

18-2130

TAX TYPE: INCOME TAX

TAX YEAR: 2015 & 2016

DATE SIGNED: 3/6/2020

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER-1 & TAXPAYER-2,</p> <p style="text-align: center;">Petitioners,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 18-2130</p> <p>Account No. #####</p> <p>Tax Type: Income</p> <p>Tax Years: 2015 & 2016</p> <p>Judge: Chapman</p>
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYERS, Representative (by telephone)
TAXPAYER-1, Taxpayer (by telephone)
TAXPAYER-2, Taxpayer (by telephone)

For Respondent: 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 DATE, 2020.

TAXPAYERS (“Petitioners” or “taxpayers”) appealed Auditing Division’s (the “Division”) assessments of Utah individual income taxes for the 2015 and 2016 tax years (the “audit period”). On DATE, 2018, the Division issued Notices of Deficiency and Audit Change (“Statutory Notices”) to the taxpayers, in which it imposed taxes and interest (calculated as of DATE, 2018),¹ as follows:

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

The taxpayers filed 2015 and 2016 federal and Utah income tax returns with a status of married filing jointly. Both taxpayers had lived in Utah for many years until MONTH 2014, when TAXPAYER-1 accepted a job in and moved to STATE-1. TAXPAYER-2, however, did not move to STATE-1 at the same time that TAXPAYER-1 moved there. Because the taxpayers needed to renovate the home they owned in CITY-1, Utah (the “Utah home”) before listing it for sale, TAXPAYER-2 continued to live in the taxpayers’ Utah home through DATE, 2016, after which she, too, moved to STATE-1. The taxpayers’ listed their Utah home for sale on DATE, 2016, and it sold on DATE, 2016.

For 2015, the taxpayers filed a Utah part-year resident return, on which they asserted that they were Utah resident individuals from DATE, 2015 to DATE, 2015, and on which they allocated to Utah \$\$\$\$ of their 2015 federal adjusted gross income (“FAGI”) of \$\$\$\$\$. The taxpayers indicated that they filed their 2015 Utah return in this manner to show: 1) that TAXPAYER-2 was a Utah resident individual for all of 2015; 2) that TAXPAYER-1 was a Utah nonresident individual for all of 2015;² 3) that all income that TAXPAYER-2 earned in Utah during 2015 was subject to Utah taxation; and 4) that all income that TAXPAYER-1 earned in STATE-1 during 2015 was not subject to Utah taxation. On their 2015 Utah return, the taxpayers did not indicate on Part 7 of the return that they were Utah residential property owners who no longer qualified to receive the residential exemption from property taxation for their primary residence.

For 2016, the taxpayers filed a 2016 Utah full-year nonresident return on which they allocated to Utah \$\$\$\$ of their 2016 FAGI of \$\$\$\$\$. The taxpayers indicated that they filed their 2016 Utah return in this manner to show: 1) that TAXPAYER-2 was a Utah resident individual from DATE, 2016 to DATE, 2016, and a Utah nonresident individual from DATE, 2016 to DATE, 2016; 2) that TAXPAYER-1 was a Utah nonresident individual for all of 2016; 3) that all income that TAXPAYER-2 earned in Utah from DATE, 2016

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

2 The Utah income tax return does not provide separate spaces for spouses to report different residency statuses or different dates of Utah residency. Regardless, the taxpayers’ representative indicated that the 2015 Form TC-40B should not have shown a Utah part-year residency from DATE, 2015 to DATE, 2015 for either

to DATE, 2016 was subject to Utah taxation;³ and 4) that all income that TAXPAYER-1 earned in STATE-1 during 2016 was not subject to Utah taxation. On their 2016 Utah return, the taxpayers did not indicate on Part 7 of the return that they were Utah residential property owners who no longer qualified to receive the residential exemption from property taxation for their primary residence.

The Division has determined that both taxpayers were domiciled in Utah for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016. Specifically, the Division has determined that the taxpayers are considered to be domiciled in Utah from DATE, 2015 to DATE, 2016, because TAXPAYER-2 lived in the taxpayers' Utah home (which received the residential exemption from property taxation)⁴ for this portion of the audit period; and because TAXPAYER-2 was registered to vote in Utah while she lived in Utah. As a result, the Division determined that both taxpayers were Utah resident individuals for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016 and imposed Utah taxes on all income that both taxpayers received for these periods.⁵

of the taxpayers.

3 TAXPAYER-1 did not work in STATE-1 during the DATE, 2016 to DATE, 2016 portion of 2016 that she lived there.

4 Utah Code Ann. §59-2-103(2) (2016) 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(36)(a) (2016) 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 MONTH of its fair market value, while a home that is not a person’s primary residence (such as a vacation home) is taxed on MONTH of its fair market value. Subsections 59-2-103(2) and 59-2-102(36)(a) were amended and/or renumbered during the 2013 through 2016 tax years at issue. However, any amendment to the language cited in this paragraph was nonsubstantive.

At the hearing, the Division indicated that information provided at the hearing concerning the listing date of the Utah home could result in the taxpayers’ being considered to be domiciled in Utah for 2015 and for a longer portion of 2016 (specifically from DATE, 2016 to DATE, 2016). For purposes of the Initial Hearing, however, the Division expressly asked the Commission to find that the taxpayers are considered to be domiciled in Utah for 2015 and only for the DATE, 2016 to MONTH, 2016 portion of 2016.

5 For a Utah resident individual, Utah Code Ann. §59-10-1003 (2015-2016) provides a credit against the Utah income tax otherwise due for income taxes imposed by another state. The Division did not apply a credit for taxes imposed by another state to either of the assessments at issue because the taxpayers have not claimed that a state other than Utah has imposed income taxes on the taxpayers’ income for either of the 2015 or 2016 tax years (STATE-1 does not impose a state income tax).

For these reasons, the Division asks the Commission to find that both taxpayers are Utah resident individuals for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016. The Division asks the Commission to sustain its 2015 assessment in its entirety. As to its 2016 assessment, however, the Division indicates that based on its determination that both taxpayers are Utah resident individuals from DATE, 2016 to DATE, 2016, it has incorrectly allocated to Utah the income that TAXPAYER-1 earned for this period. As a result, if the Commission finds that both taxpayers are considered to be domiciled in Utah for the DATE, 2016 to DATE, 2016 portion of 2016, the Division asks the Commission to find that the 2016 assessment should be revised to reflect the income that the taxpayers actually earned during this portion of 2016.⁶

The taxpayers, on the other hand, contend that none of the income that TAXPAYER-1 earned in 2015 and 2016 should be subject to Utah taxation because he had changed his residence from Utah to STATE-1 in 2014 and because TAXPAYER-2 remained in Utah for the DATE, 2015 to DATE, 2016 portion of the audit period only to prepare their Utah home for sale. The taxpayers contend that these circumstances demonstrate that both of them had an intent to change their domicile to STATE-1 once TAXPAYER-1 accepted a job in and moved to STATE-1 in 2014. For these reasons, the taxpayers ask the Commission to accept the 2015 and 2016 Utah returns that they filed and to abate the Division's assessments in their entireties.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2016)⁷, “a tax is imposed on the state taxable income of a resident individual[.]”

⁶ The Division indicated that the revision of the allocation of TAXPAYER-1 2016 income to Utah would have minimal impact on the amount of the 2016 assessment. In the event that the Commission were to find that both taxpayers were domiciled in Utah for the DATE, 2016 to MONTH, 2016 portion of 2016, the taxpayers did not object to the Commission's ordering the Division to revise the allocation of income in the 2016 assessment to reflect such a finding. In addition, neither party provided the exact amount of income that should be allocated to Utah should both taxpayers be deemed Utah resident individuals for the DATE, 2016 to MONTH, 2016 portion of 2016. As a result, should the Commission find that both taxpayers are considered to be domiciled in Utah for the DATE, 2016 to MONTH, 2016 portion of 2016, the Commission will order the Division to revise the allocation of income in the 2016 assessment to reflect such a finding.

⁷ All substantive law citations are to the 2016 version of Utah law. Unless otherwise noted, the

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 and 2016 tax years at issue), UCA §59-10-136 provides for the determination of “domicile,” as follows:⁸

- (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

substantive law remained the same during the 2015 and 2016 tax years.

⁸ Effective for tax year 2018, the Utah Legislature amended Section 59-10-136 in Senate Bill 13 (2019) (“SB 13”). However, it is the version of Section 59-10-136 in effect during the 2015 and 2016 tax years that is applicable to this appeal.

- (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.
- (3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:
- (i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
 - (ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
- (b) The determination of whether an individual is considered to have domicile in this state under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:
- (i) whether the individual or the individual's spouse has a driver license in this state;
 - (ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;
 - (iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;
 - (v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;
 - (vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
 - (vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
 - (viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
 - (ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;
 - (x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
 - (xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or
 - (xii) whether the individual is an individual described in Subsection (1)(b).

- (4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
- (i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
 - (ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
 - (A) return to this state for more than 30 days in a calendar year;
 - (B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
 - (C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
 - (D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
 - (E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.
- (b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.
- (c) For purposes of Subsection (4)(a), an absence from the state:
- (i) begins on the later of the date:
 - (A) the individual leaves this state; or
 - (B) the individual's spouse leaves this state; and
 - (ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.
- (d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:
- (i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and
 - (ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.
- (e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.
- (ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:
- (A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and

- (B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).
- (5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.
- (b) For purposes of this section, an individual is not considered to have a spouse if:
- (i) the individual is legally separated or divorced from the spouse; or
 - (ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.
- (c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.
- (6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

4. In Section 59-10-136, two subsections require the Commission to determine whether the property for which an individual or an individual's spouse claims a residential exemption is that individual's or individual spouse's "primary residence."⁹ To assist in determining whether a property is considered the "primary residence" of the individual or individual's spouse who claimed the exemption, the Legislature enacted new property tax provisions at the same time it enacted the new domicile law in Section 59-10-136. Specifically, to assist in the determination of Utah income tax domicile of a property owner, Utah Code Ann §59-2-103.5(4) provides, as follows:¹⁰

- (4) Except as provided in Subsection (5), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, the property owner shall:
- (a) file a written statement with the county board of equalization of the county in which the property is located:
 - (i) on a form provided by the county board of equalization; and

⁹ See Subsections 59-10-136(2)(a) and (4)(a)(ii)(D). It is noted that the term "primary residence" is also found in Subsection 59-10-136(6). However, Subsection 59-10-136(6) concerns the "primary residence" of a tenant, not the "primary residence" of the individual or individual's spouse who owns the property for which the residential exemption was claimed. Accordingly, the guidance provided in Subsection 59-2-103.5(4) does not apply when determining the "primary residence" of a tenant.

¹⁰ In SB 13 (2019), the Utah Legislature also amended Section 59-2-103.5. Again, however, the SB 13 amendments have no applicability to the 2015 and 2016 tax years at issue in this appeal.

- (ii) notifying the county board of equalization that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence; and
- (b) declare on the property owner's individual income tax return under Chapter 10, Individual Income Tax Act, for the taxable year for which the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence.

5. Utah Code Ann. §20A-2-305 provides for names to be removed or not be removed from the official voter register, as follows in pertinent part:

- (1) The county clerk may not remove a voter's name from the official register because the voter has failed to vote in an election.
- (2) The county clerk shall remove a voter's name from the official register if:
 - (a) the voter dies and the requirements of Subsection (3) are met;
 - (b) the county clerk, after complying with the requirements of Section 20A-2-306, receives written confirmation from the voter that the voter no longer resides within the county clerk's county;
 - (c) the county clerk has:
 - (i) obtained evidence that the voter's residence has changed;
 - (ii) mailed notice to the voter as required by Section 20A-2-306;
 - (iii) (A) received no response from the voter; or
(B) not received information that confirms the voter's residence; and
 - (iv) the voter has failed to vote or appear to vote in an election during the period beginning on the date of the notice described in Section 20A-2-306 and ending on the day after the date of the second regular general election occurring after the date of the notice;
 - (d) the voter requests, in writing, that the voter's name be removed from the official register;
 - (e)¹¹ the county clerk receives a returned voter identification card, determines that there was no clerical error causing the card to be returned, and has no further information to contact the voter;
 - (f) the county clerk receives notice that a voter has been convicted of any felony or a misdemeanor for an offense under this title and the voter's right to vote has not been restored as provided in Section 20A-2-101.3 or 20A-2-101.5; or
 - (g) the county clerk receives notice that a voter has registered to vote in another state after the day on which the voter registered to vote in this state.

....

11 Effective DATE, YEAR, Subsection 20A-2-305(2)(e) was deleted from the statute. However, it is the 2015 and 2016 versions of this statute that are pertinent to this appeal.

6. Where a change of residence occurs, Utah Code Ann. §20A-2-306 provides for names to be removed or to not be removed from the official voter register, as follows in pertinent part:

- (1) A county clerk may not remove a voter's name from the official register on the grounds that the voter has changed residence unless the voter:
 - (a) confirms in writing that the voter has changed residence to a place outside the county; or
 - (b) (i) has not voted in an election during the period beginning on the date of the notice required by Subsection (3), and ending on the day after the date of the second regular general election occurring after the date of the notice; and
 - (ii) has failed to respond to the notice required by Subsection (3).
- (2) (a) When a county clerk obtains information that a voter's address has changed and it appears that the voter still resides within the same county, the county clerk shall:
 - (i) change the official register to show the voter's new address; and
 - (ii) send to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.
- (b) When a county clerk obtains information that a voter's address has changed and it appears that the voter now resides in a different county, the county clerk shall verify the changed residence by sending to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.
- (3) Each county clerk shall use substantially the following form to notify voters whose addresses have changed: "VOTER REGISTRATION NOTICE
We have been notified that your residence has changed. Please read, complete, and return this form so that we can update our voter registration records. What is your current street address?"

Street	City	County	State	Zip
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If you have not changed your residence or have moved but stayed within the same county, you must complete and return this form to the county clerk so that it is received by the county clerk no later than 30 days before the date of the election. If you fail to return this form within that time:

- you may be required to show evidence of your address to the poll worker before being allowed to vote in either of the next two regular general elections; or
- if you fail to vote at least once from the date this notice was mailed until the passing of two regular general elections, you will no longer be registered to vote. If you have changed your residence and have moved to a different county in Utah, you may register to vote by contacting the county clerk in your county.

Signature of Voter"

....

- (4) (a) Except as provided in Subsection (4)(b), the county clerk may not remove the names of any voters from the official register during the 90 days before a regular primary election and the 90 days before a regular general election.
- (b) The county clerk may remove the names of voters from the official register during the 90 days before a regular primary election and the 90 days before a regular general election if:

- (i) the voter requests, in writing, that the voter's name be removed; or
- (ii) the voter has died.
- (c) (i) After a county clerk mails a notice as required in this section, the clerk may list that voter as inactive.
- (ii) An inactive voter shall be allowed to vote, sign petitions, and have all other privileges of a registered voter.
- (iii) A county is not required to send routine mailings to inactive voters and is not required to count inactive voters when dividing precincts and preparing supplies.

7. For the instant matter, UCA §59-1-1417(1) (2020) 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 are the periods of 2015 and 2016 that the taxpayers are Utah resident individuals. The Division contends that both taxpayers were Utah resident individuals for all of 2015 and from DATE, 2016 to DATE, 2016. The taxpayers concede that TAXPAYER-2 was a Utah resident individual for all of 2015 and from DATE, 2016 to DATE, 2016, but contend that TAXPAYER-1 was not a Utah resident individual for any portion of 2015 and 2016. For the 2015 and 2016 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 assert that the taxpayers were Utah resident individuals for any portion of 2015 or 2016 under the 183 day test. Instead, the Division asserts that the taxpayers are Utah resident individuals for all of 2015 and from DATE, 2016 to DATE, 2016 under the domicile test. As a result, the Commission will apply the facts to the domicile law in effect for the 2015 and 2016 tax years to determine whether both taxpayers are considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016 (as the Division contends); or whether TAXPAYER-2 is considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016, and TAXPAYER-1 is not considered to be domiciled in Utah for any portion of 2015 or 2016 (as the taxpayers contend).

I. Additional Facts.

The taxpayers were married in 1988, and they have not since been legally separated or divorced. In 1990, the taxpayers purchased their Utah home, where they raised their two children. In 2015 and 2016, the taxpayers' older child (who turned 23 years of age during 2015), was living on his own in Utah. The taxpayers did not claim their older child as a dependent on either of their 2015 and 2016 federal income tax returns. In 2015 and 2016, the taxpayers' younger child (who turned 21 years of age during 2015), lived in CITY-2, Utah, where he was enrolled as a resident student at UNIVERSITY. The taxpayers claimed their younger child as a dependent on both of their 2015 and 2016 federal returns (he was the only dependent the taxpayers claimed on these returns). Neither of the taxpayers attended an institution of higher education during 2015 or 2016.

The taxpayers received the residential exemption on their Utah home for the 2015 tax year and for the DATE, 2016 to DATE, 2016 portion of 2016 that they owned it. No one other than TAXPAYER-2 lived in the taxpayers' Utah home during 2015 and the portion of 2016 that they owned it. The taxpayers explained that when TAXPAYER-1 accepted a job in and moved to STATE-1 in MONTH 2014, he intended for his move to STATE-1 to be permanent and that they intended for TAXPAYER-2 to also move to STATE-1 as

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quickly as possible. However, when they consulted a real estate broker about listing their home for sale, the broker indicated that the taxpayers would need to renovate the home in order to reap any profit from the sale. The taxpayers explained that because their Utah home was their main asset, they decided to take their broker's advice and renovate the home. The taxpayers further explained that because they did not have the money to renovate the home, they took out a loan and decided that TAXPAYER-2 would continue to live in the Utah home and act as the general contractor for the remodeling project.

On or around DATE, 2016, the taxpayers moved most of their furniture to STATE-1. Afterwards, TAXPAYER-2 lived in the Utah home with minimal furnishings until DATE, 2016, when she, too, moved to STATE-1. Because the remodeling of the Utah home was not entirely finished when TAXPAYER-2 moved to STATE-1, the taxpayers' real estate broker oversaw the few items that remained to be finished (such as hanging the doors, etc.). The remaining few remodeling items were finished on DATE, 2016, and the Utah home was listed for sale on DATE, 2016. The Utah home quickly sold for \$\$\$\$\$, and the closing took place on DATE, 2016.

The taxpayers' Utah home was a split-level home with approximately #####-square feet of space, four bedrooms, two baths, and a two-car garage. During 2015 and 2016, TAXPAYER-1 rented an apartment in STATE-1, which had two bedrooms, two baths, and no garage. During 2015, TAXPAYER-2 would occasionally visit STATE-1 so that the taxpayers could look for a home there. The taxpayers, however, have never purchased a home in STATE-1, but have continued to rent apartments and/or townhouses since TAXPAYER-2 moved to STATE-1 (where both taxpayers still live).

Between MONTH 2014 and the DATE, 2016 date that TAXPAYER-2 moved to STATE-1, TAXPAYER-1 returned to Utah for no more than a total of 14 days. Since TAXPAYER-2 moved to STATE-1, the taxpayers have returned to Utah on two occasions, once in 2017 for four days and once in 2019 for four days.

For all of 2015 and from DATE, 2016 to DATE, 2016, the taxpayers owned two motor vehicles, one that TAXPAYER-1 drove in STATE-1 and one that TAXPAYER-2 drove in Utah. Both of these vehicles were registered in Utah during 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016. TAXPAYER-2 sold the vehicle she drove when she moved to STATE-1. As a result, for DATE, 2016 to DATE, 2016, the taxpayers owned only one vehicle, which was registered in Utah. The taxpayers kept this vehicle registered in Utah until they sold it in 2017, at which time they bought another vehicle that they registered in STATE-1.

During 2015 and 2016, neither taxpayer was a member of a church or a club or other similar organization, with one exception. During 2015 and 2016, TAXPAYER-1 was a member of a health information systems club in STATE-1 (which was associated with TAXPAYER-1's field of work). During 2015 and the DATE, 2016 to DATE, 2016 portion of 2016 that TAXPAYER-2 lived in Utah, the taxpayers received mail at both a Utah address and a STATE-1 address. During the DATE, 2016 to DATE, 2016 portion of 2016 that both taxpayers lived in STATE-1, the taxpayers received mail only at a STATE-1 address.

In August 2015 (when TAXPAYER-2 was the only one of the taxpayers who was living in Utah), the taxpayers filed their 2014 federal and Utah returns using a Utah address. In MONTH 2016 (when both taxpayers were living in STATE-1), the taxpayers filed their 2015 federal and Utah returns using a STATE-1 address. In MONTH 2017 (when both taxpayers were living in STATE-1), the taxpayers filed their 2016 federal and Utah returns using a STATE-1 address. The taxpayers did not declare Utah as their "tax home" on either of their 2015 or 2016 federal income tax returns or on a subsequent year's federal income tax return.

TAXPAYER-1 explained that because his Utah driver's license was still valid when he moved to STATE-1 in MONTH 2014, he was not motivated to obtain a STATE-1 driver's license. Instead, TAXPAYER-1 obtained a STATE-1 identification card ("ID card") on DATE, 2014, at which time he also

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registered to vote in STATE-1. Several years later, TAXPAYER-1 tried to obtain a STATE-1 driver's license around the date in MONTH 2017 that his Utah driver's license was expiring, but could not because he did not have a copy of his birth certificate (which he proffered was required to obtain a STATE-1 driver's license). As a result, TAXPAYER-1 renewed his Utah driver's license remotely from STATE-1 in MONTH 2017. After obtaining a copy of his birth certificate, TAXPAYER-1 obtain a STATE-1 driver's license in MONTH 2018.

On or around DATE, 2016 (about one month after moving to STATE-1), TAXPAYER-2 obtained a STATE-1 ID card and registered to vote in STATE-1. However, she retained her Utah driver's license and did not obtain a STATE-1 driver's license until April 2017.

The taxpayers first registered to vote in Utah around 1990. TAXPAYER-1 last voted in Utah in MONTH 2012, while TAXPAYER-2 last voted in Utah in MONTH 2008. The Division proffered evidence to show actions taken by the COUNTY clerk's office ("clerk's office") in regards to each of the taxpayers' Utah voter registration since registering in 1990. For TAXPAYER-1, this evidence shows that on DATE, 2016, the clerk's office took an action described as "changed status from active to inactive." Subsequently, on DATE, 2019, the clerk's office took another action described as "made removable and placed in state holding area due to inactivity."

To determine what these actions mean, the Division has previously contacted the Utah Lieutenant Governor's office, which is responsible for elections in Utah. Based on this information, the Division has proffered in prior appeals involving similar voter registration issues: 1) that when a Utah registered voter has little voting activity or when a Utah clerk receives information that a Utah registered voter may have moved, the Utah clerk generally mails the voter a confirmation card on which the clerk informs the voter that records indicate that the voter may have moved and on which the clerk asks for a new address; 2) that if the voter does not respond to the confirmation card, the voter is classified as an "inactive voter;" 3) that an "inactive voter" is

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still considered to be registered to vote in Utah and can vote if the voter goes to the polls (an “inactive voter,” however, will not receive mailings such as voter identification cards and mail-in ballots); and 4) that if an “inactive voter” does not vote within the next four years, the clerk removes the voter from the Utah voter registration rolls (which is the action described as “made removable and placed in state holding area due to inactivity”).¹² The Division indicated that this information is also pertinent to the instant appeal.

The taxpayers have not refuted any of the information that the Division has provided in regards to Utah voter registration.¹³ As a result, it appears that TAXPAYER-1 was registered to vote in Utah for all of 2015 and 2016 (including not only the DATE, 2015 to DATE, 2016 period during which he was in an “active” status, but also the DATE, 2016 to DATE, 2016 period that he was in an “inactive” status). For these reasons, the Commission finds that TAXPAYER-1 was registered to vote in both Utah and STATE-1 for all of 2015 and 2016.

As to TAXPAYER-2, the Division also proffered evidence to show actions taken by the clerk’s office in regards to her Utah voter registration since registering in 1990. On December 16, 2013, the clerk’s office took an action described as “change from active to inactive due to inactivity.” Subsequently, on DATE, 2016, the clerk’s office took another action described as “made removable and placed in state holding area due to inactivity.” Again, the taxpayers have not refuted any of the information that the Division has provided in regards to Utah voter registration. As a result, it appears that TAXPAYER-2 was registered to vote in Utah for

12 See, e.g., *USTC Appeal No. 18-793* (Initial Hearing Order Feb. 22, 2019). This and other selected Commission decisions can be reviewed in a redacted format on the Commission’s website at <https://tax.utah.gov/commission-office/decisions>.

13 Furthermore, it appears that the Division’s explanation reflects, at least in substantial part, Subsection 20A-2-305(2)(c), which provides that a Utah county clerk shall remove a voter’s name from the official Utah voter register if: 1) the county clerk obtains evidence that the voter's residence has changed; 2) the county clerk mails notice to the voter as required by Section 20A-2-306; 3) the county clerk receives no response from the voter or does not receive information that confirms the voter's residence; and 4) the voter has failed to vote or appear to vote in an election during the period beginning on the date of the notice described in Section 20A-2-306 and ending on the day after the date of the second regular general election occurring after the date of the notice.

all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016 (periods during which she was in an “inactive” status), but that she was not registered to vote in Utah from DATE, 2016 to DATE, 2016. For these reasons, the Commission finds that TAXPAYER-2 was registered to vote in Utah during all of 2015 and the DATE, 2016 to DATE, 2016 portion of 2016; that she was not registered to vote in STATE-1 from DATE, 2015 to DATE, 2016; and that she was registered to vote in STATE-1 from DATE, 2016 to DATE, 2016.

II. Domicile Test for the 2015 and 2016 Tax Years.

UCA §59-10-103(1)(q)(i)(A) defines a “resident individual” as “an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state[.]” For the 2015 and 2016 tax years at issue, 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)).¹⁴

A. Subsection 59-10-136(5)(b). For a married individual, it is often necessary to determine whether that individual is considered to have a “spouse” for purposes of Section 59-10-136. Subsection 59-10-136(5)(b) provides that a married individual is considered to have a spouse for purposes of Section 59-10-136 unless the individual is legally separated or divorced from the individual’s spouse or if “the individual and the individual’s spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.” All parties agree that the taxpayers were married during 2015 and 2016 and that they were not legally separated or divorced during these years. In addition, the taxpayers claimed a filing status of married filing jointly for purposes of filing their 2015 and 2016 federal returns.

¹⁴ 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.

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Accordingly, for all of 2015 and 2016, each of the taxpayers is considered to have a spouse for purposes of Section 59-10-136.

B. Subsection 59-10-136(4). Subsection 59-10-136(4)(a) provides an exception from Utah domicile if an individual and the individual's spouse are absent from Utah for at least 761 consecutive days, and if a number of other listed conditions are met for this 761-day period. Although TAXPAYER-1 left Utah in 2014, TAXPAYER-2 did not leave Utah until DATE, 2016. As a result, the earliest that both of the taxpayers are considered to be absent from Utah is DATE, 2016.¹⁵ Beginning on DATE, 2016, both taxpayers have been absent from Utah for at least 761 consecutive days.

However, the taxpayers would not meet all of the other listed conditions for a 761-day period until DATE, 2016, the date they sold their Utah home. The Subsection 59-10-136(4)(a)(ii)(D) condition requires that neither the individual nor the individual's spouse claim a Utah residential exemption for that individual's or individual's spouse's primary residence. For reasons explained below, the taxpayers do not meet this condition for a 761-day or more period until the DATE, 2016 date that they sold the Utah home.¹⁶

For the Subsection 59-10-136(4)(a)(ii)(D) condition *not* to be met in regards to the Utah home, two elements must exist. First, one or both of the taxpayers must have claimed the residential exemption on the Utah home. Second, the Utah home on which one or both of the taxpayers claimed the residential exemption must be considered the "primary residence" of one or both of the taxpayers in accordance with the guidance

¹⁵ The Commission recognizes that TAXPAYER-1 moved away from Utah in MONTH, 2014. However, for purposes of Subsection 59-10-136(4)(a), Subsection 59-10-136(4)(c) provides that an absence from Utah does not begin until the later of the date that an individual leaves Utah or the individual's spouse leaves Utah. Because both taxpayers did not leave Utah until DATE, 2016, the period of absence from Utah (for purposes of the Subsection 59-10-136(4)(a) exception from domicile) does not begin for either taxpayer until DATE, 2016.

¹⁶ Subsection 59-10-136(6) provides that claiming a residential exemption may not be considered in determining income tax domicile if the home for which the exemption is claimed is the primary residence of a tenant. The taxpayers, however, admit that TAXPAYER-1 lived in the Utah home for all of 2015 and from DATE, 2016 to MONTH, 2016; and that no one lived in the Utah home during the remaining DATE, 2016 to DATE, 2016 portion of 2016 that they owned the home.

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provided in Subsection 59-2-103.5(4). If both of these elements exist while the taxpayers owned the Utah home, the Subsection 59-10-136(4)(a)(ii)(D) condition will not have been met for a 761-day period that includes any portion of this period they owned the home (even if one or both taxpayers were living in STATE-1).

As to the first element, because the taxpayers received the residential exemption on the Utah home for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016 that they owned the home, they are considered to have claimed the residential exemption on the home for these periods. Subsection 59-2-103(2) generally provides that a Utah residential property will receive a %%% residential exemption, while Subsection 59-2-103.5(1) provides that a county may, at its option, require a property owner to file an application before the property receives the exemption. As a result, when the residential exemption was created by the Utah Legislature, this enactment generally added a claim for the exemption to the bundle of rights acquired with the purchase of residential property, unless the relevant county adds the second step of requiring formal application in order to receive the benefit of the exemption. The claim persists until the property is relinquished through the sale of the property or until the residential exemption is removed from the property (either by action of the county or the property owner).

Therefore, simply owning a residential property in a Utah county that does not require an application (which includes most Utah counties) generally asserts an enduring claim to the residential exemption. Furthermore, in those Utah counties that require an application, receiving the residential exemption after filing the application also constitutes a claim to the exemption.¹⁷ No evidence was proffered to suggest that COUNTY requires an application before it applies the residential exemption to a residential property or, if it

¹⁷ On the other hand, in a county that requires an application, receiving the residential exemption without filing an application does not constitute a claim to the exemption. Under such circumstances, the first element would not exist, and the Subsection 59-10-136(4)(a)(ii)(D) condition would be met. In addition, the first element would not exist and the Subsection 59-10-136(4)(a)(ii)(D) condition would be met for an individual if the property receiving the residential exemption was in the name of the individual but had been sold under contract to someone else. *See, e.g., USTC Appeal 16-1368* (Initial Hearing Order Apr. 18, 2018).

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does, that the County applied the residential exemption to the Utah home without the taxpayers' having filed an application to receive the exemption. As a result, because the taxpayers received the residential exemption on their Utah home for all of 2015 and from DATE, 2016 to DATE, 2016, the Commission finds that the taxpayers claimed the residential exemption on this home for these periods. Accordingly, the first element for the Subsection 59-10-136(4)(a)(ii)(D) condition not to be met exists for all of 2015 and from DATE, 2016 to DATE, 2016.

As to the second element, for purposes of Section 59-10-136, the Utah home is considered to be the taxpayers' "primary residence" for all of 2015 and for the DATE, 2016 to DATE, 2016 period they owned it, regardless of whether one or both of the taxpayers were living in STATE-1. When Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a Utah property on which an individual or an individual's spouse claims the residential exemption is considered their "primary residence" unless one or both of the property owners take affirmative steps to: 1) file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence; *and* 2) declare on the property owner's Utah individual income tax return for the taxable year for which the property owner no longer qualifies to receive the residential exemption, that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence.

The taxpayers never filed a written statement to notify COUNTY that their Utah home did not qualify for the residential exemption for any of these years. In addition, the taxpayers never declared on page 3 of a Utah return that they no longer qualified to receive the residential exemption for their Utah home. Accordingly, pursuant to Subsection 59-2-103.5(4), the taxpayers' Utah home is considered to be their "primary residence" during all of 2015 and for the DATE, 2016 to DATE, 2016 period they owned the home. Because the taxpayers meet both of these elements for all of 2015 and from DATE, 2016 to DATE, 2016, they

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have not met the Subsection 59-10-136(4)(a)(ii)(D) condition for any portion of these periods.¹⁸ As a result, the Subsection 59-10-136(4)(a) domicile exception would not apply to either taxpayer for any portion of 2015 or the DATE, 2016 to DATE, 2016 portion of 2016.

However, all Subsection 59-10-136(4)(a) conditions are met for a 761-day period beginning on DATE, 2016 (the date they sold their Utah home). As a result, under Subsection 59-10-136(4), neither taxpayer is considered to be domiciled in Utah from DATE, 2016 to DATE, 2016. However, because the taxpayers do not meet all of the Subsection 59-10-136(4) conditions for a 761-day period that includes any portion of 2015 or the DATE, 2016 to DATE, 2016 portion of 2016, the Commission must analyze whether the taxpayers *are* considered to have domicile in Utah for these periods 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.

C. 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 applies to the taxpayers for any portion of 2015 or the DATE, 2016 to DATE, 2016 portion of 2016.¹⁹ Accordingly, under Subsection 59-10-136(1), the taxpayers would not be considered to be domiciled in Utah for any portion of the DATE, 2015 to DATE, 2016 period that remains at issue.

18 At the hearing, the taxpayers argue that they can “rebut” their claiming the residential exemption on their Utah home. The residential exemption *condition* found in Subsection 59-10-136(4)(a)(ii)(D), however, is not a rebuttable presumption that can be rebutted (unlike the residential exemption *presumption* found in Subsection 59-10-136(2)(a), which can be rebutted and which will be discussed in more detail later in the decision).

19 The Commission recognizes that on their 2015 and 2016 federal returns, the taxpayers claimed a dependent who was enrolled as a resident student at a Utah institution of higher education during the DATE, 2015 to DATE, 2016 portion of the audit period that remains at issue. However, this is not a factor that is

D. 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 reasons already discussed in regards to Subsection 59-10-136(4), the two elements necessary for this presumption to arise exist. First, the taxpayers claimed the residential exemption on the Utah home for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016 that they owned the home. Second, the Utah home is considered to be the taxpayers' primary residence for all of 2015 and from DATE, 2016 to DATE, 2016. Accordingly, under Subsection 59-10-136(2)(a), both taxpayers will be considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016, unless they are able to rebut the presumption for these periods.²⁰

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 actions give rise to this presumption *is not* considered to have domicile in Utah.²¹ 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, consistent with the structure and language of Section 59-10-136, to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

considered under Subsection 59-10-136(1).

20 The Commission recognizes that TAXPAYER-1 did not live in the Utah home during 2015 or 2016. Regardless, where the presumption has arisen for both taxpayers, the taxpayers cannot rebut the presumption for only one of the taxpayers. Either the presumption is rebutted for both taxpayers, or the presumption is not rebutted for both taxpayers. This conclusion is supported by Subsection 59-10-136(5)(a), which provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah.

21 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).

The taxpayers contend that they have rebutted the Subsection 59-10-136(2)(a) by showing that they had the requisite intent to make STATE-1 their permanent home once TAXPAYER-1 moved there in 2014; and that TAXPAYER-2 remained in Utah through DATE, 2016, only to ready the Utah home for sale. The taxpayers' argument appears to rely on intent and weighing an individual's contacts with various states when determining whether they are considered to be domiciled in Utah, as was done under Rule 52 (prior to Section 59-10-136 becoming effective for tax year 2012) and is done under Subsection 59-10-136(3)(b) if an individual is not considered to be domiciled in Utah under Subsection 59-10-136(1) or (2).

The Commission has previously found that an individual has not rebutted a Subsection 59-10-136(2) presumption because he or she would not be considered to be domiciled in Utah under Rule 52, the property tax rule used to determine income tax domicile for tax years prior to 2012. It is arguable that using the "old" income tax domicile criteria found in the pre-2012 version of Rule 2 and/or in Rule 52 to determine an individual's income tax domicile for years when Section 59-10-136 is in effect would be giving the Legislature's "new" law little or no effect, which the Commission declines to do.²²

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

To allow an individual to rebut a Subsection 59-10-136(2) presumption by showing that they could be considered to be domiciled outside of Utah using the 12 domicile factors listed in Subsection 59-10-136(3)(b) (or using domicile factors found in Rule 2 and/or Rule 52 or other sources) would clearly frustrate the plain meaning of Section 59-10-136. The Subsection 59-10-136(2) presumptions involve three specific factors: 1)

22 See, e.g., *USTC Appeal No. 15-1857* (Initial Hearing Order Aug. 26, 2016).

23 See, e.g., *USTC Appeal No. 15-1857*.

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claiming the residential exemption on a Utah residential property (the Subsection 59-10-136(2)(a) presumption); 2) being registered to vote in Utah (the Subsection 59-10-136(2)(b) presumption); and 3) asserting Utah residency on a Utah income tax return (the Subsection 59-10-136(2)(c) presumption).

Prior to Section 59-10-136 becoming effective for tax year 2012, the three factors that the Utah Legislature described and set forth as rebuttable presumptions in Subsection 59-10-136(2) (as well as the two education factors described in Subsection 59-10-136(1)) had been among the numerous and non-exhaustive list of factors that the Commission had used to determine income tax domicile for tax years prior to 2012 (as set forth in Rule 2 and/or Rule 52).²⁴ In Section 59-10-136, however, the Utah Legislature established a hierarchy of specific factors described in Subsections 59-10-136(1) and (2) to establish income tax domicile, with the education factors creating an absolute indication of domicile and the three Subsection 59-10-136(2) factors creating rebuttable presumptions of domicile. Thus, each of the factors described in Subsections 59-10-136(1) and (2) were given greater import than they had received in establishing income tax domicile for years prior to 2012 (when each of these factors was merely one of the many factors with which domicile was determined).²⁵

As a result, it is clear that the Legislature intended that an individual meeting one of the factors described in Subsection 59-10-136(1) would, with limited exception, be considered to be domiciled in Utah; and that an individual meeting one of the factors described and set forth as a rebuttable presumption in Subsection 59-10-136(2) might be considered to be domiciled in Utah, regardless of whether that individual would otherwise be deemed to be domiciled somewhere other than Utah under a more traditional domicile test

24 Prior to tax year 2012, Rule 2(1)(b) had provided that for purposes of determining income tax domicile, “an individual’s intent will not be determined by the individual’s statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation” and that Rule 52 “provides a *non-exhaustive* list of factors or objective evidence determinative of domicile” (emphasis added).

25 Almost all of the factors that were given greater import in Subsections 59-10-136(1) and (2) are based on an individual or individual’s spouse availing themselves of certain benefits of being a resident of Utah, such as having their dependent attend a Utah public school, being enrolled as a resident student at a Utah institution of higher education, receiving a property tax benefit in the form of a residential exemption, or being registered to vote in Utah.

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(such as the one found in Rule 2 and/or Rule 52). To find that a Subsection 59-10-136(2) presumption can be rebutted by showing that the individual would not be considered to be domiciled under some more traditional type of domicile test does not consider the Subsection 59-10-136(2) presumptions in concert with the structure and language of Section 59-10-136 as a whole and would frustrate the plain meaning of Section 59-10-136.²⁶

Moreover, relying on the limited and exhaustive list of 12 factors described in Subsection 59-10-136(3)(b) to rebut a Subsection 59-10-136(2) presumption would: 1) be contrary to the express language of Subsection 59-10-136(3)(a), which provides that the Subsection 59-10-136(3)(b) factors should be used to determine domicile “if the requirements of Subsection (1) or (2) are not met[;]” and 2) be contrary to the plain meaning of Section 59-10-136 as a whole by allowing the hierarchy of factors set forth in Subsection 59-10-136(2) to be rebutted by satisfying a list of factors set forth in Subsection 59-10-136(3) that are lower in the hierarchy of domicile factors established by the Legislature.

As a result, when a Subsection 59-10-136(2) presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not.²⁷ For example, where the Subsection 59-10-136(2)(a) presumption has arisen in regards to claiming the residential exemption, the Commission has found that this presumption can be rebutted by showing that the property owner asked the county to remove the exemption, and the county failed to do so.²⁸ In the instant case, the taxpayers never asked COUNTY to remove the residential exemption from the Utah home.

26 For example, it is arguable that an individual whose only contact with Utah was claiming the residential exemption on a vacation home located in Utah could continue to do so without any Utah income tax consequences if the individual showed that they would be considered to have domicile outside of Utah based on some sort of traditional income tax domicile criteria.

27 This conclusion is consistent with prior Commission decisions. *See, e.g., USTC Appeal No. 18-1841* (Initial Hearing Order Jan. 13, 2020).

28 *See, e.g., USTC Appeal No. 17-1589* (Initial Hearing Order Aug. 8, 2018).

The Commission has also found that the Subsection 59-10-136(2)(a) presumption was rebutted where an individual whose home was receiving the residential exemption disclosed on their Utah income tax return that the home no longer qualified for the exemption (even if the individual did not contact the county directly).²⁹ The taxpayers, however, did not declare on any of the Utah returns they filed that they were Utah residential property owners who no longer qualified to receive the residential exemption from property taxation for their primary residence.

The Commission has also found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was listed for sale, but only if the home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for sale).³⁰ The taxpayers listed their Utah home for sale on DATE, 2016. Because the home was listed for sale on DATE, 2016 and because no one was residing in the home from DATE, 2016 to DATE, 2016, reasonable cause exists to rebut the Subsection 59-10-136(2)(a) presumption for the DATE, 2016 to DATE, 2016 portion of the period for which this presumption has arisen. However, further analysis is needed to determine whether reasonable cause exists to rebut the presumption for any portion of the period for which the presumption has arisen (i.e., for 2015 and the DATE, 2016 to DATE, 2016 portion of 2016).

In addition, the Commission has found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was listed for rent, but only if the home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for rent) and if the home would continue to qualify for the residential exemption by being rented to tenants who would use the home as the tenants' primary residence (i.e., not being rented to tenants who would not use the home as their primary residence,

29 *See, e.g., USTC Appeal No. 17-812 (Initial Hearing Order Mar. 13, 2018).*

30 *See, e.g., USTC Appeal No. 15-1332 (Initial Hearing Order Jun. 27, 2016).*

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such as a short-term rental).³¹ The taxpayers, however, did not list the Utah home for rent during 2015 or 2016, and TAXPAYER-2 continued to live in the home for all of 2015 and from DATE, 2016 to DATE, 2016.

The Commission has also found that the Subsection 59-10-136(2)(a) presumption would be rebutted for that period that a home was under its initial construction (not a remodel) and until it received a certificate of occupancy, if the home would be used as a primary residence upon its completion.³² However, the Commission has not found that remodeling a home is reasonable cause to rebut the Subsection 59-10-136(2)(a) presumption, even if the home is empty while the remodeling is occurring.

On the other hand, the Commission has 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 they were receiving the residential exemption.³³ The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. The taxpayers, however, have not proffered sufficient arguments or evidence to rebut the Subsection 59-10-136(2)(a) presumption for the DATE, 2015 to DATE, 2016 period that remains at issue. Accordingly, under Subsection 59-10-136(2)(a), both taxpayers would *ordinarily* be considered to be domiciled in Utah for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016.

However, for purposes of this Initial Hearing Order, the Commission will grant the Division's request and not find that the taxpayers are Utah resident individuals for any portion of 2016 subsequent to DATE, 2016. As a result, under Subsection 59-10-136(2)(a), both taxpayers are considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016. Because the Commission has found that both taxpayers are considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016 (the periods for which the Division determined that both taxpayers were Utah resident individuals in its assessments), the

31 See, e.g., *USTC Appeal No. 17-758* (Initial Hearing Order Jan. 26, 2018).

32 See, e.g., *USTC Appeal No. 17-1589*.

33 See, e.g., *USTC Appeal No. 15-1582*.

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Commission need not analyze the remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(b), (2)(c), and (3)) to determine whether the taxpayers are considered to be domiciled in Utah for these periods. However, it may prove useful to make some observations about these remaining subsections.

E. Subsection 59-10-136(2)(b). This subsection provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah. For reasons discussed earlier, the Commission has found that TAXPAYER-1 was registered to vote in Utah for all of 2015 and 2016 and TAXPAYER-2 was registered to vote in Utah for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016. Accordingly, under Subsection 59-10-136(2)(b), both taxpayers are considered to be domiciled in Utah for all of the DATE, 2015 to DATE, 2016 portion of the audit period that remains at issue (i.e., for all of 2015 and 2016 with the exception of the DATE, 2016 to DATE, 2016 period that the taxpayers are *not* considered to be domiciled in Utah under Subsection 59-10-136(4)).

The taxpayers suggest that they have rebutted the Subsection 59-10-136(2)(b) presumption for all of 2015 and 2016 because they had the intention to move to STATE-1 permanently once TAXPAYER-1 moved there in 2014. For reasons explained earlier in regards to the Subsection 59-10-136(2)(a) presumption, an individual also cannot rebut the Subsection 59-10-136(2)(b) 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) or because he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). Again, when a Subsection 59-10-136(2) presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not.

For example, if an individual is registered to vote in Utah, the Commission has found that the Subsection 59-10-136(2)(b) presumption can be rebutted by showing that the individual registered to vote in the state to which they moved relatively soon after moving there.³⁴ TAXPAYER-1 registered to vote in STATE-1 in December 2014 (which is relatively soon after he moved there). However, where the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers, this presumption, too, cannot be rebutted for only one of the taxpayers. Both taxpayers were not registered to vote in STATE-1 until TAXPAYER-2 registered to vote in STATE-1 on DATE, 2016. For this reason and because TAXPAYER-2 registered to vote in STATE-1 relatively soon after moving there on DATE, 2016, the Commission finds that the taxpayers have rebutted the Subsection 59-10-136(2)(b) presumption for the DATE, 2016 to DATE, 2016 portion of the audit period that is still at issue and for which this presumption has arisen. However, the taxpayers have not rebutted the Subsection 59-10-136(2)(b) presumption for the DATE, 2015 to DATE, 2016 period for which the presumption has arisen and during which TAXPAYER-2 lived in Utah.

In addition, the Commission has found that the Subsection 59-10-136(2)(b) presumption can be rebutted if the individual who is registered to vote in Utah requested for their name to be removed from the Utah voter registry and the local county clerk or other official who received the request did not remove the individual's name from the registry.³⁵ No evidence was provided to show that the taxpayers asked for their names to be removed from the Utah voter registry prior to or during the DATE, 2015 to DATE, 2016 period for which the Subsection 59-10-136(2)(b) presumption has arisen but has not already been rebutted.

Furthermore, the Commission has found that the Subsection 59-10-136(2)(b) presumption can be rebutted from the date that Utah voting laws provide for an individual's name to be removed from the Utah voter registry and a local county clerk does not immediately remove their name from the registry.³⁶ The

34 See, e.g., *USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016).

35 See, e.g., *USTC Appeal No. 18-793* (Initial Hearing Order Feb. 22, 2019).

36 See, e.g., *USTC Appeal No. 18-539* (Initial Hearing Order Apr. 30, 2019).

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taxpayers, however, have not shown that Utah voting laws provided for their names to be removed from the Utah voter registry at any time prior to or during the DATE, 2015 to DATE, 2016 period for which the Subsection 59-10-136(2)(b) presumption has arisen but has not already been rebutted.

The Commission has also found that it might find that the Subsection 59-10-136(2)(b) presumption is rebutted if an individual moves from Utah to a state that does not require voter registration prior to voting and if the individual eventually votes in that state.³⁷ The taxpayers, however, have not shown that STATE-1 allows an individual who moves there to vote in a STATE-1 election without having registered to vote in STATE-1. Furthermore, TAXPAYER-2 did not move to STATE-1 until DATE, 2016.

On the other hand, the Commission has found that an individual cannot rebut the Subsection 59-10-136(2)(b) presumption by showing that they did not vote in Utah during the period at issue. The Commission has reached this decision, at least in part, because the Utah Legislature elected to use voting registration, not actual voting, as the criterion that could trigger domicile under Subsection 59-10-136(2)(b).³⁸ As a result, even though neither of the taxpayers voted in Utah during 2015 or 2016, this is insufficient to rebut the Subsection 59-10-136(2)(b) presumption for the DATE, 2015 to DATE, 2016 period for which the Subsection 59-10-136(2)(b) presumption has arisen but has not already been rebutted.

The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(b) presumption. The taxpayers, however, have not proffered sufficient arguments or evidence to rebut the Subsection 59-10-136(2)(b) presumption for any portion of the DATE, 2015 to DATE, 2016 period for which the Subsection 59-10-136(2)(b) presumption has arisen for both of them but has not already been rebutted. In conclusion, under Subsection 59-10-136(2)(b), both taxpayers are also considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016. Because both taxpayers are considered to be domiciled in Utah from DATE, 2015 to DATE, 2016 not

37 See, e.g., *USTC Appeal No. 17-1552* (Initial Hearing Order Feb. 7, 2019).

38 See, e.g., *USTC Appeal No. 15-720*.

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only under Subsection 59-10-136(2)(a), but also under Subsection 59-10-136(2)(b), the Commission will make only cursory observations about the two remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(c) and (3)).

F. Subsection 59-10-136(2)(c). Under this subsection, there is a rebuttable presumption that an individual is considered to be domiciled in Utah if “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.” Accordingly, under Subsection 59-10-136(2)(c), both taxpayers would be considered to be domiciled in Utah for the DATE, 2015 to DATE, 2015 period they asserted Utah residency on their 2015 Utah return, unless they were able to rebut this presumption. However, under Subsection 59-10-136(2)(c), neither taxpayer would be considered to be domiciled in Utah for the DATE, 2015 to DATE, 2015 portion of 2015, or for any portion of 2016.

G. 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 59-10-136(3)(b). Subsection 59-10-136(3), however, is only applicable “if the requirements of Subsection (1) or (2) are not met[.]” Because the Commission has already found that both taxpayers would be considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016 (which are the periods the Division assessed both taxpayers as Utah resident individuals) under Subsection 59-10-136(2)(a) and Subsection 59-10-136(2)(b), Subsection 59-10-136(3) has no applicability to this case.³⁹

³⁹ At the hearing, the taxpayers argued that the Commission should consider the 12 factors of Subsection 59-10-136 to determine whether TAXPAYER-1 alone was domiciled in Utah in 2015 and 2016, as the Commission did in *USTC Appeal No. 16-1466* (Initial Hearing Order Jun. 6, 2018) to find that an unmarried individual was not domiciled in Utah for the 2012 tax year. In *Appeal No. 16-1466*, however, the Commission was determining the domicile of an individual who did not have a spouse for purposes of Section 59-10-136. Furthermore, the Commission used the 12 factors of Subsection 59-10-136(3) to determine the unmarried

H. Domicile Summary. For reasons discussed above, both taxpayers are considered to be domiciled in Utah for all of 2015 and from DATE, 2016 to DATE, 2016. Accordingly, pursuant to Subsection 59-10-103(1)(q)(i)(A), both taxpayers are Utah resident individuals for all of 2015 and from DATE, 2016 to DATE, 2016.

III. Other Arguments.

The taxpayers suggest that it is unfair that TAXPAYER-1 would be considered to be a Utah resident individual for periods after he had moved permanently to STATE-1. The taxpayers may be suggesting Section 59-10-136, as written, results in bad tax policy in certain situations. While the Commission is tasked with the duty of implementing laws enacted by the Legislature, the Commission is not authorized to amend these laws to achieve what the taxpayers may consider to be a better tax policy. That is the role of the Legislature.

IV. Conclusion.

Based on the foregoing, the Commission should find that both taxpayers are Utah resident individuals for all of 2015 and sustain the Division's 2015 assessment in its entirety. In addition, the Commission should find that both taxpayers are Utah resident individuals from DATE, 2016 to DATE, 2016, and order the Division to revise the amount of 2016 income that it allocated to Utah in accordance with this finding.

Kerry R. Chapman
Administrative Law Judge

individual's domicile only after determining that the individual was not considered to be domiciled in Utah for 2012 under Subsection 59-10-136(1), (2)(a), (2)(b), and (2)(c). In the instant case, TAXPAYER-1 has a spouse for purposes of Section 59-10-136, and the Commission has found that both taxpayers are considered to be domiciled in Utah for all of 2015 and the DATE, 2016 to MONTH, 2016 portion of 2016 under Subsection 59-10-136(2)(a) and Subsection 59-10-136(2)(b). As a result, the Commission's decision and consideration of the 12 factors of Subsection 59-10-136(3) in *Appeal No. 16-1466* are not applicable to the taxpayers' circumstances in the instant case.

DECISION AND ORDER

Based on the foregoing, the Commission finds that both taxpayers are Utah resident individuals for all of 2015 and, thus, sustains the Division's 2015 assessment in its entirety. In addition, the Commission finds that both taxpayers are Utah resident individuals from DATE, 2016 to DATE, 2016, and orders the Division to revise the amount of 2016 income that it allocated to Utah in accordance with this finding.

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 _____, 2020.

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.