15-49
TAX TYPE: INCOME TAX
TAX YEARS: 2010, 2011, 2012 & 2013
DATE SIGNED: 10-27-2015
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 15-49 Account No. ##### Tax Type: Income Tax Years: 2010, 2011, 2012 & 2013 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge
Appearances:
For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Representative (by telephone)
TAXPAYER, Taxpayer (by telephone)
For Respondent: RESPONDENT-1, from Auditing Division
RESPONDENT-2, 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 22, 2015.

TAXPAYER ("Petitioner" or "taxpayer") is appealing Auditing Division's (the "Division") assessments of additional individual income tax for the 2010, 2011, 2012, and 2013 tax years. On December 26, 2014, the Division issued Notices of Deficiency and Audit Change for 2010, 2012, and 2013 and a Notice of Deficiency and Estimated Income Tax for 2011 ("Statutory Notices") to the taxpayer. In the Statutory Notices, the Division imposed additional tax, a 10% failure to timely file penalty (for 2011 only), a 10% failure to timely pay penalty (for 2011 only), and interest (calculated as of January 26, 2015),[1] as follows:

1 Interest continues to accrue until any tax liability is paid.

Year	Tax	Penalties	Interest	Total
2010	$$$$$	$$$$$	$$$$$	$$$$$
2011	$$$$$	$$$$$	$$$$$	$$$$$
2012	$$$$$	$$$$$	$$$$$	$$$$$
2013	$$$$$	$$$$$	$$$$$	$$$$$

For the 2010 tax year, the taxpayer filed a full-year Utah resident income tax return on which he reported federal adjusted gross income ("FAGI") of $$$$$ and $$$$$ of itemized deductions. The Internal Revenue Service ("IRS") subsequently increased the taxpayer's 2010 FAGI to $$$$$ and decreased his 2010 itemized deductions to $$$$$. The Division's 2010 assessment reflects these changes. For the 2010 tax year, the taxpayer now claims that he was not a Utah resident individual for any of 2010 and that he filed a full-year Utah resident return for this year by mistake. As a result, he asks the Commission to find that he was not a Utah resident individual for 2010, which he contends should negate any assessment imposed by the Division for this year. For these reasons, he asks the Commission to reverse the Division's 2010 assessment.

The taxpayer did not file a 2011 Utah return. In addition, he filed Utah nonresident returns for 2012 and 2013. For each of these three years, the Division has determined that the taxpayer was domiciled in Utah. Consequently, the Division has assessed the taxpayer as a full-year Utah resident individual in its assessments for 2011, 2012, and 2013. For all years at issue, the taxpayer contends that he was domiciled in STATE-1, not Utah. As a result, the taxpayer also asks the Commission to reverse the Division's 2011, 2012, and 2013 assessments.

APPLICABLE LAW

I. Definitions Involving "Income."

1. For all four years at issue, Utah Code Ann. §59-10-103 defines "adjusted gross income," "federal taxable income," and "'taxable income' or 'state taxable income,'" as follows:

> (1) As used in this chapter:
> (a) "Adjusted gross income":

(i) for a resident or nonresident individual, is as defined in Section 62, Internal Revenue Code; or

. . . .

(f) "Federal taxable income":

(i) for a resident or nonresident individual, means taxable income as defined by Section 63, Internal Revenue Code; or

. . . .

(w) "Taxable income" or "state taxable income":

(i) . . . for a resident individual, means the resident individual's adjusted gross income after making the:

(A) additions and subtractions required by Section 59-10-114; and

(B) adjustments required by Section 59-10-115;

. . . .

II. Taxation of a Resident Individual.

2. For all four tax years at issue, Utah Code Ann. §59-10-104(1) provides that "a tax is imposed on the state taxable income of a resident individual[.]"

3. For all four tax years at issue and for purposes of Utah income taxation, a "resident individual" is defined in UCA §59-10-103(1)(q), 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.

(ii) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and for purposes of Subsection (1)(q)(i)(B), the commission shall by rule define what constitutes spending a day of the taxable year in the state.

II. Domicile Law for the 2010 and 2011 Tax Years.

4. For the 2010 and 2011 tax years only, Utah Admin. Rule R865-9I-2 ("Rule 2") provides guidance concerning the determination of "domicile," as follows in pertinent part:[2]

2 Effective January 1, 2012, Utah law concerning "domicile" was substantively amended. The Rule 2 definition of "domicile" in effect for 2010 and 2011 was repealed beginning with tax year deleted for 2012,

A. Domicile.

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.

2. For purposes of establishing 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.

a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

b) Domicile applies equally to a permanent home within and without the United States.

3. A domicile, once established, is not lost until there is a concurrence of the following three elements:

a) a specific intent to abandon the former domicile;

b) the actual physical presence in a new domicile; and

c) the intent to remain in the new domicile permanently.

4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

. . . .

5. For the 2010 and 2011 tax years, Utah Admin. Rule R884-24P-52 ("Rule 52") sets forth a non-exhaustive list of factors or objective evidence that may be determinative of domicile, as follows:[3]

. . . .

(5) Factors or objective evidence determinative of domicile include:

(a) whether or not the individual voted in the place he claims to be domiciled;

(b) the length of any continuous residency in the location claimed as domicile;

(c) the nature and quality of the living accommodations that an individual has in the location claimed as domicile as opposed to any other location;

(d) the presence of family members in a given location;

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and new criteria concerning "domicile" were enacted in UCA §59-10-136 (which will be discussed later in this decision). As a result, the Rule 2 definition of domicile in effect for 2010 and 2011 will be used to determine the taxpayer's domicile during 2010 and 2011, but Section 59-10-136 will be used to determine his domicile during 2012 and 2013.

3 Rule 52 is referenced in the version of Rule 2 that was in effect for 2010 and 2011. As a result, Rule 52 is applicable when determining the taxpayer's 2010 and 2011 domicile, but not his 2012 and 2013 domicile.

(e) the place of residency of the individual's spouse or the state of any divorce of the individual and his spouse;
(f) the physical location of the individual's place of business or sources of income;
(g) the use of local bank facilities or foreign bank institutions;
(h) the location of registration of vehicles, boats, and RVs;
(i) membership in clubs, churches, and other social organizations;
(j) the addresses used by the individual on such things as:
(i) telephone listings;
(ii) mail;
(iii) state and federal tax returns;
(iv) listings in official government publications or other correspondence;
(v) driver's license;
(vi) voter registration; and
(vii) tax rolls;
(k) location of public schools attended by the individual or the individual's dependents;
(l) the nature and payment of taxes in other states;
(m) declarations of the individual:
(i) communicated to third parties;
(ii) contained in deeds;
(iii) contained in insurance policies;
(iv) contained in wills;
(v) contained in letters;
(vi) contained in registers;
(vii) contained in mortgages; and
(viii) contained in leases.
(n) the exercise of civil or political rights in a given location;
(o) any failure to obtain permits and licenses normally required of a resident;
(p) the purchase of a burial plot in a particular location;
(q) the acquisition of a new residence in a different location.

. . . .

III. Domicile Law for the 2012 and 2013 Tax Years.

6. Effective January 1, 2012 (and thus applicable to the 2012 and 2013 tax years at issue), Utah Code Ann. §59-10-136 provides guidance concerning the determination of "domicile," as follows:

(1) (a) An individual is considered to have domicile in this state if:
(i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
(ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.

(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.

IV. Waivers of Penalty and Interest and Burden of Proof.

7. UCA §59-1-401(13) (2015) provides that "[u]pon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part."[4]

8. Utah Admin. Rule R861-1A-42 ("Rule 42") (2015) provides guidance concerning the waiver of penalties and interest that is authorized under Section 59-1-401(13), as follows in pertinent part:

> . . . .
> (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
> (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
> (a) Timely Mailing…
> (b) Wrong Filing Place…
> (c) Death or Serious Illness…
> (d) Unavoidable Absence…
> (e) Disaster Relief…
> (f) Reliance on Erroneous Tax Commission Information…
> (g) Tax Commission Office Visit…
> (h) Unobtainable Records…
> (i) Reliance on Competent Tax Advisor…
> (j) First Time Filer…
> (k) Bank Error…
> (l) Compliance History. . . .
> (m) Employee Embezzlement…
> (n) Recent Tax Law Change…
> (4) Other Considerations for Determining Reasonable Cause.
> (a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:
> (i) whether the commission had to take legal means to collect the taxes;
> (ii) if the error is caught and corrected by the taxpayer;
> (iii) the length of time between the event cited and the filing date;
> (iv) typographical or other written errors; and
> (v) other factors the commission deems appropriate.

4 Effective January 1, 2012, Section 59-10-136 has specific provisions addressing interest and penalties imposed in domicile cases for certain circumstances. However, for prior years, including the 2009 and 2010 tax years at issue, the only applicable law concerning the waiver of penalties and interest is found in Section 59-1-401(13) and Utah Admin. Rule R861-1A-42.

> (b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.
> (c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.
> (d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

9. For all years at issue, UCA §59-1-1417 (2015) provides that the burden of proof is upon the petitioner in proceedings before the Commission, with limited exceptions 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.
> (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
> (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
> (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

DISCUSSION

The taxpayer does not challenge the changes the IRS made to his 2010 FAGI and itemized deductions and which the Division incorporated into its 2010 assessment. However, he challenges the 2010 assessment on the basis that he mistakenly filed as Utah resident individual for that year. He asserts that he was not a Utah resident individual for the 2010 tax year, which is also the basis on which he challenges the Division's other assessments for the 2011, 2012, and 2013 tax years. As a result, the issue is whether TAXPAYER was a Utah resident individual for these years. For all of these years, Section 59-10-103(1)(q) provides that a person is a

Utah resident individual under either of two scenarios: 1) if the person is domiciled in Utah; 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 Division does not argue that the taxpayer qualifies as a Utah resident individual for any of the four years under the second scenario, which involves, in part, spending 183 or more days of the taxable year in Utah. The Division does, however, argue that TAXPAYER was a Utah resident individual for all four years under the first scenario concerning his domicile. The Division argues that he was domiciled in Utah for all of these years. As a result, the Commission must apply the laws in effect for each year at issue to the facts and determine whether or not TAXPAYER was domiciled in Utah. If the Commission determines that TAXPAYER was domiciled in Utah, all of his income is subject to Utah taxation (regardless of whether it was earned while he was working and living in another state). Accordingly, for any period for which the Commission determines that the taxpayer was domiciled in Utah, it should sustain the Division's assessment for that period. On the other hand, for any period for which the Commission determines that the taxpayer was *not* domiciled in Utah, it should reverse the Division's assessment for that period.[5]

I. Facts.

TAXPAYER and his ex-wife divorced in 1997 after a number of years of marriage and after raising three children in Utah. TAXPAYER, who is now in his 70's, has remained single since the divorce. In the divorce, TAXPAYER'S ex-wife received the family home, and he has not owned an interest in that property since the divorce. TAXPAYER purchased a condominium in the CITY-1area after the divorce, which he owned until selling it in 2007. TAXPAYER has not owned any real property in any state since selling his Utah condominium in 2007.

In 1998, TAXPAYER retired from his job with COMPANY ("COMPANY"), for whom he had worked for 23 years. After retiring from COMPANY, TAXPAYER started working at various short-term

5 The Division did not assert that any of TAXPAYER'S income would be subject to Utah taxation if

construction jobs around the country. Initially, he owned a travel trailer that he would take with him to the various states in which these construction jobs were located. In 2006, he sold the trailer and purchased a motorhome to live in at these various locations. After selling his condominium in 2007, the taxpayer only lived in the motorhome, whether he was working in a state other than Utah or visiting his ex-wife or children in Utah. TAXPAYER stated that most of the jobs he took after retiring from COMPANY only lasted three or four months, although one job lasted about a year. He described the jobs as temporary in nature. He also stated that he could generally rent a spot for his motorhome in an RV park or trailer park for around $$$$$ per month.

TAXPAYER could not remember the states in which he was working between 2007, when he sold his Utah condominium, and 2010, the first of the years at issue. However, he proffered that during the years at issue, he lived in his motorhome in the following states (he also indicated whether he was working or not working in these states for these periods), as follows:

January to March 2010:	STATE-2 (working)
May 2010 to August 2010:	STATE-3 (working)
October 2010 to June 2012:	STATE-1 (not working)
June 2012:	STATE-4 (working)
August 2012 to August 2013:	STATE-5 (working)
September 2013:	STATE-6 (went for daughter's wedding)
October 2013 to present:	STATE-1 (not working)

TAXPAYER stated that he did not consider Utah to be his domicile after selling his condominium in 2007. He stated that he did not work in Utah after selling his condominium in 2007 and only returned to Utah for brief visits in the subsequent years. At the hearing, TAXPAYER stated that he only returned to Utah for a couple of weeks each year and that he had not spent more than 30 calendar days in Utah for any year since 2007. In a questionnaire for the 2010 and 2011 tax years that the Division asked TAXPAYER to complete, he indicated that he was in a (X) campground in CITY-1 for three weeks to one month in 2010 and 2011. The

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TAXPAYER were deemed to be a Utah nonresident for any portion of the audit period.

Division did ask TAXPAYER to complete a questionnaire for the 2012 and 2013 tax years. However, in the evidence the Division proffered, it included a letter it had received from TAXPAYER dated October 1, 2014. In this letter, TAXPAYER stated that "[w]ith the exception of perhaps driving my RV back for perhaps a month while I was visiting the doctors I have had for years, I have not resided nor been in [Utah] for several years." TAXPAYER'S written statement suggests that he may have visited Utah for 31 days in a calendar year during 2012, 2013, and/or 2014.

TAXPAYER explained that while living in STATE-1 from October 2010 to June 2012 and from October 2013 to the present, he has rented a motorhome spot and lived in the NAME-1 trailer park/RV park located in CITY-2, STATE-1 (which is in between CITY-3 and CITY-4). He stated that once he decided not to work, he decided that he would live in CITY-2, STATE-1 and make it his permanent home.

Throughout the four tax years at issue, TAXPAYER owned a truck and the previously mentioned motorhome. Until July 2010, both vehicles were registered in Utah. In July 2010, while TAXPAYER was working in STATE-3, he traded his truck in on a new one and registered the new truck in STATE-3. After he left STATE-3 in August 2010, he registered both his truck and motorhome in STATE-7, even though he had never visited there. TAXPAYER explained that he registered his vehicles in STATE-7 after he was told that it was cheaper to register them in STATE-7 than in STATE-1 and that he could register the vehicles in STATE-7 remotely. In August 2013 (after his job in STATE-5 ended), TAXPAYER traded his motorhome in for a new one at a dealership in CITY-1. He financed the new motorhome through his Utah credit union and registered it in STATE-7. In late 2014, TAXPAYER registered both his truck and motorhome in STATE-1.

Throughout the four years at issue, TAXPAYER had a Utah driver's license. He even renewed his Utah license at the DMV office in CITY-5, Utah in July 2014. In September 2014, TAXPAYER obtained a STATE-1 driver's license and relinquished his Utah license. TAXPAYER stated that it has been many years

since he has voted. He indicated on the previously-mentioned questionnaire that he has not been registered to vote since before 2010, which the Division did not refute.

TAXPAYER has banked at COMPANY Credit Union in CITY-1for many years and continues to bank there as of the date of the Initial Hearing. He has a checking account and savings account at the credit union and does not have checking or savings accounts elsewhere. Until one year ago, TAXPAYER also had a brokerage account at another financial institution in CITY-1. In 2014, he closed the brokerage account in CITY-1 and opened a new account at an institution in CITY-2, STATE-1.

TAXPAYER stated that in 2013, he obtained a post office box in CITY-2, STATE-1 at which he could receive mail. Until then, TAXPAYER used his ex-wife's Utah address as his address and had all of his mail sent there. TAXPAYER explained that his ex-wife would put his mail in a package and send it to him wherever he was located. In addition, TAXPAYER has had a doctor in the CITY-1 area for many years. As of the date of the Initial Hearing, TAXPAYER continues to see the CITY-1 doctor during his occasional visits to Utah.

For many years, including the four tax years at issue, TAXPAYER has filed his income tax returns with a "single" status and claiming no dependents. TAXPAYER had his 2010 federal return and Utah resident return prepared by his long-time tax preparer in Utah. On both returns, he showed his address to be in Utah. These returns were filed in 2011.

TAXPAYER had his 2011 federal return prepared by a STATE-1 tax preparer. TAXPAYER did not file a 2011 Utah return. On his 2011 federal return, TAXPAYER showed his address to be in Utah. It appears that TAXPAYER'S 2011 federal return was filed on or around April 14, 2012, the date his STATE-1 tax preparer signed it.

All of TAXPAYER'S 2012, 2013, and 2014 tax returns, including his 2012 and 2013 Utah nonresident returns, show his address to be in STATE-1. TAXPAYER'S 2012 federal return and 2012 Utah

nonresident return appear to have been filed in July 2013 and were prepared by a STATE-8 tax preparer. His 2013 federal return and 2013 Utah nonresident return appear to have been filed in April 2014 and were prepared by his STATE-1 tax preparer. TAXPAYER did not file a 2014 Utah return. However, his 2014 federal return was prepared by his STATE-1 tax preparer in 2015.

II. 2010 and 2011 Tax Years.

For these two tax years, the issue of domicile was primarily addressed in Rule 2. Rule 2(A)(1) provides that "[d]omicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home." Once domicile is established, Rule 2(A)(3) provides that domicile "is not lost until there is a concurrence of the following three elements: a) a specific intent to abandon the former domicile; b) the actual physical presence in a new domicile; and c) the intent to remain in the new domicile permanently."

At issue is whether TAXPAYER has met the elements necessary to show that he had abandoned his Utah domicile when he sold his condominium or afterwards and whether he had established a new domicile in another state for 2010 and 2011. Based on the facts, it appears that the taxpayer meets the second of the three criteria necessary to change his domicile from Utah to another state. Specifically, because the taxpayer sold his Utah condominium and lived in his motorhome in other states, he established an "actual physical presence in a new domicile" pursuant to Rule 2(A)(3)(b).

However, it does not appear that the taxpayer meets the other two criteria that must be present for a person to change domicile. These other two criteria involve a person's intent. For domicile to change, Rule 2(A)(3)(a),(c) requires "a specific intent to abandon the former domicile" and "the intent to remain in the new domicile permanently." In addition, Rule 2(A)(1) provides that "[d]omicile is the place where an individual has a permanent home and to which he **intends** to return after being absent. It is the place at which an

individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the **intent** of making a permanent home" (emphasis added).

TAXPAYER stated that he intended STATE-1 to be his permanent home when he first took his motorhome to CITY-2, STATE-1 in October 2010. Utah appellate courts have addressed whether a person is domiciled in Utah for state income tax purposes [6] and have determined that a person's actions may be accorded greater weight in determining his or her domicile than a declaration of intent.[7] The Division argues that TAXPAYER'S *actions* do not show that he intended to abandon Utah and establish a new domicile in STATE-1 during the 2010 and 2011 tax years. The Division's position is persuasive.

During 2010 and 2011, TAXPAYER continued to hold a Utah driver's license and continued to use a Utah address for all of his mail. He did not obtain a STATE-1 driver's license until 2014 and did not change his address to STATE-1 until late 2013. During 2010 and 2011, TAXPAYER only had bank accounts and a brokerage account in Utah. He did not change the brokerage account to a STATE-1 institution until 2014 and, as of the hearing date, still has his bank accounts in Utah. In addition, for all tax returns that the taxpayer filed in 2010 and 2011 (his 2009 and 2010 returns), he used a Utah tax preparer and showed his address to be in Utah. He did not obtain a STATE-1 tax preparer until 2012 (to prepare his 2011 returns). In addition, during 2010 and 2011, the taxpayer continued to use his long-time Utah doctor that he still uses as of the hearing date.

Furthermore, the taxpayer did not remain in STATE-1 permanently when he first moved there in October 2010. He left STATE-1 in June 2012 and worked in other states until returning to STATE-1 in October 2013. Since late 2010, TAXPAYER appears to have primarily lived in STATE-1 when he has not

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6 The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals. *See Lassche v. State Tax Comm'n*, 866 P.2d 618 (Utah Ct. App. 1993); *Clements v. State Tax Comm'n*, 839 P.2d 1078 (Utah Ct. App. 1995); *O'Rourke v. State Tax Comm'n*, 830 P.2d 230 (Utah 1992); *Orton v. State Tax Comm'n*, 864 P.2d 904 (Utah Ct. App. 1993); and *Benjamin v. State Tax Comm'n*, 2011 UT 14 (Utah 2011).

7 *See Clements v. Utah State Tax Comm'n*, 893 P.2d 1078 (Ct. App. 1995); and *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613, 614 (Utah 1978).

been working. However, living in a STATE-1 RV/trailer park where a spot is rented on a month-to-month basis appears temporary in nature unless contacts suggest otherwise. In 2010 and 2011, almost all of the taxpayer's contacts were with Utah, not STATE-1, and do not show that he had either abandoned his Utah domicile or established a new domicile in STATE-1 for these two years. For these reasons, the Commission should find that TAXPAYER was domiciled in Utah for both 2010 and 2011 and, thus, that he was a Utah resident individual for both of these years. Accordingly, the Commission should sustain the Division's assessments of tax for 2010 and 2011.

III. 2012 and 2013 Tax Years.

For 2012 and 2013, the Division also asks the Commission to find that the evidence does not show that TAXPAYER abandoned his Utah domicile and established a new domicile in STATE-1. However, these criteria better relate to the old law that was in effect for 2010 and 2011 (as previously discussed) than to the new law that is applicable to 2012 and 2013 (as found in Section 59-10-136). In addition, some of the factors that are considered when determining domicile under the old law are not considered when determining domicile under the new law (e.g., location of doctors and other professionals, location of bank accounts, location of insurance agents, etc.). At the hearing, the Division asked the Commission to sustain its 2012 and 2013 assessments, but admitted that it was unable to describe how TAXPAYER would be considered domiciled in Utah under the new law. Regardless, the Division is not the party who bears the burden of proof in this matter. That burden lies with the taxpayer. As a result, the Commission will apply the facts to the provisions of Section 59-10-136 to determine whether TAXPAYER was domiciled in Utah or in STATE-1 for 2012 and 2013.

A. Subsections 59-10-136(1), (2) and (5). Section 59-10-136 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)). The facts do not show that the taxpayer is considered to be domiciled in Utah during 2012 or 2013 under Subsections 59-10-136(1), (2) or (5).

The taxpayer is not considered to be domiciled in Utah under Subsection (1) because he did not have a spouse and was not himself attending a Utah institution of higher education and because he did not have a dependent enrolled in a Utah public kindergarten, elementary, or secondary school during 2012 or 2013. The taxpayer is not considered to be domiciled in Utah under Subsection (2) because he did not claim a property tax residential exemption in Utah, was not registered to vote in Utah, and did not assert residency on a Utah income tax return in 2012 or 2013. The taxpayer is not considered to be domiciled in Utah under Subsection (5) because he did not have a spouse who was domiciled in Utah in 2012 or 2013.

B. Subsection 59-10-136(3). Remaining at issue, however, is whether TAXPAYER is considered domiciled in Utah under Section 59-10-136(3). Section 59-10-136(3)(a) provides that TAXPAYER is considered to be domiciled in Utah if he has a permanent home in Utah to which he intends to return after being absent and if he has voluntarily fixed his habitation in Utah not for a special or temporary purpose, but with the intent of making a permanent home.

Section 59-10-136(3)(b) provides that the Commission shall base its determination of whether a taxpayer is domiciled in Utah under Section 59-10-136(3)(a) on a preponderance of the evidence, taking into account the totality of 12 facts and circumstances. Subsection 59-10-136(3)(b) does not indicate that the facts to be considered "include" the 12 listed facts and circumstances or some other wording that would suggest that other facts and circumstances may also be considered. The language clearly provides for the determination for domicile to be limited to the 12 listed facts and circumstances. Accordingly, for purposes of determining whether TAXPAYER is considered domiciled in Utah under Subsection 59-10-136(3) for 2012 and 2013, only the 12 listed facts and circumstances will be considered. It is also noted that Section 59-10-136(3)(b) provides

for the 12 facts and circumstances to be used to determine if TAXPAYER is domiciled *in Utah*, not another state. As a result, the Commission will be determining whether TAXPAYER was domiciled in Utah, not whether he was domiciled in STATE-1. Following is a discussion of the 12 factors to be considered when determining whether TAXPAYER is domiciled in Utah for 2012 and 2013:

1) The first factor is whether TAXPAYER has a Utah driver's license. TAXPAYER had a Utah driver's license during all of 2012 and 2013. This factor supports a finding that TAXPAYER is domiciled in Utah for both 2012 and 2013.

2) The second factor is whether a dependent of TAXPAYER is a resident student enrolled in a Utah institution of higher education. Because TAXPAYER has not had any dependents for many years, he has no dependent enrolled as a resident student in a Utah institution of higher education in 2012 or 2013. This factor supports a finding that TAXPAYER is not domiciled in Utah for 2012 or 2013.

3) The third factor is the nature and quality of TAXPAYER'S living accommodations in Utah as compared to another state. TAXPAYER'S living accommodations are the same, whether he is living in his motorhome on his occasional visits to Utah or whether he is living in his motorhome when he is in other states. As a result, this factor is not useful in determining whether TAXPAYER is domiciled in Utah for either 2012 or 2013.

4) The fourth factor is the presence in Utah of a spouse or dependent for whom TAXPAYER claims a personal exemption on his federal income tax return. TAXPAYER has an ex-wife and two grown children who live in Utah. However, he has not claimed any of them as a dependent on his federal income tax returns for many years. This factor supports a finding that TAXPAYER is not domiciled in Utah for 2012 or 2013.

5) The fifth factor is the physical location of the taxpayer's 2012 and 2013 "earned income," as defined by Internal Revenue Code ("IRC") §32(c)(2).[8] TAXPAYER had earned income from other states, but not Utah, during 2012 or 2013. As a result, this factor supports a finding that TAXPAYER is not domiciled in Utah for 2012 or 2013.

6) The sixth factor is whether the taxpayer's vehicles are registered in Utah or another state. During all of 2012 and 2013, the taxpayer's truck and motorhome were both registered in a state other than Utah. As a result, this factor supports a finding that TAXPAYER is not domiciled in Utah for 2012 or 2013.

7) The seventh factor is whether TAXPAYER has a membership in a church, a club, or another *similar* organization in Utah. On the Division's questionnaire for the 2010 and 2011 tax years, TAXPAYER answered that he did not belong to any clubs or organizations in Utah, which the Division did not refute. There was no evidence to suggest that TAXPAYER joined any new church, club, or *similar* organization in Utah after 2011.[9] For these reasons, this factor supports a finding that TAXPAYER is not domiciled in Utah for 2012 or 2013.

8) The eighth factor is whether TAXPAYER lists a Utah address on mail, a telephone listing, a listing in an official governmental publication, other correspondence, or another similar item. TAXPAYER did not have a telephone listing during 2012 or 2013 and indicates that he only used a Utah address on mail sent to his ex-wife's address. TAXPAYER admits that he used this Utah address for his mail until he obtained a STATE-1 post office box in 2013. The first document proffered at the Initial Hearing on which

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8 Under IRC §32(c)(2), "earned income" is defined to mean:
(i) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income for the taxable year, plus
(ii) the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of section 1402(a)), but such net earnings shall be determined with regard to the deduction allowed to the taxpayer by section 164(f).

9 TAXPAYER was a member of a credit union in Utah during 2012 and 2013. However, it does not appear that the Legislature intended membership in a Utah credit union to be a consideration under this factor. This factor specifically provides for a consideration of membership in a church, a club, or another *similar*

TAXPAYER listed his STATE-1 post office box as his address is his 2012 federal tax return, which was filed on July 8, 2013. However, it is clear that he continued listing a Utah address for other purposes as late as mid-2014. TAXPAYER not only received 2013 W-2's and 1099's in early 2014 at a Utah address, he also listed a Utah address when he renewed his Utah driver's license in July 2014. As a result, this factor supports a finding that TAXPAYER is domiciled in Utah for both 2012 and 2013.

9) The ninth factor is whether TAXPAYER listed a Utah address on his state or federal tax return. The evidence shows that TAXPAYER used a Utah address when he filed his 2011 federal return on April 14, 2012. It also shows that he used a STATE-1 address when he filed his 2012 federal return on July 8, 2013. No evidence shows that TAXPAYER used an address other than a Utah address to file a state or federal tax return prior to July 8, 2013. As a result, the Commission should find that TAXPAYER filed his state and federal returns using a Utah address until July 8, 2013, the first date that he filed with a STATE-1 address. For these reasons, this factor supports a finding that TAXPAYER is domiciled in Utah for all of 2012 and for the first half of 2013 (specifically from January 1, 2013 through July 7, 2013). However, it also supports a finding that he was not domiciled in Utah for the last half of 2013 (specifically from July 8, 2013 through December 31, 2013).

10) The tenth factor involves whether TAXPAYER asserts residency in Utah 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. Neither party addressed whether obtaining a Utah driver's license is an assertion of residency in Utah. However, the Division shows that TAXPAYER renewed his Utah driver's license using a Utah address on June 24, 2014. The taxpayer has the burden of proof. Without evidence to show otherwise, this 2014 action should be considered an assertion of residency in Utah on a document provided to a

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organization. A credit union is not a church or a club, and it is not similar to a church or a club.

governmental entity.[10] However, this assertion did not occur in either 2012 or 2013, the years at issue. There is no evidence suggesting that TAXPAYER made an assertion of Utah residency on a document filed with or provided to a court or other applicable governmental entity in 2012 or 2013.[11] As a result, this factor supports a finding that TAXPAYER is not domiciled in Utah for 2012 or 2013.

11) The eleventh factor is whether TAXPAYER failed to obtain a permit or license normally required of a resident of STATE-1, where he asserts he was domiciled in 2012 and 2013. TAXPAYER claims to have changed his domicile to STATE-1 in 2010, but did not obtain a STATE-1 driver's license or register his vehicles in STATE-1 until the latter half of 2014. The taxpayer has the burden of proof and has not shown that STATE-1 law allowed him to retain a Utah driver's license or allowed him to register his vehicles in STATE-7 for four years after the time that he claims to have become a STATE-1 resident. For these reasons, the Commission should find that TAXPAYER failed to obtain a permit or license normally required of a STATE-1 resident. This factor supports a finding that TAXPAYER is domiciled in Utah for both 2012 and 2013.

12) The twelfth factor is whether TAXPAYER is a noncustodial parent of a person described in Subsection 59-10-136(1)(b). Subsection 59-10-136(1)(b) describes a dependent with respect to whom the

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10 TAXPAYER obtained a Class D driver's license when he renewed his Utah driver's license in 2014. Utah Code Ann. §53-3-102(2) defines a "Class D license" as "the class of license issued to drive motor vehicles not defined as commercial motor vehicles or motorcycles under this chapter." Utah Code Ann. §53-3-204(1)(a)(v) provides that a Utah driver's license may not be issued to a person who is not a Utah resident, unless the person is issued a temporary commercial driver's license or qualifies for a non-domiciled commercial driver's license. TAXPAYER did not receive a commercial driver's license and, as a result, must have declared himself to be a Utah resident in 2014 when he renewed his Class D Utah license. For purposes of obtaining a Utah driver's license, "resident" is defined in Section 53-3-102(35) to mean, in part, "an individual who . . . has established domicile in [Utah] . . . or regardless of domicile, remains in [Utah] for an aggregate period of six months or more during any calendar year. Section 53-3-102(35)(a)(i).

11 Evidence exists that shows that TAXPAYER obtained a loan from his Utah credit union to purchase his new motorhome in 2013. It is unknown whether TAXPAYER used a Utah address or declared Utah residency on the loan documents. Regardless, the eleventh factor of Subsection 59-10-136(3)(b) only considers whether a taxpayer declares Utah residency on a document filed with a court or other governmental entity. It does not consider what a taxpayer may declare on loan documents filed with a credit union.

taxpayer claims a personal exemption on his or her federal income tax return and who is in enrolled in a Utah public kindergarten, elementary school, or secondary school. TAXPAYER has not claimed a dependent on his federal tax returns for many years. As a result, this factor supports a finding that TAXPAYER is not domiciled in Utah for either 2012 or 2013.

Considering the 12 Factors for the 2012 Tax Year. Section 59-10-136(3)(b) requires the Commission to determine whether TAXPAYER is domiciled in Utah based on the preponderance of the evidence taking into consideration the totality of the 12 factors discussed above. In *T-Mobile USA, Inc. v. Utah State Tax Comm'n*, 2011 UT 28 (Utah 2011), the Utah Supreme Court indicated that it has defined "preponderance of the evidence" to mean "more likely than not" and as the "greater weight of the evidence" (*citing Harken Sw. Corp. v. Bd. Of Oil, Gas & Mining*, 920 P.2d 1176 (Utah 1996) and *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P.2d 986 (Utah 1954)). As a result, the Commission should consider whether the greater weight of these 12 facts and circumstances supports a determination that TAXPAYER was domiciled in Utah or not.

For the 2012 tax year, 4 of the 12 factors indicate that TAXPAYER was domiciled in Utah (Factors #1, #8, #9 and #11). On the other hand, 7 of the 12 factors indicate that TAXPAYER was not domiciled in Utah in 2012 (Factors #2, #4, #5, #6, #7, #10 and #12). The remaining factor (Factor #3) was not useful in determining whether TAXPAYER was domiciled in Utah in 2012. As a result, a majority of the 11 "useful" factors indicate that TAXPAYER was not domiciled in Utah during 2012. Section 59-10-136(3)(b), however, does not state that the Commission should make its determination by giving the same weight to each factor and deciding whether more of the factors support a finding of Utah domicile than not. As a result, it may be appropriate to give some of the useful factors more or less weight than others when determining whether TAXPAYER is domiciled in Utah in 2012.[12]

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12 The application and weighting of the 12 factors are factually specific determinations for each case.

For example, 3 of the 7 factors showing that TAXPAYER was not domiciled in Utah involved dependents or a spouse (Factors #2, #4, and #12). TAXPAYER has had neither a spouse nor any dependents for many years. As a result, it may be appropriate to give these factors less weight in the analysis.[13] However, even if these 3 factors are given half the weight of the other factors, there would be 5½ factors supporting a finding that TAXPAYER was not domiciled in Utah in 2012, in comparison to 4 factors supporting a finding of Utah domicile. As a result, the greater weight of the 12 applicable facts and circumstances supports a finding that TAXPAYER was not domiciled in Utah for the 2012 tax year. While this is a close case, by a preponderance of the evidence, the Commission should find that TAXPAYER was not domiciled in Utah in 2012 and, thus, should abate the Division's 2012 assessment.

Considering the 12 Factors for the 2013 Tax Year. For the first half of the 2013 tax year, 4 of the 12 factors (Factors #1, #8, #9 and #11) indicate that TAXPAYER was domiciled in Utah, while 7 of the 12 factors indicate that he was not domiciled in Utah (Factors #2, #4, #5, #6, #7, #10 and #12). For the last half of 2013, only 3 of the 12 factors (Factors #1, #8 and #11) indicate that TAXPAYER was domiciled in Utah, while 8 of the 12 factors indicate that he was not domiciled in Utah (Factors #2, #4, #5, #6, #7, #9, #10 and #12). For both halves of 2013, Factor #3 is not useful in determining whether TAXPAYER was domiciled in Utah.

For the first half of 2013, the same factors are applicable that were previously analyzed when determining whether TAXPAYER was domiciled in Utah for 2012. Because the Commission found that these same factors showed that TAXPAYER was not domiciled in Utah in 2012, the Commission should also find

13 One could also argue that one or more of the four factors that support the Division's position should receive less weight. Three of the four factors found to support the Division's position (Factors #1, #8, and #11) were based in whole or in part upon the taxpayer's retaining and renewing his Utah driver's license and not obtaining a STATE-1 driver's license. However, such a decision is unnecessary because the factors support the taxpayer's position for 2012 and 2013 even if the four factors that support the Division's position are given full weight.

that he was not domiciled in Utah for the first half of 2013. Because even fewer factors support the Division's position for the last half of 2013, the Commission should further find that TAXPAYER was not domiciled in Utah for the last half of the 2013 tax year. For these reasons, the Commission should find that TAXPAYER was not domiciled in Utah for any portion of 2013. Accordingly, the Commission should also abate the Division's 2013 assessment.

C. Section 59-10-136(4). Because the Commission has found that TAXPAYER is not considered to be domiciled in Utah in 2012 and 2013 under all of the previously discussed Subsections 59-10-136(1), (2), (3) and (5), it is not necessary to address the "absence exemption" of Section 59-10-136(4) in order to reach a decision for these two years. Nevertheless, it may prove useful to the parties to know why the Commission did not abate the 2012 and 2013 assessments pursuant to Subsection 59-10-136(4).

Subsection 59-10-136(4) provides that a taxpayer is not considered to have domicile in Utah if a number of requirements are met. It appears that TAXPAYER meets most of these requirements because he has been absent from Utah for 761 days without claiming a personal exemption for a dependent enrolled in a Utah public kindergarten, elementary, or secondary school, because he is not a resident student registered in a Utah institution of higher education, and because he has not claimed a property tax residential exemption.

However, for all of 2012 and 2013, TAXPAYER has not met one of the other requirements of Section 59-10-136(4). During the 761-day period of absence from Utah, Section 59-10-136(4)(a)(ii)(A) also requires that "neither the individual or the individual's spouse . . . return to [Utah] for *more than* 30 days in a calendar year" (emphasis added). As a result, TAXPAYER must show that he has returned to Utah 30 days or less in a calendar year during his 761-day absence in order to meet this particular requirement. If the evidence shows that he may have been in Utah for 31 days in a calendar year, this requirement is not met.

The Division proffered an October 1, 2014 letter from TAXPAYER in which he stated that "[w]ith the exception of perhaps driving my RV back for *perhaps a month* while I was visiting the doctors I have had for

years, I have not resided nor been in [Utah] for several years" (emphasis added). TAXPAYER'S written statement indicates that he may have been in Utah for as long as "a month" during the various calendar years that would comprise the 761-day period of absence. Because most months are 31 days in length, this statement should be construed to mean that TAXPAYER may have been in Utah 31 days in any recent calendar year. It is acknowledged that TAXPAYER proffered testimony indicating that he was in Utah no more than two weeks during any recent calendar year. However, TAXPAYER has the burden of proof, and where his written statement contradicts his proffered testimony, the Commission should find that he has not met his burden to show that he has not returned to Utah for 30 days or less in any recent calendar year that would comprise a 761-day period of absence.[14]

IV. Waiver of Penalties and Interest.

When the 2012 and 2013 assessments were abated, all interest imposed for these two years was also abated.[15] The assessments for 2010 and 2011, however, were sustained. As a result, an issue remains as to whether reasonable cause exists to waive the penalties imposed on the 2011 assessment or the interest imposed on the 2010 and 2011 assessments. For years prior to 2012, including 2010 and 2011, the only laws applicable to the waiver of penalties and interest in domicile cases were Section 59-1-401(13) (which authorizes the Commission to waive penalties and interest upon a showing of "reasonable cause") and Rule 42 (which provides guidance in determining what constitutes "reasonable cause" for waiver).[16]

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14 It should also be noted that another requirement of Section 59-10-136(4) was not met for the first portion of 2012, specifically from January 1, 2012 through April 14, 2012. During the 761 days of absence from Utah, Section 59-10-136(4)(a)(ii)(E) requires that "neither the individual or the individual's spouse . . . assert that [Utah] is the individual's or the individual's spouse's tax home for federal individual income tax purposes." On April 14, 2012, TAXPAYER asserted that Utah was his tax home on his 2011 federal return. As a result, he would not qualify for the Section 59-10-136(4) absence exception from January 1, 2012 to April 14, 2012, regardless of whether he had met all other requirements. However, for a new 761-day period of absence beginning on April 15, 2012, TAXPAYER could have qualified for the Section 59-10-136(4) absence exception for the remainder of 2012 and for all of 2013 if he had shown that he met all other requirements.

15 In the assessments for the four tax years at issue, penalties were only imposed in the 2011 assessment.

16 For 2012 and subsequent tax years, Section 59-10-136(4)(d) and (e) also address interest and penalties

Generally, the Commission has relied on Section 59-1-401(13) and Rule 42 to waive penalties in domicile cases because of the complexity of the issue. As a result, the Commission should find that reasonable cause exists to waive the penalties imposed for the 2011 tax year. Rule 42(2) provides that interest is waived only if a taxpayer proves that the Tax Commission gave the taxpayer erroneous information or took inappropriate action that contributed to the taxpayer's error. The taxpayer does not assert Tax Commission error. As a result, the Commission should sustain the interest the Division imposed for 2010 and 2011.

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Kerry R. Chapman
Administrative Law Judge

in certain circumstances involving domicile cases. These new provisions are not applicable for prior years such as 2010 and 2011. Because the 2012 and 2013 assessments have been abated, the interest and penalty provisions of Section 59-10-136 need not be addressed.

DECISION AND ORDER

Based on the foregoing, the Commission abates the Division's assessments for the 2012 and 2013 tax years. The Division's assessments for the 2010 and 2011 tax years, however, are sustained with one exception. The Commission finds that reasonable cause exists to waive all penalties imposed for the 2011 tax year. 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
CITY-1, Utah 84134

or emailed to:

taxappeals@utah.gov

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

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

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