15-1332
TAX TYPE: INCOME
TAX YEAR: 2012-2013
DATE SIGNED: 6-27-2016
COMMISSIONERS: J. VALENTINE, R. PERO, R. ROCKWELL
EXCUSED: M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 15-1332 Account No. ##### Tax Type: Income Tax Years: 2012 & 2013 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYER, CPA
TAXPAYER-1, Taxpayer
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 March 23, 2016.

TAXPAYER-1 & TAXPAYER-2 ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessments of additional individual income tax for the 2012 and 2013 tax years. On July 27, 2015, the Division issued Notices of Deficiency and Audit Change to the taxpayers, in which it imposed additional tax and interest (calculated as of August 26, 2015)[1] for these years, as follows:

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

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

For the 2012 and 2013 tax years, the taxpayers filed Utah resident returns with a status of married filing joint. Both of these returns were filed using a Utah address. On the returns, the taxpayers claimed equitable adjustments of $$$$$ for the 2012 tax year and $$$$$ for the 2013 tax year. The amounts the taxpayers claimed as equitable adjustments are equal to the amounts of income that TAXPAYER-1 earned while living and working in CITY-1, FOREIGN COUNTRY and STATE-1 from August 2012 through November 2013. The taxpayers explained they claimed the equitable adjustments because TAXPAYER-1 holds dual citizenship in FOREIGN COUNTRY and the United States and because he did not consider himself to be a Utah resident for periods he worked outside of Utah.

The Division has determined that TAXPAYER-1 was domiciled in Utah during all of 2012 and 2013. As a result, it has disallowed the equitable adjustments the taxpayers claimed and subjected all of their 2012 and 2013 federal adjusted gross income ("FAGI") to Utah taxation. The Division does not dispute TAXPAYER-1's claim that he holds dual citizenship in FOREIGN COUNTRY and the United States or that he lived and worked outside of Utah from August 2012 through November 2013. However, the Division claims that these facts are irrelevant if TAXPAYER-1 remained domiciled in Utah during all of 2012 and 2013. Because the Division has determined that TAXPAYER-1 was domiciled in Utah during the period he was working in FOREIGN COUNTRY and STATE-1, it contends that he was a Utah resident individual for all of 2012 and 2013. As a result, the Division asks the Commission to sustain its assessments, with one exception. The Division concedes that its 2013 assessment should be adjusted to reflect a credit for income taxes that TAXPAYER-1 paid to STATE-1 for that year.[2]

2 The Division stated that Utah law does not provide a similar credit for income taxes that TAXPAYER-1 may have paid to a FOREIGN COUNTRY governmental entity for 2012 and 2013. In addition, in the event

The taxpayers acknowledged that under Utah law in effect for the years at issue, TAXPAYER-1 might be considered a Utah resident individual for all of 2012 and 2013. They contend, however, that "gaps" exist in Utah law in regards to the international aspects of their circumstances. They contend that Utah law does not specifically address a person like TAXPAYER-1 who was still considered a resident of FOREIGN COUNTRY when he moved to Utah in 2009 to complete his doctorate degree and who, upon completing his degree, moved back to FOREIGN COUNTRY for work. They believe that Utah law is not only prejudicial and unfair, but also results in double taxation. Nevertheless, because Utah law may provide that TAXPAYER-1 was domiciled in Utah while working in FOREIGN COUNTRY and STATE-1 in 2012 and 2013, the taxpayers believe the fairest solution would be for the Commission to sustain the Division's assessment for 2012 (the year TAXPAYER-1 primarily lived in Utah) and to reverse the assessment for 2013 (the year he primarily lived outside of Utah).

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2012)[3], "a tax is imposed on the state taxable income of a resident individual[.]"

2. For purposes of Utah income taxation, a "resident individual" is defined in UCA §59-10-103(1)(q), 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

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the Commission were to find that TAXPAYER-1 was not domiciled in Utah during the period he lived and worked in FOREIGN COUNTRY and STATE-1, the Division asks the Commission to sustain its 2012 assessment because TAXPAYER-1 was present in Utah for more than 183 days in 2012 and because he maintained a place of abode in Utah throughout 2012.

3 All citations are to the 2012 version of the Utah Code and the Utah Administrative Code, unless otherwise indicated. The substantive law remained the same during 2012 and 2013.

(II) spends in the aggregate 183 or more days of the taxable year in this state.

. . . .

3. Effective for tax year 2012, UCA §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.

4. UCA §59-1-401(13) (2016) 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."

5. Utah Admin. Rule R861-1A-42(2) ("Rule 42") (2016) provides guidance concerning the waiver of interest, as follows:[4]

> (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.

6. UCA §59-1-1417 (2016) 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.
> . . . .

4 Rule 42 also has provisions concerning reasonable cause to waive penalties. Because no penalties have been imposed in this case, the Commission will not address those provisions of Rule 42 concerning penalties.

DISCUSSION

The taxpayers admit that TAXPAYER-2 was domiciled in Utah during all of 2012 and 2013 and, thus, was a Utah resident individual for these years. At issue is whether TAXPAYER-1 was a full-year Utah resident individual for these years, as well. For these years, Subsection 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 has determined that TAXPAYER-1 is a Utah resident individual for all of 2012 and 2013 under the first of these two scenarios, which concerns his domicile. The Commission will address this scenario first. If the Commission determines that TAXPAYER-1 was domiciled in Utah for all of 2012 and 2013, he will be considered a full-year Utah resident individual for these years. In this event, the Commission will consider the taxpayers' fairness and double taxation arguments. On the other hand, if the Commission determines that TAXPAYER-1 was not domiciled in Utah for those periods of 2012 and 2013 when he lived and worked in FOREIGN COUNTRY and STATE-1, the Commission will address the Division's other argument that TAXPAYER-1 is a full-year Utah resident individual for 2012 year under the second scenario (which involves, in part, the number of days spent in Utah). The Commission, however, need not address the second scenario for the 2012 tax year if it determines that TAXPAYER-1 is a full-year Utah resident individual for 2012 under the first scenario (which involves domicile).[5]

5 The second scenario will not be addressed if TAXPAYER-1 is found to be domiciled in Utah for all of 2012. Nevertheless, it is noted that the Commission has addressed the second scenario in regards to another petitioner who was found to be domiciled in Utah for most of a tax year and in another state or country for a small portion of that year. In *USTC Appeal No. 08-0856* (Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Motion for Summary Judgment Oct. 28, 2010), the Commission considered a petitioner who was domiciled outside of Utah from January 1, 2004 through, at the earliest, January 4, 2004 and who was domiciled in Utah for the remainder of 2004 (i.e., domiciled in Utah for all but approximately four days of the taxable year). In that case, the Division argued that the income the petitioner earned prior to January 4, 2004 was subject to Utah taxation because the petitioner had owned a home in Utah for several years prior to 2004 and because the petitioner was present in Utah for 183 or more days of 2004.

I. Facts.

The taxpayers had lived in FOREIGN COUNTRY for many years until 2009, when they moved to STATE-2, Utah so that TAXPAYER-1 could attend school and obtain a doctorate degree. It was relatively easy for TAXPAYER-1 and the taxpayers' children to move from FOREIGN COUNTRY to Utah because they all have dual United States and FOREIGN COUNTRY citizenship. TAXPAYER-2, however, is a citizen of FOREIGN COUNTRY only, and she had to obtain a green card to move to Utah with her family. In 2009, TAXPAYER-1 purchased a home in STATE-2, Utah ("STATE-2 home"). As of the date of the Initial Hearing, TAXPAYER-1 still owns this home, and the taxpayers continue to live in it.

When the taxpayers moved to Utah in July 2009, their four youngest children moved to Utah with them. In August 2012, TAXPAYER-1 completed his doctorate degree and accepted a position with a school division in CITY-1, FOREIGN COUNTRY. TAXPAYER-1 explained that his wife and their two youngest children who were still living at home did not move with him to FOREIGN COUNTRY in 2012 because TAXPAYER-2 was studying cosmetology at the SCHOOL in STATE-2 and the taxpayers' two youngest children were completing their high school educations at HIGH SCHOOL, which is also in STATE-2.[6] As a result, TAXPAYER-2 and the taxpayers' two youngest children continued to live in the STATE-2 home while TAXPAYER-1 lived and worked outside of Utah. TAXPAYER-2 completed her cosmetology studies in 2013, while the taxpayers' two youngest children graduated from HIGH SCHOOL in May 2013 and May 2014, respectively.

The Commission did not find the Division's argument persuasive, in part, because the 183 or more days and place of abode criteria of Subsection 59-10-103(1)(q)(ii) pertains to an individual who is "not domiciled in this state" and because that petitioner *was* domiciled in Utah for most of 2004. Redacted copies of this and other selected decisions can be viewed on the Commission's website at http://www.tax.utah.gov/commission-office/decisions.

6 The SCHOOL is a private school, while HIGH SCHOOL is a public secondary school.

TAXPAYER-1 worked in CITY-1, FOREIGN COUNTRY from August 2012 through July 2013, at which time he moved to STATE-1 to work for the STATE-1 State Department of Education. TAXPAYER-1 continued to work in STATE-1 until November 2013, when he moved back to Utah after accepting a position at UNIVERSITY, where he still works.

TAXPAYER-1 explained that he listed the STATE-2 home for sale in July 2013, when he accepted the position in STATE-1. However, he took the home off the market about a month later in August 2013. The Division stated that it has obtained information showing that the STATE-2 home received the residential exemption from property taxation for both 2012 and 2013.[7] The taxpayers did not challenge the Division's claim that the STATE-2 home received the residential exemption for both years at issue. TAXPAYER-1 explained, however, that he did not know what the residential exemption was and that he had not known that the STATE-2 home was receiving the exemption.

TAXPAYER-1 obtained an CITY-1, FOREIGN COUNTRY "operator's license" in 2012, but was not required to relinquish his Utah driver's license to obtain the FOREIGN COUNTRY license. TAXPAYER-1 explained that for this reason, he retained his Utah driver's license throughout 2012 and 2013. TAXPAYER-1 did not vote in Utah during 2012 and 2013, but was registered in Utah to do so. Because of TAXPAYER-1's dual citizenship, however, he was also entitled to be registered to vote in FOREIGN COUNTRY during the years at issue. During 2012 and 2013, the taxpayers had motor vehicles registered in both Utah and FOREIGN COUNTRY. TAXPAYER-1 explained that while he was living in FOREIGN COUNTRY in 2012 and 2013, he was considered to be a resident of FOREIGN COUNTRY because he qualified for FOREIGN COUNTRY health care, which is only available to a resident of FOREIGN COUNTRY.

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7 During the years at issue, UCA §59-2-103(2) provided that ". . . the fair market value of residential property located within the state shall be reduced by 45%, representing a residential exemption[,]" while "residential property" was defined in Utah Code Ann. §59-2-102(31) to mean, in part, "any property used for residential purposes as a primary residence." As a result, for property tax purposes, a home that is used as a person's primary residence is only taxed on 55% of its fair market value, while a home that is not a person's

After moving to FOREIGN COUNTRY in August 2012 and prior to moving back to Utah in November 2013, TAXPAYER-1 returned to Utah to visit his family on a number of weekends and holidays. After August 31, 2012, when TAXPAYER-1 moved to FOREIGN COUNTRY, he was present in Utah approximately 25 days during 2012. Before November 11, 2013, when TAXPAYER-1 moved back to Utah, he was present in Utah approximately 87 days in 2013.

II. Applying the Facts to the Domicile Law in Effect for 2012 and 2013.

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 2012 and 2013, a taxpayer's domicile 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)).[8]

At the hearing, the Division stated that TAXPAYER-1 is considered to be domiciled in Utah for all of 2012 and 2013 under any one of three different subsections of Section 59-10-136. First, the Division claims that TAXPAYER-1 is considered domiciled in Utah for all of 2012 and 2013 under Subsection 59-10-136(1)(a) because the taxpayers were married and claimed dependents who were enrolled in a Utah secondary school in 2012 and 2013. Second, the Division claims that TAXPAYER-1 is also considered domiciled in Utah for all of 2012 and 2013 under Subsection 59-10-136(2)(a) because his STATE-2 home received the primary residential exemption for both years. Third, the Division claims that TAXPAYER-1 is also considered

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primary residence (such as a vacation home) is taxed on 100% of its fair market value.

8 The taxpayers suggested that TAXPAYER-1 may not have changed his domicile from FOREIGN COUNTRY to Utah when he moved to Utah in 2009 for a temporary purpose of attending school. Determining whether a taxpayer has first changed his or her domicile to Utah before he or she later moved outside of Utah may have been relevant under the "old" domicile law in effect for tax years prior to 2012 (*See* Utah Admin. Rule R865-9I-2 (2011) and Utah Admin. Rule R884-24P-52 (2011)). Such a determination, however, is not relevant in determining a person's domicile under the "new" domicile law in effect for the tax

domiciled in Utah for all of 2012 and 2013 under Subsection 59-10-136(5)(a) because TAXPAYER-2, his spouse, was domiciled in Utah for both years.

Subsection 59-10-136(1)(a). The Division's first position concerning Subsection 59-10-136(1)(a) is correct. Under this subsection, TAXPAYER-1 is considered to be domiciled in Utah for all of 2012 and 2013 because two of his children that he and his wife claimed as dependents attended a Utah secondary school during these years and because he and his wife were not divorced.[9] Because TAXPAYER-1 is considered to be domiciled in Utah for 2012 and 2013 under Subsection 59-10-136(1), no further analysis of his circumstances is necessary. TAXPAYER-1 is considered to be domiciled in Utah for all of 2012 and 2013 even if he does not satisfy any of the other criteria found in Subsections 59-10-136(2), (3), and (5). However, it may be helpful to explain why the Division's positions concerning Subsections 59-10-136(2)(a) and 59-10-136(5) are also correct.[10]

Subsection 59-10-136(2)(a). The Division's second position concerning Subsection 59-10-136(2)(a) is also correct. Under this subsection, TAXPAYER-1 is presumed to be domiciled in Utah if he or his wife claims a property tax residential exemption for his or his spouse's primary residence, unless the taxpayers rebut the presumption. TAXPAYER-1 received the residential exemption on the STATE-2 home in which his

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years at issue in this appeal.

9 An individual who has a dependent child attending a Utah public kindergarten, elementary, or secondary school is not considered to be domiciled in Utah under Subsection 59-10-136(1)(a) if two conditions exist, specifically: 1) the individual is the noncustodial parent; and 2) the individual and the custodial parent are divorced. *See* Subsection 59-10-136(1)(b). Because the taxpayers were not divorced, both conditions of the Subsection 59-10-136(1)(b) exception do not exist, and TAXPAYER-1 is considered to be domiciled in Utah.

10 It should also be noted that TAXPAYER-1 does not satisfy the requirements of Subsection 59-10-136(4) to *not* be considered domiciled in Utah after he moved to FOREIGN COUNTRY in 2012. First, TAXPAYER-1 was not absent from Utah for at least 761 consecutive days, a requirement set forth in Subsection 59-10-136(4)(a)(i). Second, at least two of the circumstances described in Subsection 59-10-136(4)(a)(ii) exist, any one of which would also disqualify TAXPAYER-1 from *not* being considered domiciled in Utah.

spouse resided for all of 2012 and 2013. Accordingly, he is presumed to be domiciled in Utah unless he can rebut this presumption.

No statute or rule exists to provide guidance on how a Subsection 59-10-136(2) presumption can be rebutted. However, in *USTC Appeal No. 14-30* (Findings of Fact, Conclusions of Law, and Final Decision Sept. 21, 2015), the Commission provided some guidance on how the presumption concerning the residential exemption can be rebutted. The Commission indicated that to rebut this presumption, a taxpayer has to do something more than to show "a preponderance of the domicile factors" listed in Subsection 59-10-136(3). As examples, the Commission stated that a taxpayer could rebut this presumption by either showing:

> that the taxpayer had taken the proper steps to notify the County that they no longer qualified for the exemption and the County then in error continued to leave the property in that status, or that there was a tenant in the property and the tenant used it as his or her primary residence, which would allow the property to qualify based on the tenant's use.

In this case, the taxpayers have not rebutted the Subsection 59-10-136(2)(a) presumption by showing that either of the two circumstances described in *Appeal No. 14-30* exist. First, the taxpayers did not ask Utah County to remove the exemption. Second, the taxpayers did not have a tenant who used the STATE-2 home as his or her primary residence in 2013. Subsection 59-10-136(6) provides that:

> . . . whether or not an individual or the individual's spouse claims a property tax residential exemption . . . 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.

The TAXPAYERS', however, have not shown that the STATE-2 home was a primary residence of a *tenant* of either TAXPAYER-1 or TAXPAYER-2. Admittedly, TAXPAYER-2 and the taxpayers' children used the STATE-2 home as their primary residence during 2012 and 2013, and neither TAXPAYER-2 nor the taxpayers' children had any ownership interest in the home. Nevertheless, Subsection 59-10-136(2)(a) specifically applies because TAXPAYER-1 claimed a residential exemption either for himself *or* for his spouse. When Subsections 59-10-136(2)(a) and 59-10-136(6) are read in concert, it appears evident that the

Subsection 59-10-136(6) "exception" does not apply when a home is owned by one spouse and used as the primary residence of the other spouse.

There may be circumstances other than the two identified in *Appeal No. 14-30* that could rebut this particular presumption, but the taxpayers have not proffered any that are sufficient to do so. The taxpayers noted that they were unaware of the law concerning the residential exemption and that they were unaware that the STATE-2 home even received the exemption. In *Appeal No. 14-30*, however, the petitioners in that case had also claimed that they were unaware of the laws concerning the residential exemption, yet the Commission did not find this sufficient to rebut the Subsection 59-10-136(2)(a) presumption.

Lastly, it is noted that TAXPAYER-1 listed the STATE-2 home for sale for about one month in 2013 while TAXPAYER-2 and the taxpayers' children still resided in it. Utah Admin. Rule R884-24P-52(6)(f) ("Rule 52") provides that "[i]f the county assessor determines that an unoccupied property will qualify as a primary residence when it is occupied, the property shall qualify for the residential exemption while unoccupied." Pursuant to this rule, an unoccupied home may still be entitled to the residential exemption even if the owner of that property has established his or her primary residence at a different location. Accordingly, if a home that a taxpayer is trying to sell is unoccupied and still qualifies for the residential exemption pursuant to Rule 52(6)(f), these circumstances may be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. In the instant case, however, TAXPAYER-1's spouse and children resided in the STATE-2 home during all of the 2012 and 2013 tax years at issue. As a result, it was not unoccupied during the short period it was listed for sale. Accordingly, TAXPAYER-1's attempt to sell the STATE-2 home in 2013 is insufficient to rebut the Subsection 59-10-136(2)(a) presumption that applies in this case. Because the taxpayers have not rebutted the residential exemption presumption found in Subsection 59-10-136(2)(a), TAXPAYER-1 is also considered domiciled in Utah for all of 2012 and 2013 under this subsection.

Subsection 59-10-136(5). The Division's third position concerning Subsection 59-10-136(5) is also correct. Under this subsection, TAXPAYER-1 is also considered domiciled in Utah for all of 2012 and 2013 because his spouse was domiciled in Utah throughout both years and because the taxpayers were not legally separated or divorced and did not file separately for United States income tax purposes.[11]

Domicile – Summary. Because TAXPAYER-1 is considered domiciled in Utah for all of 2012 and 2013 under any one of the three subsections discussed above, he is considered to be a full-year Utah resident individual for both years at issue.[12] Accordingly, all of the FAGI he earned in 2012 and 2013 is subject to Utah taxation (unless a credit applies), regardless of whether the income was earned while he was living and working in another state or FOREIGN COUNTRY and regardless of whether he was also considered a resident of another state or FOREIGN COUNTRY.

III. Interest.

In Subsection 59-1-401(13), the Commission is authorized to waive penalties and interest upon a showing of reasonable cause. The Commission has adopted Rule 42 to provide guidance as to when reasonable cause exists to waive penalties and interest. For the years at issue, Subsections 59-10-136(4)(d) and (e) also address interest and penalties in certain circumstances involving domicile cases. As a result, the Commission will not only consider Subsections 59-10-136(4)(d) and (e), but it will also consider, to the extent

11 The Division did not raise the possibility that TAXPAYER-1 might also be considered to be domiciled in Utah under other subsections of Section 59-10-136. The Commission notes that TAXPAYER-1 was registered to vote in Utah during 2012 and 2013 and that the taxpayers filed joint Utah resident returns for these years. As a result, TAXPAYER-1 is presumed to be domiciled in Utah under Subsections 59-10-136(2)(b) and 59-10-136(2)(c), unless the taxpayers are able to rebut these presumptions. In regards to Subsection 59-10-136(3)(b), no analysis has been performed to determine whether TAXPAYER-1 might also be considered domiciled in Utah under this subsection. It is noted that in determining domicile under Subsection 59-10-136(3), the factors that are listed are an exhaustive list. Accordingly, only the factors that are listed would be considered when determining domicile under this particular subsection.

12 Because the Commission has found TAXPAYER-1 to be a full-year Utah resident individual for 2012 under the first scenario (which involves domicile), it need not address whether he would also be considered a full-year Utah resident individual for 2012 under the second scenario (which concerns, in part, the number of days he was present in Utah).

applicable, Subsection 59-1-401(13) and Rule 42.[13] In this case, the Division did not impose any penalties. Accordingly, the Commission will only address whether interest may be waived.

Subsection 59-10-136(4)(d) provides that an individual shall file the appropriate Utah return and pay any applicable interest if the individual did not file because he or she mistakenly believed that they had met the qualifications of Subsection 59-10-136(4)(a). This specific interest provision is not applicable in the instant matter, however, because the taxpayers did not fail to file 2012 and 2013 Utah resident returns on the basis that they mistakenly believed that they met the qualifications of Subsection 59-10-136(4)(a). Not only did the taxpayers file Utah resident returns for the two years at issue, but they also did not even know about the qualifications of Subsection 59-10-136(4)(a). Because Subsection 59-10-136(4)(a) does not apply, it is appropriate to consider Subsection 59-1-401(13) and Rule 42 in determining whether reasonable cause exists to waive the interest that the Division has imposed.

Rule 42(2) provides that interest is waived only if a taxpayer shows that the Tax Commission gave the taxpayer erroneous information or took inappropriate action that contributed to the taxpayer's error.[14] The taxpayers have not asserted that they failed to pay Utah income taxes on TAXPAYER-1's wages because of Tax Commission error or erroneous advice. As a result, reasonable cause does not exist to waive any of the interest that has been imposed.

IV. Taxpayers' Policy Concerns and Double Taxation Argument.

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13 Subsections 59-10-136(4)(d) and (e) are applicable if the limited circumstances described in those provisions exist. For all other circumstances, it is appropriate to consider Subsection 59-1-401(13) and Rule 42 when deciding whether penalties and interest can be waived.

14 The Rule 42 criteria to waive interest are more stringent than the rule's criteria to waive penalties because a taxpayer has had use of money that should have been paid to the state and because of the time value of this money. The Commission often waives penalties in domicile cases because of the complexity of the issue; however, no penalties were imposed in the instant case.

The taxpayers ask the Commission to consider that the domicile criteria set forth in Section 59-10-136 are inadequate to address the international circumstances of this case and are prejudicial and unfair because they treat a married couple differently than an unmarried or divorced couple. If the taxpayers are contending that the provisions of Section 59-10-136 do not reflect good tax policy and should be changed, the Commission does not have the authority to make such changes. The Commission's role is to implement the laws enacted by the Utah Legislature. If the taxpayers are contending that the provisions of Section 59-10-136 may be unconstitutional, the Commission also does not have the authority to find that a statute is unconstitutional. While a taxpayer may preserve a constitutional challenge for the courts to address by raising the issue in an appeal before the Commission, the Commission is not authorized to determine the constitutionality of Utah laws.[15]

As to the taxpayers' double taxation argument, Utah Code Ann. §59-10-1003 does allow a credit against a Utah resident individual's income tax liability for income taxes imposed by "another state of the United States, the District of Columbia, or a possession of the United States." This credit, however, does not extend to income taxes imposed by a different United States governmental entity (such as an American city) or to income taxes imposed by a governmental entity in another FOREIGN COUNTRY.[16] Accordingly, the taxpayers qualify for a credit of the income taxes they paid to STATE-1 in 2013, based on the 2013 STATE-1 return they proffered at the Initial Hearing. The taxpayers, however, do not qualify for a credit of the income taxes they paid to the province of CITY-1, FOREIGN COUNTRY in 2012 or 2013.

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15 *See Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶15, 34 P.3d 180 (Utah 2001), in which the Utah Supreme Court stated that "[i]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments" (quoting *State Tax Commission v. Wright*, 596 P. 2d 634 (Utah 1979)).

16 It is noted that the federal tax code provides a credit for taxes paid to foreign governments. Utah law, however, does not contain a similar provision. In fact, UCA §59-10-110 provides that "[a] credit applied directly to the income tax calculated for federal income tax purposes in accordance with the Internal Revenue Code may not be applied in calculating the tax due under this chapter."

Lastly, the taxpayers are not entitled to claim an equitable adjustment in an attempt to prevent what they consider to be "double taxation." For the years at issue, UCA §59-10-115(1) provides that "[t]he commission shall allow an adjustment to adjusted gross income of a resident or nonresident individual if the resident or nonresident individual would otherwise: (a) receive a double tax benefit under this part; or (b) suffer a double tax detriment under this part." This subsection provides for an adjustment to FAGI if a taxpayer would otherwise suffer a double tax detriment under "this part" (which means Title 59, Chapter 10, Part 1 of the Utah Code). The taxpayers have only been subjected to tax once pursuant to Title 59, Chapter 10, Part 1 of the Utah Code. While the taxpayers may have also been subjected to taxes pursuant to the laws of other jurisdictions, those taxes were not imposed pursuant to "this part" of the Utah Code. Because the taxpayers have not suffered a double tax detriment under "this part" of the Utah Code, they do not qualify for the equitable adjustments they claimed for 2012 and 2013.[17]

V. Conclusion.

Unless a credit applies, all of the income that TAXPAYER-1 earned in 2012 and 2013 is subject to Utah taxation because he was domiciled in Utah and, thus, was a Utah resident individual for the entirety of both years. The taxpayers have shown that they are entitled to a credit for income taxes imposed by STATE-1 in 2013. However, they have not shown that they are entitled to a credit for income taxes imposed by a

17 The Division proffered that in *USTC Appeal No. 08-0590* (Findings of Fact, Conclusions of Law and Final Decision Aug. 5, 2010), the Commission determined that petitioners in that case could not claim an equitable adjustment to prevent what they deem to be the "double taxation" of income they earned in FOREIGN COUNTRY. It must be noted, however, that the version of Section 59-10-115 in effect for 2012 and 2013 has been substantively amended since 2004, the year at issue in *Appeal No. 08-0590*. Nevertheless, *Appeal No. 08-0590* lends some support to the Division's position that a taxpayer cannot claim an equitable adjustment to avoid "double taxation" by Utah and a province of FOREIGN COUNTRY.

It should also be noted that the petitioners in *Appeal No. 08-0590* appealed the Commission's ruling to the Utah Third District Court, where Judge Toomey also found that they were not entitled to an equitable adjustment under the law in effect during 2004. *See Fleming v. Utah State Tax Comm'n*, Case No. 100917302. It is not known, however, if Judge Toomey's ruling was later vacated after the petitioners appealed his ruling to the Utah Supreme Court, which sent the matter to the Utah Court of Appeals where it was eventually settled through mediation. *See Fleming v. Utah State Tax Comm'n*, Case No. 20120708 (Utah Ct. App).

governmental entity in FOREIGN COUNTRY in 2012 or 2013. Furthermore, the taxpayers are not entitled to deduct wages that TAXPAYER-1 earned outside of Utah as an equitable adjustment to their Utah taxable income. Lastly, the taxpayers do not qualify for a waiver of interest. For these reasons, the Commission should sustain the Division's 2012 assessment in its entirety, and it should sustain the Division's 2013 assessment except for allowing a credit for taxes paid to STATE-1.[18]

Kerry R. Chapman
Administrative Law Judge

18 The Commission also notes that the taxpayers offered a settlement proposal at the Initial Hearing, specifically offering to pay the 2012 assessment if the Commission would abate the 2013 assessment. While the two parties (i.e., the taxpayers and the Division) may agree to a settlement and ask the Commission to approve their joint agreement, the Commission does not consider a settlement offer that a party unilaterally makes during the appeals process. The purpose of the appeals process is to determine a taxpayer's tax liability under the provisions found in Utah law. After an appeal is closed and the amount of the tax liability is final, however, taxpayers are afforded an opportunity to contact Taxpayer Services Division at (801) 297-2200 to see if they qualify for a reduction in their tax liability.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's 2012 assessment in its entirety. The Commission sustains the Division's 2013 assessment except that the Division is ordered to revise the assessment to reflect a credit for income taxes that the taxpayers paid to STATE-1 for this 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
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 _____, 2016.

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.