15-1857
TAX TYPE: INCOME
TAX YEAR: 2012 & 2013
DATE SIGNED: 8-26-2016
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
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. 15-1857 Account No. ##### Tax Type: Income Tax Years: 2012 & 2013 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1, Taxpayer
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 July 27, 2016.

TAXPAYER-1 and 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 November 12, 2015, the Division issued Notices of Deficiency and Estimated Income Tax to the taxpayers, in which it imposed additional tax, penalties, and interest (calculated as of October 9, 2015)[1] for these years, as follows:

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

Year	Tax[2]	Penalties	Interest	Total
2012	$$$$$	$$$$$	$$$$$	$$$$$
2013	$$$$$	$$$$$	$$$$$	$$$$$

The taxpayers filed joint federal income tax returns for the 2012 and 2013 tax years, but filed separate Utah returns for these two years. TAXPAYER-2 filed Utah resident returns for 2012 and 2013, while TAXPAYER-1 filed Utah nonresident returns (on which he reported his Utah source income or losses) for these years. The taxpayers also filed joint STATE-1 nonresident returns on which they reported royalty income from oil and gas interests that TAXPAYER-2 owns in STATE-1.

The Division determined that both taxpayers were domiciled in Utah during the 2012 and 2013 tax years. As a result, the Division also determined that TAXPAYER-1 was a Utah resident individual for 2012 and 2013 and, thus, could not file separate Utah returns for these years on which he claimed to be a Utah nonresident. Based on these determinations, the Division assessed the taxpayers as though they were both full-year Utah resident individuals for the 2012 and 2013 tax years.[3]

The taxpayers admit that TAXPAYER-2 was domiciled in Utah during 2012 and 2013. However, they contend that TAXPAYER-1 was domiciled in STATE-2 during these years. In addition, they contend that TAXPAYER-1 spent less than 183 days in Utah during each year at issue. As a result, they contend that TAXPAYER-1 is a STATE-2 resident individual and a Utah nonresident individual. The taxpayers also assert that where one spouse is a Utah resident individual and the other spouse is not, Utah laws allows for the spouses to file separate Utah returns. For these reasons, the taxpayers ask the Commission to find that they properly filed their 2012 and 2013 Utah tax returns and to overturn the Division's assessments.

2 At the hearing, the Division stated that its tax assessments do not reflect payments that TAXPAYER-2 has previously made for the years at issue, specifically her prior payments of $$$$$ for the 2012 tax year and $$$$$ for the 2013 tax year.

3 In its assessments, the Division allowed credits for income taxes paid to STATE-1.

The Division contends that under the "new" domicile law that became effective for tax year 2012, an individual is considered to be domiciled in Utah if his or her spouse is considered to be domiciled in Utah, unless specific conditions are met. Because the taxpayers do not meet these specific conditions and because TAXPAYER-2 is domiciled in Utah during 2012 and 2013, the Division contends that TAXPAYER-1 is also considered to be domiciled in Utah during these years. For these reasons, the Division asks the Commission to find that both taxpayers are Utah resident individuals for the 2012 and 2013 tax years and to sustain its assessments (subject to credits for the taxes that TAXPAYER-2 has previously paid to Utah for these years).

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2012)[4], "a tax is imposed on the state taxable income of a resident individual[.]"

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

> (i) "Resident individual" means:
> (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
> (B) an individual who is not domiciled in this state but:
> (I) maintains a place of abode in this state; and
> (II) spends in the aggregate 183 or more days of the taxable year in this state.
> . . . .

3. Effective for tax year 2012, 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

4 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) 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 penalties and interest, as follows:

> . . . .
> (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.
> (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.

6. For the instant matter, UCA §59-1-1417(1) (2016) provides guidance concerning which party has the burden of proof, as follows:

> (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
> (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
> (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
> (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.
> . . . .

DISCUSSION

Pursuant to Subsection 59-1-1417(1), the taxpayers have the burden of proof in this matter. The taxpayers admit that TAXPAYER-2 was domiciled in Utah during 2012 and 2013 and, thus, was a Utah resident individual for these years. At issue is whether TAXPAYER-1 is also a Utah resident individual for the 2012 and 2013 tax years. For these years, Subsection 59-10-103(1)(q)(i) provides that a person is a Utah resident individual under either of two scenarios: 1) if the person is domiciled in Utah (the "domicile test"); or 2) if the person maintains a place of abode in Utah and spends 183 or more days of the taxable year in Utah (the "183 day test").

The Division does not assert that TAXPAYER-1 was present in Utah for 183 or more days during either 2012 or 2013. As a result, the Division has not determined that TAXPAYER-1 is a Utah resident individual for these years under the 183 day test. Instead, the Division contends that TAXPAYER-1 is

considered to be domiciled in Utah during 2012 and 2013 and, thus, is a Utah resident individual for these years under the domicile test.

I. Facts.

The taxpayers have been married for many years. TAXPAYER-1 is a licensed Utah attorney who was a professor in the (X) school at the UNIVERSITY until he retired in 1998. TAXPAYER-1 continues to provide legal services in the tax and estate planning areas to a very small number of Utah clients. The taxpayers have owned a home in CITY-1, Utah for many years that is titled in both of their names (the "Utah home").[5] In 1997, the taxpayers purchased a condominium in STATE-2 (the "STATE-2 condominium"). In 2002, TAXPAYER-1 took steps to change his domicile from Utah to STATE-2, including changing his driver's license and voter registration from Utah to STATE-2.

Since 2002 and including the 2012 and 2013 tax years at issue, the taxpayers have filed joint federal returns and separate Utah returns, with TAXPAYER-2 filing Utah resident returns and TAXPAYER-1 filing Utah nonresident returns.[6] In 2007, the taxpayers purchased a single-family residence in a gated community in STATE-2 (the "STATE-2 home"), but kept their STATE-2 condominium as a rental property. The taxpayers live together and spend parts of each year at their Utah home, at their STATE-2 home, and on vacations around the world. TAXPAYER-1 explained that while he took steps to change his domicile to STATE-2 in 2002, TAXPAYER-2 decided that she wanted her domicile to be in Utah and has never taken steps to change it. TAXPAYER-2 still has a Utah driver's license and is registered to vote in Utah, as she was during the 2012

5 The taxpayers explained that TAXPAYER-2's family has owned the property on which the Utah home is located for more than 100 years and that she inherited the property. TAXPAYER-1 stated that the only reason his name is on the property's title is because their mortgage company required it.

6 For the 2012 and 2013 tax years, a STATE-2 address was used for the taxpayers' joint federal returns and for TAXPAYER-1 separate Utah nonresident returns. A Utah address was used on the taxpayers' joint STATE-1 nonresident returns and on TAXPAYER-2's separate Utah resident returns.

and 2013 tax years at issue.[7] TAXPAYER-1 states that it is TAXPAYER-2 who claims the property tax residential exemption and pays the property taxes on the Utah home.

The Utah home consists of #####-acres of land and a number of improvements, including the main residence in which the taxpayers live, a second residence that is used as a rental property, a barn, and two detached garages that, together, can accommodate five vehicles. The main residence is approximately #####-square feet in size. As of the date of the hearing, the Utah home is worth approximately $$$$$. The STATE-2 home is also approximately #####-square feet in size. It has a two-car garage and is situated on #####-acres of land in a gated community (which offers a number of amenities, such as a pool and park areas). As of the date of the hearing, the STATE-2 home is worth approximately $$$$$.

The taxpayers did not have any dependents during 2012 and 2013, and they did not attend any school or university during 2012 or 2013. The taxpayers were also not legally separated or divorced during 2012 or 2013. During the years at issue, the taxpayers owned three vehicles, all of which were registered in Utah. When the taxpayers visited the STATE-2 home during the 2012 and 2013 tax years, they would take one of the Utah-registered vehicles to STATE-2 with them. TAXPAYER-1 noted that insurance for a vehicle in CITY-2 is less expensive than insurance for a vehicle in STATE-2. TAXPAYER-2 has been a member of a church in Utah for many years, including the years at issue. TAXPAYER-1 was not affiliated with a church during 2012 and 2013. TAXPAYER-2 has also been a member of a Utah ladies' club and has participated in Utah charities for many years, including the years at issue. TAXPAYER-1 did not indicate that he was a member of any club or organization in either Utah or STATE-2 during 2012 and 2013.

As mentioned earlier, the taxpayers used both Utah and STATE-2 addresses on the various income tax returns they filed for the 2012 and 2013 tax years. For these tax years, most of TAXPAYER-1's tax forms (1099's, etc.) were sent to a STATE-2 address, but a few were sent to a Utah address. All of TAXPAYER-2's

7 TAXPAYER-2 voted in Utah elections twice in 2012 and twice in 2013.

tax forms were sent to a Utah address. In addition, the records for TAXPAYER-1's STATE-2 driver's license shows that he listed a Utah address as his "mailing address" and a STATE-2 address as his "physical address."

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 the 2012 and 2013 tax years, a taxpayer's domicile *for income tax purposes* is determined under Section 59-10-136, which contains four subsections addressing when a taxpayer is considered to have domicile in Utah (Subsections (1), (2), (3), and (5)) and a fifth subsection addressing when a taxpayer is not considered to have domicile in Utah (Subsection (4)).[8]

The taxpayers do not claim that Subsection 59-10-136(4) applies to them. Had Subsection 59-10-136(4) applied to the taxpayers, they would not be considered to be domiciled in Utah. It appears that the taxpayers were correct when they did not argue that Subsection 59-10-136(4) was applicable because one or both of them has been present in Utah more than 30 days in a calendar year and because they claimed a property tax residential exemption on their Utah home. As a result, the Commission must determine whether either or both of the taxpayers are considered to be domiciled in Utah under the remaining subsections of Section 59-10-136. The taxpayers admit that TAXPAYER-2 is domiciled in Utah, but do not indicate whether she is domiciled in Utah under Subsection 59-10-136(1), (2)(a), (2)(b), (2)(c), (3), and/or (5). The Division claims that because TAXPAYER-2 is domiciled in Utah and because the taxpayers do not meet either of the

8 Prior to tax year 2012, an individual's income tax domicile was determined under Utah Admin. Rule R865-9I-2 (2011) ("Rule 2"), which provided, in part, criteria to be used when determining an individual's income tax domicile and which referred to a non-exhaustive list of domicile factors in Utah Code Ann. R884-24P-52 (2011) ("Rule 52") (which is a property tax rule). After the Legislature enacted new criteria in Section 59-10-136 to determine income tax domicile for the 2012 tax year, Rule 2 was amended to remove any reference to domicile and to the Rule 52 factors. As a result, the version of Rule 2 in effect for the 2012 and 2013 tax years at issue is not controlling for purposes of determining income tax domicile. Rule 52 is still used to determine a person's domicile for *property tax purposes* (i.e., specifically to determine whether a person qualifies to claim the property tax residential exemption). However, Rule 52 is also not controlling for

two criteria set forth in Subsection 59-10-136(5)(b), TAXPAYER-1 is also considered to be domiciled in Utah under Subsection 59-10-136(5)(a).

Subsection 59-10-136(5)(a) provides that "[i]f an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state." However, Subsection 59-10-136(5)(b) provides that an individual is not considered to have a spouse for purposes of Section 59-10-136 if either of two exceptions exist, specifically: 1) the married couple are legally separated or divorced; or 2) the married couple file federal returns with a status of married filing separately. If either exception exists, an individual is not considered to have a spouse under Section 59-10-136, and Subsection 59-10-136(5)(a) would have no application to the spouse of such an individual. In the instant case, the taxpayers do not meet either of the exceptions set forth in Subsection 59-10-136(5)(b) because they were not legally separated or divorced in 2012 and/or 2013 and because they filed joint federal returns for these years. Accordingly, each of the taxpayers is considered to have a spouse for purposes of Section 59-10-136.

Because the taxpayers have admitted that TAXPAYER-2 is domiciled in Utah and because TAXPAYER-1 is considered to be TAXPAYER-2's spouse for purposes of Section 59-10-136, it would appear, at first glance, that TAXPAYER-1 would also be considered to have domicile in Utah, pursuant to Subsection 59-10-136(5)(a). However, Subsection 59-10-136(5)(a) only applies to TAXPAYER-1 if TAXPAYER-2 is considered to have domicile in Utah "in accordance with this section" (i.e., in accordance with one of the remaining subsections of Section 59-10-136). As a result, it may be helpful to discuss how the remaining subsections of Section 59-10-136 apply to this case.

The remaining subsections under which one or both of the taxpayers may be considered to be domiciled in Utah are Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), and (3). If an individual meets the criteria found in any one of these subsections, that individual is considered to be domiciled in Utah, even if the

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purposes of determining *income tax domicile* for the 2012 and 2013 tax years.

individual does not meet the criteria found in any of the other subsections. Neither of the taxpayers are considered to be domiciled in Utah under Subsection 59-10-136(1) because they had no dependents who were enrolled in a Utah public kindergarten, elementary, or secondary school in 2012 or 2013 and because neither of the taxpayers were enrolled as a resident student in a Utah institution of higher education during these years. Nevertheless, as will be explained below, it appears that *both* taxpayers may be considered to be domiciled in Utah under each of the remaining subsections (Subsections 59-10-136(2)(a), (2)(b), (2)(c), and (3)).

Subsection 59-10-136(2)(a). Under Subsection 59-10-136(2)(a), there is a rebuttable presumption that both taxpayers are considered to be domiciled in Utah in 2012 and 2013 because they claimed a property tax residential exemption on their Utah home for these years.[9] TAXPAYER-1 explains that he is on the title of the Utah home only because the mortgage company required it and that he is not the spouse who pays the property taxes assessed to the Utah home. TAXPAYER-1 may be suggesting that Subsection 59-10-136(2)(a) provides two separate and distinct presumptions of domicile (one that applies to him and one to his wife) and that he should be able to separately rebut the presumption that applies to him on the basis that he was not the spouse who claimed the residential exemption. Such an interpretation, however, would be contrary to the plain language of the statute.

Subsection 59-10-136(2)(a) provides that there is a rebuttable presumption that an *individual* is considered to be domiciled in Utah if *the individual or the individual's spouse* claims the exemption. Even if TAXPAYER-2 had owned the Utah home in her name only and was the only one who claimed the residential exemption, TAXPAYER-1 would still have been an individual whose spouse claimed the exemption. Accordingly, under this hypothetical, TAXPAYER-1 would also be considered to be domiciled in Utah unless the taxpayers were able to rebut the presumption arising from TAXPAYER-2's actions.[10] In other words,

9 The Division argued that TAXPAYER-1, as well as TAXPAYER-2, may be considered to be domiciled in Utah under Subsection 59-10-136(2)(a).

10 Admittedly, if neither taxpayer was considered to have a spouse for purposes of Section 59-10-136

regardless of whether TAXPAYER-2 alone or the taxpayers together claimed the residential exemption on the Utah home for 2012 and 2013, the Subsection 59-10-136(2)(a) rebuttable presumption applies to the taxpayers together.

Because Subsection 59-10-136(2)(a) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual who claims a residential exemption *is* considered to have domicile in Utah, but also for there to be circumstances where an individual who claims a residential exemption *is not* considered to have domicile in Utah.[11] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-136(2)(a) presumption.[12] As a result, it is left to the Commission to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

The Commission has previously found that the Subsection 59-10-136(2)(a) presumption can be rebutted if an individual has asked a county to remove the residential exemption, and the county failed to implement the individual's request. In addition, the Commission has indicated that the presumption may be rebutted if an individual received the residential exemption for a vacant home that was listed for sale and that qualified for the exemption upon being sold.[13] Neither of these circumstances exists in this case. On the other

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(i.e., if the taxpayers had met one of the Subsection 59-10-136(5)(b) exceptions) and if TAXPAYER-2 alone had claimed the residential exemption, the Subsection 59-10-136(2)(a) presumption would have applied only to TAXPAYER-2 (i.e., it would not have applied to TAXPAYER-1). For reasons previously explained, however, each taxpayer *is* considered to have a spouse for purposes of Section 59-10-136.

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

12 In Subsection 59-10-136(6), the Legislature has provided that the Subsection 59-10-136(2)(a) presumption does not even arise if an individual claims the residential exemption for a property that is the primary residence of a tenant. However, once the Subsection 59-10-136(2)(a) presumption does arise, the Legislature has not provided the circumstances with which it can be rebutted.

13 *See* Utah Admin. Rule R884-24-52(6)(f), which provides that "[i]f the county assessor determines that an unoccupied property will qualify as a primary residence when it is occupied, the property shall qualify for the residential exemption while unoccupied." While Rule 52 is no longer the controlling law for purposes of

hand, the Commission has found that the Subsection 59-10-136(2)(a) presumption is not rebutted because an individual had never heard of the residential exemption or did not know that he or she was receiving the residential exemption. Furthermore, the Commission has also indicated that there may be other circumstances to be raised in future cases that will be sufficient to rebut the presumption.

In the instant case, the Commission does not believe that the taxpayers' circumstances are sufficient to rebut the Subsection 59-10-136(2)(a) presumption. First, the taxpayers live together in the Utah home for a portion of each year and have claimed the residential exemption on the home for many years. Second, TAXPAYER-2 purposefully maintained her Utah domicile for income tax purposes even though TAXPAYER-1 took steps to change his domicile in 2002 (under the old income tax domicile law in effect prior to tax year 2012). Third, the taxpayers purposefully claimed the residential exemption for the 2012 and 2013 tax years. Fourth, as married individuals, both taxpayers benefitted from the Utah home receiving the residential exemption in 2012 and 2013 regardless of who may have paid the property taxes. The specific circumstances of this case do not warrant a finding that the taxpayers have rebutted the Subsection 59-10-136(2)(a) presumption.

TAXPAYER-1 asks the Commission to consider that he does not meet a majority of the domicile factors found in Rule 52, the property tax rule. As already explained, however, a consideration of TAXPAYER-1's separate circumstances would be improper to rebut a presumption that applies to the taxpayers together. Furthermore, regardless of whether one of the Subsection 59-10-136(2) presumptions applies to an individual alone (i.e., an individual without a spouse) or to a married couple together, the presumption cannot be rebutted by showing that the individual or the married couple would not have been considered to be domiciled in Utah under the "old" law that was used to determine income tax domicile for tax

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determining income tax domicile, there may be limited portions of Rule 52 that may be useful when the Commission delineates which circumstances are sufficient or insufficient to rebut a Subsection 59-10-136(2) presumption.

years prior to 2012. One could argue that using the old criteria found in the pre-2012 version of Rule 2 and/or in Rule 52 to determine an individual's income tax domicile for years when Section 59-10-136 is in effect would be giving the new law enacted by the Legislature little or no effect, which the Commission declines to do.[14]

The Commission also takes this opportunity to address the use of the 12 factors found in Subsection 59-10-136(3)(b) to rebut a Subsection 59-10-136(2) presumption. In Subsection 59-10-136(3)(b), the Legislature provided 12 factors to be used when determining whether a person is considered to be domiciled in Utah under Subsection 59-10-136(3). The Commission also declines to find that an individual can rebut a Subsection 59-10-136(2) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). If the Commission were to do so, one could argue that the Commission was giving no meaning to the Subsection 59-10-136(2) presumptions (i.e., determining domicile as though the Subsection 59-10-136(2) presumptions did not exist).[15]

In summary, under Subsection 59-10-136(2)(a), there is a presumption that both taxpayers are considered to be domiciled in Utah for the 2012 and 2013 tax years because they claimed a residential exemption on the Utah home for these years. Even though TAXPAYER-2 may have been the spouse who paid the property taxes on the Utah home, the presumption applies to the taxpayers together. Furthermore, the taxpayers' circumstances are insufficient to effectively rebut the residential exemption presumption of

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

15 This conclusion is further supported by the plain language of Subsection 59-10-136(3)(a), which provides that a person may be considered to be domiciled in Utah subject to Subsection 59-10-136(3)(b) "if the requirements of Subsection (1) or (2) are not met[.]" As a result, the provisions of Subsection 59-10-136(3)(b) only come into play if neither Subsection 59-10-136(1) or one of the presumptions of Subsection 59-10-136(2) applies.

Subsection 59-10-136(2)(a). Accordingly, both taxpayers are considered to be domiciled in Utah for the years at issue.

Other Domicile Criteria of Section 59-10-136. Because the Commission has found that both taxpayers are considered to be domiciled in Utah for the 2012 and 2013 years under Subsection 59-10-136(2)(a), the Commission need not analyze the remaining subsections (Subsections (2)(b), (2)(c), and (3)) to see if the taxpayers would also be considered to be domiciled in Utah under any one of these subsections. However, at the hearing, the Division indicated that TAXPAYER-2 (but not TAXPAYER-1) might be considered to be domiciled in Utah under Subsection 59-10-136(3). The Division's assertion that TAXPAYER-2 *only* might be considered to be domiciled in Utah under this subsection needs to be addressed.

Where an individual is considered to have a spouse, as in this case, Subsection 59-10-136(3) provides that an *individual* is considered to be domiciled in Utah if a preponderance of the 12 factors set forth in Subsection 59-10-136(3)(b) are met by either *the individual or the individual's spouse*. As a result, if a preponderance of the 12 factors set forth in Subsection 59-10-136(3)(b) are met by TAXPAYER-2's actions alone, not only is TAXPAYER-2 considered to be domiciled in Utah, but TAXPAYER-1 is also considered to be domiciled in Utah (even if TAXPAYER-1's actions alone do not meet any, much less a preponderance, of the Subsection 59-10-136(3)(b) factors).[16] Because both taxpayers have been found to be domiciled in Utah under Subsection 59-10-136(2)(a), the Commission will not analyze the 12 factors of Subsection 59-10-136(3)(b) in detail. However, a cursory review of the 12 factors shows that TAXPAYER-2 meets a preponderance of these 12 factors.[17] As a result, it appears that not only would TAXPAYER-2 be considered to be domiciled in Utah under Subsection 59-10-136(3), but that TAXPAYER-1 would also be considered to

16 It is noted that unlike the three presumptions found in Subsection 59-10-136(2), Subsection 59-10-136(3) is not a rebuttable presumption. It is an "absolute." As a result, if an individual meets a preponderance of the 12 factors found in Subsection 59-10-136(3)(b), the individual and the individual's spouse will both be considered to be domiciled in Utah without consideration of any other circumstances or factors.

17 It appears that approximately 8 of the 12 factors suggest a Utah domicile.

be domiciled in Utah under this subsection (even if they were not considered to be domiciled in Utah under another subsection of Section 59-10-136).[18]

It is noted that TAXPAYER-2's actions also invoke the rebuttable presumptions of Subsections 59-10-136(2)(b) and (2)(c) because she was registered to vote in Utah in 2012 and 2013 and because she filed Utah resident returns for these years. As a result, there is a rebuttable presumption under each of these subsections that both of the taxpayers are domiciled in Utah for these years. Again, because both taxpayers have already been found to be domiciled in Utah, the Commission will not analyze each of the Subsection 59-10-136(2)(b) and (2)(c) presumptions in detail. Nevertheless, TAXPAYER-2 purposefully decided to maintain her Utah voter registration and voted in Utah in 2012 and 2013, and she purposefully filed 2012 and 2013 Utah resident returns with an intention for all of her income both within and without Utah to be subject to Utah taxation (subject to a credit for taxes paid to other states). Such actions are consistent with her stated desire to remain a Utah domiciliary and Utah resident individual during the years at issue. As a result, it is possible that the taxpayers would not be able to rebut either of these presumptions and would also be considered to be domiciled in Utah under either Subsection 59-10-136(2)(b) or (2)(c) because of TAXPAYER-2's actions.[19]

Domicile – Summary. Both taxpayers are considered to be domiciled in Utah for the 2012 and 2013 tax years under either Subsection 59-10-136(2)(a) or Subsection 59-10-136(3). In addition, it is possible that both of them may also be considered to be domiciled in Utah under Subsection 59-10-136(2)(b) or (2)(c). Because both taxpayers are considered to be domiciled in Utah for income tax purposes for the 2012 and 2013 tax years, they are both Utah resident individuals for these years, pursuant to Subsection 59-10-103(1)(q)(i).

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18 That both taxpayers may be considered to be domiciled in Utah under Subsection 59-10-136(3) because of TAXPAYER-2's actions alone is supported by Subsection 59-10-136(5)(a), which provides that where an individual is considered to be domiciled in Utah under this section, the individual's spouse is also considered to be domiciled in Utah.

19 Again, that both taxpayers may be considered to be domiciled in Utah under one of the Subsection 59-10-136(2) presumptions because of TAXPAYER-2's actions alone is supported by Subsection 59-10-136(5)(a).

The taxpayers have not met their burden of proof to show that the Division's assessments of additional tax for the 2012 and 2013 tax years are incorrect.

III. Taxpayers' Other Arguments.

The taxpayers contend that the Commission should allow TAXPAYER-2 to file a separate Utah resident return and TAXPAYER-1 to file a separate Utah nonresident return for the 2012 and 2013 tax years because UCA §59-10-119(3) (2012) provides for separate returns "[i]f one spouse is a nonresident of this state and the other spouse is a resident of this state[.]" Furthermore, the taxpayers point out that Utah Admin. Rule R865-9I-6(2) (2012) ("Rule 6") provides that "[a] husband and wife, one being a nonresident and the other a resident, may use an alternate method of calculating their separate state taxable incomes. . . ." However, this statute and rule only apply to married individuals who are considered residents of different states. Because both of the taxpayers have been found to be Utah resident individuals for the years at issue, Subsection 59-10-119(3) and Rule 6(2) do not apply to them or this case.[20]

TAXPAYER-1 also contends that pursuant to UCA §59-10-117 (2012), Utah should not tax any income he earned in 2012 and 2013 other than the income (or losses) associated with his part-time Utah law practice. Section 59-10-117, however, contains language indicating that its provisions are "[f]or purposes of Section 59-10-116." UCA §59-10-116 (2012) provides for a tax on nonresident individuals, not resident individuals. As a result, neither Section 59-10-116 nor Section 59-10-117 is applicable to TAXPAYER-1, who has been found to be a Utah resident individual for the years at issue.[21] As a Utah resident individual, all

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20 Although these provisions do not apply to the taxpayers' circumstances, there are instances where these provisions may still apply for the 2012 and subsequent tax years. As one example, consider a married couple who are *not* considered to have spouses pursuant to Subsection 59-10-136(5)(b). If the married couple were residents of different states (i.e. one a resident of Utah and one a resident of another state), they could file separate Utah returns pursuant to Subsection 59-10-119(3) and Rule 6(2).

21 *See also Benjamin v. Utah State Tax Comm'n*, 250 P.3d 39 (Utah 2011). Subsections 59-10-117(2)(d) and (2)(f) provide that in certain circumstances, Utah source income is determined in accordance with UCA

of TAXPAYER-1's 2012 and 2013 income is subject to Utah taxation (subject to a credit for income taxes paid to another state).

Lastly, TAXPAYER-1 believes that the Division's assessments should be overturned because the Division admitted that both taxpayers could possibly be considered to be residents of STATE-2 under STATE-2 law in addition to being residents of Utah under Utah law. Because STATE-2 does not have an income tax, it is likely that there is no STATE-2 law concerning income tax residency. Regardless, the Division's point is valid. An individual may be considered an income tax resident of more than one state. For example, if an individual is domiciled in one state yet spends 183 or more days in another state, he or she may be considered residents of both states for income tax purposes. To avoid double taxation under such circumstances, most states, like Utah, provide a credit for income taxes paid to another state. As a result, the Division's assessments are not invalid because one or both taxpayers could also be considered a resident of a state other than Utah. In summary, none of the taxpayers' additional arguments invalidate the Division's assessments.

IV. Penalties and Interest.

For this case, the applicable law to determine whether the penalties and interest assessed to the taxpayers may be waived is found in Subsection 59-1-403(13) and Rule 42.[22] 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. Rule 42(2) provides that interest is waived only if a taxpayer shows that the Tax Commission

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§59-10-118 (2012). The Benjamins argued that even though they might be Utah resident individuals, a portion of their income should not be subject to Utah taxation pursuant to Section 59-10-118. The Court found otherwise, indicating in footnote 6 of *Benjamin* that Section 59-10-116, Section 59-10-117, and Section 59-10-118 apply to nonresident individuals and not to resident individuals.

22 Different criteria concerning the imposition and/or waiver of penalties and interest are provided in Subsections 59-10-136(4)(d) and (4)(e), which apply if an individual did not file a Utah return based on a belief that he or she was not considered to be domiciled in Utah under Subsection 59-10-136(4)(a). Because the limited circumstances described in Subsections 59-10-136(4)(d) and (4)(e) are not present in this case, these specific provisions are not applicable in determining whether the penalties and interest assessed to the

gave the taxpayer erroneous information or took inappropriate action that contributed to the taxpayer's error.[23] The taxpayers have not asserted that they failed to pay Utah income taxes for 2012 and 2013 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. Pursuant to Subsection 59-10-401(13) and Rule 42, the Commission generally waives penalties in domicile cases because of the complexity of the issues. In addition, the Division stated at the hearing that it would not object to the Commission waiving the penalties it imposed. Accordingly, reasonable cause exists to waive all penalties imposed for the 2012 and 2013 tax years.

V. Conclusion.

The taxpayers have not met their burden of proof to show that the Division's assessments for the 2012 and 2013 tax years are incorrect (other than showing that the assessments do not reflect payments that TAXPAYER-2 has previously made to Utah for these years). As a result, the Commission should sustain the Division's 2012 and 2013 assessments, except that the Commission should waive all penalties and order the Division to reduce its tax and interest assessments to reflect the payments that TAXPAYER-2 has previously made to Utah.

_____
Kerry R. Chapman
Administrative Law Judge

taxpayers may be waived.

23 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.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's 2012 and 2013 assessments, with two exceptions. First, the Commission waives all penalties that have been imposed. Second, the Commission orders the Division to adjust its assessments of tax and interest to reflect the payments that TAXPAYER-2 has previously made to Utah for these years. 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.