17-514
TAX TYPE: INCOME TAX
TAX YEAR: 2013 & 2014
DATE SIGNED: 01/08/2018
COMMISSIONERS: J VALENTIN, M CRAGUN, R PERO, R ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYERS, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 17-514 Account No. #### Tax Type: Income Tax Years: 2013 & 2014 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYERS, Representative (by telephone)[1]
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 November 1, 2017.

1 Neither of the taxpayers was present to proffer testimony, and REPRESENTATIVE FOR TAXPAYERS indicated that she obtained many of the facts she proffered from talking with the taxpayers. While the testimony that REPRESENTATIVE FOR TAXPAYERS proffered about these facts is hearsay, Utah Code Ann. §63G-4-206(1)(c) provides that in Tax Commission proceedings, evidence may not be excluded solely because it is hearsay. Nevertheless, UCA §63G-4-208(3) provides that "[a] finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence." Utah Admin. Rule R861-1A-28(2)(b) provides that hearsay evidence may be admitted at Tax Commission proceedings, but that no decision of the Commission will be based solely on hearsay evidence. For purposes of this decision, the Commission will consider all hearsay evidence that REPRESENTATIVE FOR TAXPAYERS proffered at the Initial Hearing under the assumption that the taxpayers would provide this evidence themselves if there is a Formal Hearing. Even though all testimony REPRESENTATIVE FOR TAXPAYERS proffered has been considered for purposes of making this decision, it was insufficient to support the taxpayers' position (for reasons that will be explained later in the decision).

TAXPAYERS ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessments of additional individual income tax for the 2013 and 2014 tax years. On March 6, 2017, the Division issued Notices of Deficiency and Audit Change to the taxpayers, in which it imposed additional tax and interest (calculated as of April 5, 2017), as follows:

Year	Tax	Penalties	Interest[2]	Total
2013	$$$$$	$0.00	$$$$$	$$$$$
2014	$$$$$	$0.00	$$$$$	$$$$$

For the 2013 and 2014 tax years, the taxpayers filed Utah resident returns with a status of married filing jointly. With each of these Utah returns, the taxpayers included a TC-40B form on which they checked the "nonresident" box and only allocated TAXPAYER-1's income to Utah. The taxpayers proffered that these returns were intended to show that TAXPAYER-1 (who lived and worked in Utah) was a Utah resident for 2013 and 2014 and that TAXPAYER-2 (who lived and worked in STATE) was a STATE resident for these years. The taxpayers also filed federal returns with a status of married filing jointly for the 2013 and 2014 tax years at issue.

The Division determined that both taxpayers were domiciled in Utah for the 2013 and 2014 tax years and, thus, that both of them were Utah resident individuals for these years. As a result, the Division determined that TAXPAYER-2's 2013 and 2014 income was also subject to Utah taxation and assessed the taxpayers accordingly. For these reasons, the Division asks the Commission to sustain its assessments. The taxpayers admit that TAXPAYER-1 was domiciled in Utah during the 2013 and 2014 tax years, but contend that TAXPAYER-2 was neither a Utah domiciliary nor a Utah resident individual for any portion of these years. For these reasons, the taxpayers ask the Commission to reverse the Division's 2013 and 2014 assessments.

APPLICABLE LAW

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

1. Under Utah Code Ann. §59-10-104(1) (2013)[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)(i), as follows in pertinent part:

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

3. Effective for tax year 2012 (and, thus, applicable to the 2013 and 2014 tax years at issue), 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;

3 All citations are to the 2013 version of the Utah Code and the Utah Administrative Code, unless otherwise indicated. The substantive law remained the same during 2013 and 2014.

(b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or

(c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

(3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:

(i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and

(ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.

(b) The determination of whether an individual is considered to have domicile in this state under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:

(i) whether the individual or the individual's spouse has a driver license in this state;

(ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;

(iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;

(iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;

(v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;

(vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;

(vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;

(viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;

(ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;

(x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;

(xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or

(xii) whether the individual is an individual described in Subsection (1)(b).

(4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:

(i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and

(ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:

(A) return to this state for more than 30 days in a calendar year;

(B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);

(C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;

(D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or

(E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.

(b) Notwithstanding Subsection (4)(a), an individual that meets the qualifications of Subsection (4)(a) to not be considered to have domicile in this state may elect to be considered to have domicile in this state by filing an individual income tax return in this state as a resident individual.

(c) For purposes of Subsection (4)(a), an absence from the state:

(i) begins on the later of the date:

(A) the individual leaves this state; or

(B) the individual's spouse leaves this state; and

(ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.

(d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:

(i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and

(ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.

(e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.

(ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:

(A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and
(B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).

(5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.
(b) For purposes of this section, an individual is not considered to have a spouse if:
(i) the individual is legally separated or divorced from the spouse; or
(ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.
(c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.

(6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

4. For the instant matter, UCA §59-1-1417(1) (2017) 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-1 was domiciled in Utah during all of 2013 and 2014 and, thus, was a Utah

resident individual for these years. At issue is whether TAXPAYER-2 was also a Utah resident individual for these 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 contend that TAXPAYER-2 is a Utah resident individual for the 2013 and 2014 tax years under the 183 day test. Instead, the Division has determined that TAXPAYER-2 is a Utah resident individual for these years under the domicile test. As a result, the Commission must apply the facts to the domicile law in effect for 2013 and 2014 to determine whether TAXPAYER-2 is or is not considered to be domiciled in Utah during these years.

I. Facts.

As of the date of the hearing, the taxpayers have been married approximately 25 years and have five children. The taxpayers have not been divorced, and no court has decreed them to be legally separated. From the time the taxpayers married until 2012, they lived together in STATE. In 2012, TAXPAYER-1 and the taxpayers' youngest two children moved to CITY, Utah, while TAXPAYER-2 remained in STATE. Since 2012 or before, the taxpayers' oldest three children have not lived with either taxpayer and have not been claimed as dependents by the taxpayers. The taxpayers claimed their youngest two children as dependents on their federal and Utah returns for each of the 2013 and 2014 tax years.

In 2012, one or both of the taxpayers purchased a home in CITY, Utah (the "Utah home"). The Division claims that the home was titled in the names of both taxpayers. Initially, REPRESENTATIVE FOR TAXPAYERS proffered that the Utah home was titled in the name of TAXPAYER-1 only. Later in the hearing, REPRESENTATIVE FOR TAXPAYERS claimed that the Utah home was titled in a trust. Neither party proffered evidence to support their various claims. In addition, REPRESENTATIVE FOR

TAXPAYERS stated that she did not know if only TAXPAYER-1 or if both taxpayers were trustees and/or beneficiaries of the purported trust. For the 2013 and 2014 tax years, the Utah home received the residential exemption from Utah property taxation.[4]

When TAXPAYER-1 and the taxpayers' two youngest children moved to Utah in 2012, the taxpayers sold the home they had owned together in the CITY-1, STATE area. TAXPAYER-2, however, owned another home in CITY-2, STATE in his name only (the "CITY-2, STATE home"), where he lived during the 2013 and 2014 tax years at issue. TAXPAYER-2 is an OCCUPATION who works for an ENTITY, and the CITY-2, STATE home is near the facility at which he worked during 2013 and 2014. During each of the 2013 and 2014 tax years at issue, TAXPAYER-2 was present in Utah for less than 14 days.

REPRESENTATIVE FOR TAXPAYERS proffered that both of the taxpayers' youngest children, who the taxpayers claimed as dependents for 2013 and 2014, attended institutions of higher education during these years. Both parties agree that the taxpayers' youngest child turned 18 in June 2013. REPRESENTATIVE FOR TAXPAYERS, however, did not know whether the taxpayers' youngest child graduated from high school in or around June 2013 and attended an institution of higher education during the latter half of 2013 only, or whether the taxpayers' youngest child graduated from high school prior to 2013 and only attended an institution of higher education during 2013. In addition, in the event that taxpayers' youngest child did attend high school in CITY-1 during the first half of 2013, REPRESENTATIVE FOR TAXPAYERS did not know whether this child attended a public or private high school. Regardless, both parties agree that at least one of the taxpayers' two dependent children was enrolled as a resident student at UNIVERSITY, a Utah

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

public institution of higher education, during the 2013 and 2014 tax years. Neither TAXPAYER-1 nor TAXPAYER-2 attended any institution of higher education during the years at issue.

During the 2013 and 2014 tax years, TAXPAYER-2 had a STATE driver's license and was registered to vote in STATE. TAXPAYER-1 obtained a Utah driver's license in February 2012. REPRESENTATIVE FOR TAXPAYERS proffered that TAXPAYER-1 also registered to vote in Utah, but she does not know if TAXPAYER-1 registered to vote in Utah in 2012 (when she obtained her Utah driver's license) or not. Neither party provided information to show the exact date that TAXPAYER-1 registered to vote in Utah or whether she has ever voted in Utah. During 2013 and 2014, TAXPAYER-1 owned two vehicles that were titled in her name only that were registered in Utah. For these years, TAXPAYER-2 owned one vehicle that was titled in his name only that was registered in STATE.

The taxpayers used the address of the Utah home to file their 2013 and 2014 joint federal and Utah returns. Otherwise, TAXPAYER-2 received all mail at a STATE address, while TAXPAYER-1 received all mail at a Utah address. Both taxpayers were members of the same church during the 2013 and 2014 tax years. During these years, TAXPAYER-2's church records were kept at a STATE unit of the church, while TAXPAYER-1's church records were kept at a Utah unit of the church. REPRESENTATIVE FOR TAXPAYERS did not know if either of the taxpayers was a member of any other organization or club during the 2013 and 2014 tax years.

II. Applying the Facts to the Domicile Law in Effect for 2013 and 2014.

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 2013 and 2014, 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)).[5]

Subsection 59-10-136(5)(b). For a married individual, it is often necessary to determine whether that individual is considered to have a "spouse" for purposes of Section 59-10-136. Subsection 59-10-136(5)(b) provides that a married individual is considered to have a spouse for purposes of Section 59-10-136 unless the individual satisfies at least one of the following two conditions: 1) if the individual is "legally separated" or "divorced" from the individual's spouse (under Subsection 59-10-136(5)(b)(i)); or 2) if the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year (under Subsection 59-10-136(5)(b)(ii)). All parties agree that the taxpayers filed a federal return with a status of married filing jointly for each of the 2013 and 2014 tax years. In addition, both parties agree that the taxpayers were not divorced. The parties, however, disagree as to whether the taxpayers were "legally separated" during the 2013 and 2014 tax years.

The Division contends that the taxpayers were not "legally separated" because they have never obtained a court document declaring them to be separated. The taxpayers, on the other hand, contend that they are "legally separated" for purposes of the Utah law because they are "considered unmarried" by the Internal Revenue Service ("IRS"). To support this claim, the taxpayers point out that IRS Publication 504, Divorced or Separated Individuals ("Publication 504") indicates that an individual is "considered unmarried" and can file a federal return with a status of head of household if certain conditions are met. The taxpayers contend that they meet the Publication 504 conditions to be "considered unmarried" and, thus, should be considered "legally separated" for purposes of Utah's domicile law.

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5 Prior to tax year 2012, an individual's income tax domicile was determined under Utah Admin. Rule R865-9I-2 (2011) ("Rule 2"), which provided, in part, criteria to be used when determining an individual's income tax domicile and which referred to a non-exhaustive list of domicile factors in Utah Admin. Rule R884-24P-52 (2011) ("Rule 52") (which is a property tax rule). After the Legislature enacted new criteria in Section 59-10-136 to determine income tax domicile for the 2012 tax year, Rule 2 was amended to remove any reference to domicile and to the Rule 52 factors.

For reasons to be discussed below, the Commission is not convinced that married individuals who are "considered unmarried" for IRS purposes are "legally separated" for purposes of Section 59-10-136. Regardless, the taxpayers have not shown they meet all requirements to be "considered unmarried" for IRS purposes, as set forth in Publication 504.[6] The first IRS requirement to be "considered unmarried" provides that "[y]ou file a separate return . . . claiming married filing separately, single, or head of household filing status." Neither of the taxpayers filed a separate federal return for the 2013 or 2014 tax years. Instead, they filed joint federal returns for these years. As a result, neither taxpayer meets all of the requirements necessary to be "considered unmarried" for federal tax purposes.[7]

Nevertheless, even if the taxpayers had met all requirements to be "considered unmarried," it would not necessarily mean that they were "legally separated" for purposes of Section 59-10-136. First, under Subsection 59-10-136(5)(c), the Utah Legislature has made clear that except for claiming married filing separately filing status on a federal return, "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." Accordingly, whether an individual qualifies as "considered unmarried" for federal filing purposes is not controlling for purposes of determining whether an individual has a spouse under Section 59-10-136.

Second, in Publication 504, the IRS indicates that being "considered unmarried" for purposes of determining one's filing status is not the same as being "legally separated." In Publication 504 (p. 3), the IRS explains that "[y]ou are unmarried for the whole year if . . . [y]ou have obtained a final decree of divorce or

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6 The various requirements that must be met before married individuals are "considered unmarried" are found on page 6 of the 2013 and 2014 versions of Publication 504. Any further reference to Publication 504 will refer to the 2013 and 2014 versions of the publication.

7 However, married individuals do not have to meet all of the requirements to be "considered unmarried" for federal tax purposes in order for them not to be considered to have a spouse for Utah income tax purposes. Under Subsection 59-10-136(5)(b), married individuals are not considered to have a spouse for Utah income tax purposes if they are legally separated or divorced, or if they file federal returns with a married filing separately filing status (as opposed to a single or head of household filing status), even if they do not meet all IRS requirements to be "considered unmarried."

separate maintenance by the last day of your tax year. You must follow your state law to determine if you are divorced or legally separated. . . ." The taxpayers have not shown that they obtained a decree of separate maintenance or a similar order from any court in Utah or STATE.

Furthermore, the taxpayers are not considered to be "legally separated" under Utah law. Utah divorce laws are found in Title 30, Chapter 3 of the Utah Code. For example, Utah Code Ann. §30-3-4.5 provides that one party to a marriage "may file an action for a temporary separation order without filing a petition for divorce" and that "temporary orders are valid for one year from the date of the hearing, or until one of the following occurs: (a) a petition for divorce is filed and consolidated with the petition for temporary separation; or (b) the case is dismissed." Moreover, Utah Code Ann. §30-3-1(3)(j) provides that one of the grounds for divorce is "when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation." In Utah, laws concerning "separate maintenance" are found in Title 30, Chapter 4 of the Utah Code. Utah Code Ann. §30-4-1 provides that upon one party to a marriage filing a petition for separate maintenance, the court may enter a decree of separate maintenance.

The taxpayers have not filed a petition for temporary separation (as allowed under Section 30-3-4.5), a petition for separate maintenance (as allowed under Section 30-4-1), or a similar petition in another jurisdiction. As a result, the Commission must determine whether married individuals are considered "legally separated" if they live apart and maintain separate homes, as the taxpayers appear to have done during the 2013 and 2014 tax years. The term "legally separated" is not defined in Utah law. However, living separately and maintaining separate homes does not constitute being "legally separated." To interpret the term "legally separated" in this manner would impermissibly give no effect or meaning to the word "legally."[8]

8 In *Warne v. Warne*, 275 P.3d 238, 2012 UT 13 (Utah 2012), the Utah Supreme Court ruled that "[u]nder our rules of statutory construction, we must give effect to every provision of a statute and avoid an interpretation that will render portions of a statute inoperative" (*citing Hall v. Utah State Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958). In *Hall v. Utah State Dept. of Corrections*, 24 P.3d 958, 2001 UT 34 (Utah 2001), the Court also stated that "our primary goal when construing statutes is to evince 'the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.'" (*citing Jensen v. Intermountain Health*

Furthermore, another informational website about divorce and legal separation in Utah indicates that "[p]arties are legally separated only when a court enters a decree of separate maintenance. To obtain a decree of separate maintenance in Utah, the parties go through an action like a divorce."[9] The taxpayers did not obtain a decree of separate maintenance (as permitted under Section 30-4-1). Unless shown otherwise, the Commission believes that a party should also be considered "legally separated" if they obtain a temporary separation order (as permitted under Section 30-3-4.5). However, the taxpayers did not obtain one of these orders either. Moreover, the taxpayers did not obtain a decree or order from STATE that is similar to the decree of separate maintenance or the temporary separation order set forth in Utah law.

In conclusion, to be "legally separated," a court must have issued a decree or order approving a petition for temporary separation or separate maintenance or, for jurisdictions other than Utah, issued a similar type of order. Because no such decree or order was issued by a court in regards to the taxpayers, the taxpayers are not considered to be "legally separated" during 2013 or 2014, even though they lived separately and maintained separate homes. The taxpayers have the burden of proof in this matter and have not shown that the term "legally separated" should be interpreted differently. Accordingly, for purposes of determining whether the taxpayers are considered to be domiciled in Utah during the 2013 and 2014 tax years, each taxpayer is considered to have a spouse during these years.

Because TAXPAYER-1 admits that she was domiciled in Utah during the 2013 and 2014 tax years and because TAXPAYER-2 is considered to be TAXPAYER-1's spouse for purposes of Section 59-10-136, it would appear, at first glance, that TAXPAYER-2 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 if TAXPAYER-1 is

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Care, Inc., 679 P.2d 903, 906 (Utah 1984)). The Court further stated that "[i]n doing so, we seek 'to render all parts thereof relevant and meaningful' . . . and we accordingly avoid interpretations that will render portions of a statute superfluous or inoperative" (*citing Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980), *Platts v. Parents Helping Parent*s, 947 P.2d 658, 662 (Utah 1997); *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995)).

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

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 is necessary to see if both TAXPAYER-1 and TAXPAYER-2 are considered to be domiciled in Utah for the 2013 and 2014 tax years under the remaining subsections of Section 59-10-136.

Remaining Subsections of Section 59-10-136. The taxpayers do not argue that either of them is *not* considered to be a Utah domiciliary for the 2013 or 2014 tax years under Subsection 59-10-136(4).[10] As a result, the Commission must analyze whether TAXPAYER-1 and TAXPAYER-2 are considered to have domicile in Utah for the 2013 and 2014 tax years under the remaining subsections of Section 59-10-136 (i.e., under Subsections 59-10-136 (2)(a), (2)(b), (2)(c), and (3)). If an individual meets the criteria found in *any one* of these subsections, that individual is considered to be domiciled in Utah, even if the individual does not meet the criteria found in any of the other subsections.

Subsection 59-10-136(1)(a)(i).[11] Subsection 59-10-136(1)(a)(i) provides that an individual is considered to be domiciled in Utah if for federal income tax purposes, the individual or the individual's spouse claims a dependent who is enrolled in a Utah public kindergarten, elementary, or secondary school. Because the taxpayers' youngest dependent child lived in Utah and did not turn 18 until June 2013, it is possible that this child may have attended a Utah public high school for the first half of 2013. If so, both taxpayers would be considered to be domiciled in Utah for that portion of 2013 that their youngest child may have attended a Utah public high school.[12] The Commission, however, need not find that either taxpayer is domiciled in Utah under Subsection 59-10-136(1)(a)(i) for the first half of 2013 because they are both considered to be domiciled

10 Subsection 59-10-136(4) applies to an individual who is "absent from the state" for at least 761 consecutive days, if a number of requirements are satisfied. One of the requirements is that the individual *and* the individual's spouse not return to Utah for more than 30 days in a calendar year. Because TAXPAYER-1 lives in Utah, this requirement is not satisfied for either TAXPAYER-1 or TAXPAYER-2.

11 The taxpayers are not considered to be domiciled in Utah under Subsection 59-10-136(1)(a)(ii) because neither of them was enrolled in a Utah public institution of higher education during 2013 or 2014.

12 Under Subsection 59-10-136(1)(a)(i), each of the taxpayers would be considered to be domiciled in Utah for whatever period their dependent child attended a Utah public high school (even if they were not

in Utah for all of 2013 and 2014 under at least one other subsections of Section 59-10-136 (as will be discussed below).[13]

Subsection 59-10-136(2)(a). This subsection provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse claims the property tax residential exemption on either the individual's or individual's spouse's primary residence. For the 2013 and 2014 tax years, the Utah home in which TAXPAYER-1 (but not TAXPAYER-2) lived received the property tax residential exemption.

It is unclear whether the Utah home is owned by the taxpayers together, by TAXPAYER-1 alone, or by a trust of whom the trustee(s) and/or beneficiary(ies) may include one or both taxpayers. It is possible that the Utah home was only owned by TAXPAYER-1 or by a trust of which TAXPAYER-1 alone was a trustee or beneficiary. Even if this is true, it would not mean that the Subsection 59-10-136(2)(a) presumption would only apply to TAXPAYER-1. 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. Thus, regardless of whether TAXPAYER-2 had no ownership interest in and did not live in the Utah home during 2013 and 2014, the rebuttable presumption of Subsection 59-10-136(2)(a) would apply to both TAXPAYER-1 and TAXPAYER-2.[14]

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

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considered to have a spouse under Subsection 59-10-136(5)(b)).

13 That being said, the taxpayers have the burden of proof in this matter. As a result, were the taxpayers not considered to be domiciled in Utah for all of 2013 and 2014 under another subsection of Section 59-10-136, the Commission would have found them domiciled in Utah for the first half of 2013 under Subsection 59-10-136(1)(a)(i) (because REPRESENTATIVE FOR TAXPAYERS did not know if the taxpayers' youngest child attended a Utah public high school or a Utah private school during the first half of 2013).

14 This conclusion is supported by the previously-mentioned Subsection 59-10-136(5)(a), which provides that "[i]f an individual is considered to have domicile in this state in accordance with this section, the

residential exemption *is not* considered to have domicile in Utah.[15] 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.[16] 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.[17] Neither of these circumstances exists in this case.

On the other 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 found that an individual has not rebutted the presumption because he or she would not be considered to be domiciled in Utah under Rule 52, the property tax rule used to determine income tax domicile for tax years prior to 2012. It is arguable that using the "old" income tax domicile criteria found in the pre-2012 version of Rule 2 and/or in Rule 52 to

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individual's spouse is considered to have domicile in this state."

15 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).

16 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.

17 *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 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.

determine an individual's income tax domicile for years when Section 59-10-136 is in effect would be giving the new law enacted by the Legislature little or no effect, which the Commission declines to do.[18]

Similarly, the Commission has found that an individual cannot rebut a Subsection 59-10-136(2) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). If the Commission were to do so, one could argue that the Commission would be giving no meaning to the Subsection 59-10-136(2) presumptions (i.e., that it was determining domicile as though the Subsection 59-10-136(2) presumptions did not exist).[19]

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. However, the Commission does not believe that the taxpayers' circumstances are sufficient to rebut the Subsection 59-10-136(2)(a) presumption for the 2013 and 2014 tax years. TAXPAYER-1 has lived in the Utah home since moving to Utah with the taxpayers' two youngest children in 2012, and no evidence was proffered to suggest that the Utah home has not received the residential exemption every tax year since 2012. In addition, TAXPAYER-1 purposefully changed her domicile from STATE to Utah in 2012, even though TAXPAYER-2 remained in STATE once the taxpayers decided to live separately. The specific circumstances of this case do not warrant a finding that the taxpayers have rebutted the Subsection 59-10-136(2)(a) presumption that is applicable to both of them. Accordingly, under Subsection 59-10-136(2)(a), both TAXPAYER-1 and TAXPAYER-2 are considered to be domiciled in Utah for all of the 2013 and 2014 tax years.

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

19 This conclusion is further supported by the plain language of Subsection 59-10-136(3)(a), which provides that a person may be considered to be domiciled in Utah subject to Subsection 59-10-136(3)(b) "if the requirements of Subsection (1) or (2) are not met[.]" As a result, the provisions of Subsection 59-10-136(3)(b) only come into play if neither Subsection 59-10-136(1) nor one of the presumptions of Subsection 59-10-136(2) applies.

Other Subsections of Section 59-10-136. Because the taxpayers have been found to be domiciled in Utah under Subsection 59-10-136(2)(a), they are 2013 and 2014 Utah domiciliaries regardless of whether they are also considered to be domiciled in Utah under another subsection of Section 59-10-136. As a result, the Commission need not address the other subsections of Section 59-10-136 to resolve this appeal. Nevertheless, it may be helpful for the Commission to make some cursory observations about these other subsections.

Under Subsection 59-10-136(2)(b), an individual is presumed to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah, unless the presumption is rebutted. Because the taxpayers have not met their burden of proof to show that TAXPAYER-1 was not registered to vote in Utah for all of 2013 and 2014, the Commission would consider TAXPAYER-1 to be registered to vote in Utah for both of these years. Accordingly, the Commission would also consider both taxpayers to be domiciled in Utah under Subsection 59-10-136(2)(b), unless they were able to rebut this presumption.

Utah Subsection 59-10-136(2)(c), an individual is presumed to be domiciled in Utah if the individual *or* the individual's spouse asserts Utah residency on a Utah return. It is not clear whether this presumption arises in the instant case because the taxpayers filed Utah nonresident returns for the 2013 and 2014 tax years (by completing and submitting the TC-40B form with the returns). However, on the TC-40B forms submitted with the 2013 and 2014 Utah returns, the taxpayers allocated TAXPAYER-1's income to Utah, and REPRESENTATIVE FOR TAXPAYERS indicated that they did so to indicate that TAXPAYER-1 was a Utah resident individual. Because the Commission has already determined that both taxpayers are Utah domiciliaries for 2013 and 2014 under another subsection of Section 59-10-136, the Commission need not determine if the Subsection 59-10-136(2)(c) presumption even arises.

Finally, it appears that both taxpayers may also be considered Utah domiciliaries for the 2013 and 2014 tax years under Subsection 59-10-136(3)(b) because many of the factors found in this subsection are satisfied by one or both of the taxpayers. Because the Commission has already determined that both taxpayers

are Utah domiciliaries for 2013 and 2014 under another subsection of Section 59-10-136, the Commission will not discuss Subsection 59-10-136(3)(b) and the individual factors found in it any further.

Domicile – Summary. Based on the foregoing, both TAXPAYER-1 and TAXPAYER-2 are considered to be domiciled in Utah for all of the 2013 and 2014 tax years. As a result, both taxpayers are also considered to be Utah resident individuals for all of 2013 and 2014. Accordingly, all income that TAXPAYER-2 earned in 2013 and 2014 is also subject to taxation, even though he lived and earned this income in STATE. For these reasons, the Commission should sustain the Division's 2013 and 2014 assessments.

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessments for the 2013 and 2014 tax years in their entireties. It is so ordered.

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

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

or emailed to:

taxappeals@utah.gov

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

DATED this _____ day of _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

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.