtaining a decree of separate maintenance. Utah Code Ann. §30-3-4.5 provides that one party to a marriage "may file an action for a temporary separation order without filing a petition for divorce" and that "temporary orders are valid for one year from the date of the hearing, or until one of the following occurs: (a) a petition for divorce is filed and consolidated with the petition for temporary separation; or (b) the case is dismissed." In addition, Subsection 30-3-1(3)(j) provides that one of the grounds for divorce is "when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation." As a result, the Commission believes that a married couple should also be considered "legally separated" if they obtain a temporary separation order, as permitted under Section 30-3-4.5. The taxpayers, however, also did not obtain a temporary separation order prior to or during the 2014 and 2015 tax years.

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a statute superfluous or inoperative (*citing Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980), *Platts v. Parents Helping Parent*s, 947 P.2d 658, 662 (Utah 1997); *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995)).

11 *See* http://www.divorcesource.com/ds/utah/utah-legal-separation-5346.shtml.

Because a Utah court did not issue a decree or order approving a petition for temporary separation, separate maintenance, or divorce prior to 2018 and because a court of a different jurisdiction did not issue a decree or order approving a similar type of petition, the taxpayers are not considered to be "legally separated or divorced" for any portion of the 2014 and 2015 tax years. Moreover, the taxpayers have not shown that the term "legally separated or divorced," as used in Subsection 59-10-136(5)(b)(i) should be interpreted differently.[12] Accordingly, for purposes of determining whether each taxpayer is considered to be domiciled in Utah during the 2014 and 2015 tax years, each taxpayer is considered to have a spouse throughout these years.

Now that the Commission has determined that each of the taxpayers is considered to have a spouse for purposes of Section 59-10-136 for the entirety of the 2014 and 2015 tax years, the Commission will analyze whether the taxpayers are considered to be domiciled in Utah for these years under the remaining subsections of Section 59-10-136 (i.e., under Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), (3), and (4)). If an individual meets the criteria found in *any one* of Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), or (3), that person is considered to be domiciled in Utah unless the individual meets the exception found in Subsection 59-10-136(4).

B. Subsection 59-10-136(1). This subsection provides that an individual is considered to be domiciled in Utah if: 1) a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on their federal return is enrolled in a Utah public kindergarten, elementary, or secondary school; or 2) the individual or the individual's spouse is enrolled in a Utah institution of higher education. Neither of these circumstances are applicable to the taxpayers during 2014 or 2015. Accordingly, the

12 At the hearing, the taxpayers opined on whether there exists "common-law separation" that would be somewhat analogous to common-law marriage and, if so, whether common-law separation would be sufficient to satisfy the "legally separated" language of Subsection 59-10-136(5)(b)(i). The taxpayers were allowed to submit post-hearing information to develop this argument. On October 4, 2018, the taxpayers submitted a document in which they indicated that they had "researched the topic of 'common-law' separation versus legal separation in the state of Utah [and had] been unable to find any statute or law that allows this." The Division was given an opportunity to respond to the taxpayers' post-hearing information, but chose not to submit a response.

taxpayers would not be considered to be domiciled in Utah during any portion of 2014 or 2015 under Subsection 59-10-136(1). Although neither of the taxpayers is considered to be domiciled in Utah under Subsection 59-10-136(1), the Commission must still determine whether they would be considered to be domiciled in Utah under another subsection of Section 59-10-136.

C. Subsection 59-10-136(2)(a). This subsection 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's or individual's spouse's primary residence, unless the presumption is rebutted. For the presumption to arise for 2014 and 2015, two elements must exist. First, a Utah home that one or both of the taxpayers owned during 2014 and 2015 must have received the residential exemption for these years. Second, the Utah home that received the residential exemption must be considered the "primary residence" of one or both of the taxpayers. The taxpayers admit that the CITY-1 home that TAXPAYER-2 owned alone received the residential exemption for the 2014 and 2015 tax years and that it was the primary residence of TAXPAYER-2 for these years. Accordingly, the Subsection 59-10-136(2)(a) presumption has arisen for both taxpayers, and both taxpayers will be considered to be domiciled in Utah for all of 2014 and 2015, unless they are able to rebut this presumption.[13]

Because Subsection 59-10-136(2)(a) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual 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

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13 The Commission is aware that TAXPAYER-1 did not own the CITY-1 home and did not live in it during 2014 and 2015. Nevertheless, the Subsection 59-10-136(2)(a) 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* claims a residential exemption for that *individual's or individual's spouse's* primary residence. 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.

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 59-10-136(2)(a) presumption. As a result, it is left to the Commission to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

The Commission has previously found that the Subsection 59-10-136(2)(a) presumption can be rebutted if an individual has asked a county to remove the residential exemption, and the county failed to implement the individual's request. TAXPAYER-2, however, has never asked COUNTY to remove the residential exemption from his CITY-1 home. The Commission has also previously found that the Subsection 59-10-136(2)(a) presumption can be rebutted if an individual received the residential exemption for a *vacant* home that was listed for sale and which would qualify for the exemption upon being sold.[15] In the instant case, however, TAXPAYER-2's CITY-1 home was not listed for sale or for rent during any portion of 2014 or 2015.[16]

The Commission has also previously found that the Subsection 59-10-136(2)(a) presumption is not rebutted because an individual had never heard of the residential exemption or did not know that he or she was receiving the residential exemption. Similarly, the Commission finds that the Subsection 59-10-136(2)(a)

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

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

16 Had the CITY-2 home owned by TAXPAYER-1 received the residential exemption for that portion of 2014 that she owned it, the Subsection 59-10-136(2)(a) presumption that would have arisen in regards to her CITY-2 home could have been rebutted because it was vacant and was listed for sale during that portion of 2014 that she owned it. Regardless, the Subsection 59-10-136(2)(a) presumption has arisen for both taxpayers because of the CITY-1 home, which was not vacant and was not listed for sale or for rent during 2014 or 2015.

presumption is not rebutted where TAXPAYER-2 received the residential exemption on his CITY-1 home even though he did not file an application to receive the exemption (i.e., where a county automatically classifies a home as a primary residence that qualifies for the exemption without the owner having knowledge that he or she was receiving the exemption).[17]

Furthermore, the Commission has found that an individual has not rebutted the presumption because he or she would not be considered to be domiciled in Utah under Rule 52, the property tax rule used to determine income tax domicile for tax years prior to 2012. It is arguable that using the "old" income tax domicile criteria found in the pre-2012 version of Rule 2 and/or in Rule 52 to determine an individual's income tax domicile for years when Section 59-10-136 is in effect would be giving the new law enacted by the Legislature little or no effect, which the Commission declines to do.[18]

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).[19]

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17 *See; e.g.*, the Commission's decisions in *USTC Appeal No. 15-720* (Initial Hearing Order May 6, 2016); and *USTC Appeal No. 15-1582* (Initial Hearing Order Aug. 26, 2016). Redacted versions of these and other selected decisions can be reviewed on the Commission's website at https://tax.utah.gov/commission-office/decisions.

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

19 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.

The Commission has also indicated that there may be other circumstances to be raised in future cases that will be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. The taxpayers, however, have not proffered any convincing arguments to rebut this presumption, especially where TAXPAYER-2 lived in the CITY-1 home throughout the 2014 and 2015 tax years. Accordingly, under Subsection 59-10-136(2)(a), both taxpayers are considered to be domiciled in Utah for all of the 2014 and 2015 tax years.

D. Other Subsections of Section 59-10-136. Because the taxpayers have both been found to be domiciled in Utah for all of 2014 and 2015 under Subsection 59-10-136(2)(a), they are Utah domiciliaries for the entirety of these years unless they meet the exception of Subsection 59-10-136(4). However, before discussing the exception of Subsection 59-10-136(4), it may be helpful to note that both taxpayers may also be considered to be domiciled in Utah under subsections other than Subsection 59-10-136(2)(a).

Subsection 59-10-136(2)(b) provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the *individual or the individual's spouse* is registered to vote in Utah. For most of 2014 and for all of 2015, TAXPAYER-1 was registered to vote in STATE-1. However, during all of 2014 and 2015, TAXPAYER-1's spouse (i.e., TAXPAYER-2) was registered to vote in Utah. Because TAXPAYER-2 was registered to vote in Utah throughout the 2014 and 2015 tax years, the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers for all of 2014 and 2015. Accordingly, both taxpayers will be considered to be domiciled in Utah throughout these years under Subsection 59-10-136(2)(b), unless they are able to rebut this presumption.

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. On each of their 2014 and 2015 Utah returns, the taxpayers reported a Utah part-year residency from January 1 to December 31 (i.e., for the entire year). The taxpayers explained that they completed their 2014 and 2015 Utah returns in this manner to assert that TAXPAYER-2 was a Utah resident individual for all of 2014 and 2015, which seems consistent with the returns themselves. Because the taxpayers asserted on their 2014 and 2015 Utah returns that TAXPAYER-2 was a Utah resident individual for all of these years, the Subsection 59-10-136(2)(c) presumption has arisen for both taxpayers for all of 2014 and 2015. Accordingly, both taxpayers will be considered to be domiciled in Utah throughout 2014 and 2015 under Subsection 59-10-136(2)(c), unless they are able to rebut this 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 specifically addressed each of these 12 factors. However, a cursory review of the 12 factors indicates that the taxpayers' joint and/or separate actions meet a preponderance of the relevant factors for the entirety of 2014 and 2015.[20] As a result, both taxpayers may also be considered to be domiciled in Utah for all of 2014 and 2015 under Subsection 59-10-136(3)(b).

Because both of the taxpayers meet the criteria of one or more of the subsections discussed above for all of 2014 and 2015, both taxpayers will be considered to be domiciled in Utah for these years unless they meet the exception set forth in Subsection 59-10-136(4).

E. Subsection 59-10-136(4). This subsection provides an exception where individuals who would otherwise be considered to be domiciled in Utah under Subsection 59-10-136(1), (2), and/or (3) will not be considered to be domiciled in Utah. Subsection 59-10-136(4) applies to an individual if the individual meets a number of listed conditions. Among these conditions are that the *individual and the individual's*

20 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. Admittedly, TAXPAYER-1 did not have a Utah driver's license for most of 2014 and all of 2015. However, TAXPAYER-2 did. As a result, when determining the taxpayers' domicile under Subsection 59-10-136(3), *both* taxpayers would meet the Subsection 59-10-136(3)(b)(i) factor for all of 2014 and 2015.

spouse are absent from Utah for 761 or more consecutive days (Subsection 59-10-136(4)(a)(i)); that neither the *individual nor the individual's spouse* return to Utah for more than 30 days in a calendar year (Subsection 59-10-136(4)(a)(ii)(A)); and that neither the *individual nor the individual's spouse* claim a residential exemption on a Utah residence that is *the individual's or individual's spouse's* primary residence (Subsection 59-10-136(4)(a)(ii)(D)).

The taxpayers suggest that TAXPAYER-1 meets the Subsection 59-10-136(4) conditions because she was absent from Utah from January 1, 2014 to January 6, 2017 (which is more than 761 consecutive days) and because she did not return to Utah for more than 30 days in a calendar year during this period of absence. However, where TAXPAYER-1 has a spouse for purposes of Section 59-10-136 and where the Subsection 59-10-136(4) conditions are based on the actions of the individual *and* the individual's spouse, TAXPAYER-1's circumstances alone do not satisfy all of the Subsection 59-10-136(4) conditions.

For example, an individual meets the Subsection 59-10-136(4)(a)(i) condition only if the individual and the individual's spouse are absent from Utah for 761 or more consecutive days. While TAXPAYER-1 may have been absent from Utah for 761 or more consecutive days that included all of 2014 and 2015, TAXPAYER-2 was not. Accordingly, TAXPAYER-1 does not meet the Subsection 59-10-136(4)(a)(i) condition. For similar reasons, TAXPAYER-1 does not meet the Subsection 59-10-136(4)(a)(ii)(A) and (4)(a)(ii)(D) conditions. Because neither of the taxpayers meets all of the Subsection 59-10-136(4) conditions for any portion of the 2014 and 2015 tax years, neither of the taxpayers qualify to *not* be considered to be domiciled in Utah for any portion of these years.

F. Domicile – Summary. Both taxpayers are considered to be domiciled in Utah for all of 2014 and 2015 under one or more subsections of Section 59-10-136. In addition, neither of the taxpayers meets all of the Subsection 59-10-136(4) conditions necessary to not be considered to be domiciled in Utah for these years. Accordingly, under Section 59-10-136, both of the taxpayers are considered to be domiciled in Utah for all of the 2014 and 2015 tax years. Because both taxpayers are considered to be domiciled in Utah during all of 2014 and 2015, both taxpayers are Utah full-year resident individuals for these years, pursuant to Subsection 59-10-103(1)(q)(i)(A).

III. Taxpayers' Other Arguments.

Even if both of the taxpayers are considered to be domiciled in Utah for all of 2014 and 2015 under Utah law (i.e., under Section 59-10-136), they contend that such a result is unconstitutional or unfair where TAXPAYER-1 lived and worked in STATE-1 and had most, if not all, of her contacts with STATE-1 during 2014 and 2015. They also contend that they were unaware that Utah law could result in an individual who lived and worked in a state other than Utah being considered to be domiciled in Utah.

A. Unconstitutionality of Utah Law. 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 spouse or if the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal tax return for the taxable year. The taxpayers are concerned that the provision regarding the filing of federal tax returns with married filing separately filing status "overreaches" and, thus, is unconstitutional. The Commission, however, is not authorized to find that a statute enacted by the Utah Legislature is unconstitutional.[21]

B. Taxation of Income Earned Outside of Utah. The taxpayers suggest that Utah should not tax the income that TAXPAYER-1 earned while she was living and working in STATE-1. 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

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21 *See State Tax Commission v. Wright, 596 P.2d 634 (Utah 1979)*, in which the Utah Supreme Court found that "[a]lthough the Tax Commission must of necessity interpret the taxing statutes and make determinations as to their applicability, . . . 'it is not for the tax commission to determine questions of legality or constitutionality of legislative enactments'" (citations omitted). *See also Nebeker v. Utah State Tax Commission*, 34 P.3d 180, 2001 UT 74 (Utah 2001).

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, including TAXPAYER-1, have been found to be Utah resident individuals for all of 2014 and 2015, Subsection 59-10-117(2)(c) does not apply to either of them for these years. Accordingly, all of the taxpayers' 2014 and 2015 income is subject to Utah taxation, including the income that TAXPAYER-1 earned while living and working outside of Utah.

C. Commission Notice of Section 59-10-136. The taxpayers indicate that they were unaware that Utah enacted a new domicile law that became effective for tax year 2012 and that the new law provided that an individual such as TAXPAYER-1 would still be considered to be domiciled in Utah, even though she had moved to STATE-1 and established most, if not all, of her contacts with STATE-1. The Commission, however, gave taxpayers notice of the new law in the instructions of the 2012 Form TC-40 and in the instructions for each subsequent tax year's Form TC-40.

Page 2 of the 2012 instructions contained a "What's New" section, which provided as follows:

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

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

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

Similar information was also provided on pages 3 and 4 of the 2014 and 2015 instructions.[22] Accordingly, the instructions for the 2014 and 2015 Form TC-40 cautioned married couples that an individual whose spouse was domiciled in Utah would also be considered to be domiciled in Utah, unless they were legally separated or divorced or filed their federal returns as married filing separately.

D. Tax Policy. The taxpayers also contend that it would be unfair for the Commission to tax the 2014 and 2015 income that TAXPAYER-1 received while living and working in STATE-1 under her specific circumstances. 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 Utah 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.

IV. Conclusion.

Based on the foregoing, both taxpayers are considered to be domiciled in Utah for all of 2014 and 2015. As a result, both taxpayers are Utah resident individuals for all of 2014 and 2015. Accordingly, all of the income that both taxpayers received for 2014 and 2015 is subject to Utah taxation (subject to a credit for income taxes paid to another state). The Division allowed a credit for the income taxes that the taxpayers paid to STATE-1 for the 2014 and 2015 tax years. In addition, for reasons discussed earlier, the taxpayers' other arguments do not warrant an abatement of the Division's assessments. For these reasons, the Commission should sustain the Division's 2014 and 2015 assessments in their entireties.

Kerry R. Chapman
Administrative Law Judge

22 Forms for previous years can be found on the Commission's website at https://tax.utah.gov/forms-pubs/previousyears.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessments for the 2014 and 2015 tax years in their entireties. It is so ordered.

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

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

or emailed to:

taxappeals@utah.gov

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

DATED this _________ day of ________________________, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
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.