17-824
TAX TYPE: INCOME TAX
TAX YEAR: 2013, 2014 & 2015
DATE SIGNED: 02/16/2018
COMMISSIONERS: J. VALENTINE, 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. 17-824 Account No. ##### Tax Type: Income Tax Years: 2013, 2014 & 2015 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYERS, CPA
TAXPAYER-1, Taxpayer
TAXPAYER-2, 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 January 10, 2018.

TAXPAYERS ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessments of additional Utah individual income taxes for the 2013, 2014, and 2015 tax years. On April 13, 2017, the Division issued Notices of Deficiency and Audit Change ("Statutory Notices") to the taxpayers, in which it imposed additional tax and interest (calculated as of May 13, 2017),[1] as follows:

Year	Tax	Penalties	Interest	Total

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

2013	$$$$$	$0.00	$$$$$	$$$$$
2014	$$$$$	$0.00	$$$$$	$$$$$
2015	$$$$$	$0.00	$$$$$	$$$$$

The taxpayers are a married couple who, for the 2013, 2014, and 2015 tax years, filed joint federal returns. TAXPAYER-1 moved from Utah to STATE-1 in 2010, while TAXPAYER-2 continued to live in Utah until May 31, 2013, when she also moved to STATE-1. For the 2013 tax year, taxpayers filed a joint Utah part-year resident return showing that they were Utah resident individuals from January 1, 2013 to May 31, 2013, and Utah nonresident individuals from June 1, 2013 to December 31, 2013. For the 2014 and 2015 tax years, the taxpayers filed joint Utah nonresident returns. The taxpayers explained that even after they both moved to and began working in STATE-1, they filed Utah returns to report Utah source income that they received.

The Division, however, determined that both taxpayers were domiciled in Utah for all of the 2013, 2014, and 2015 tax years. As a result, in its assessments, the Division changed the taxpayers' 2013, 2014, and 2015 Utah part-year resident and nonresident returns to full-year Utah resident returns, thus imposing Utah tax on all income that both taxpayers received for these years. Based on information the Division has received from the taxpayers during the appeals process, however, the Division has now determined that it needs to make changes to its assessment for 2013 and 2014 (but not to its assessment for 2015).

The Division proffered that it now accepts the taxpayers' 2013 Utah part-year resident return as filed and, thus, indicates that its 2013 assessment should be reversed. For 2014, the Division indicates that instead of changing the taxpayers' 2014 Utah nonresident return to a full-year 2014 Utah resident return, it has now determined that this return should be changed to a 2014 Utah part-year resident return. The Division explains that it now considers both taxpayers to be domiciled in Utah and Utah resident individuals only from August 3, 2014 to December 31, 2014 (i.e., it now considers both taxpayers to be Utah nonresident individuals from January 1, 2014 to August 2, 2014). For 2015, the Division still believes that both taxpayers are considered to

be domiciled in Utah for all of 2015. As a result, the Division contends that its 2015 assessment is correct. In summary, the Division now asks the Commission to reverse its 2013 assessment, to amend its 2014 assessment to reflect a Utah part-year residency for both taxpayers from August 3, 2014 to December 31, 2014, and to sustain its 2015 assessment in its entirety.[2]

The taxpayers, however, contend that neither of them should be considered to be domiciled in Utah or should be considered a Utah resident individual after June 1, 2013, the date that TAXPAYER-2 moved to STATE-1 to join her husband. As a result, the taxpayers agree with the Division's current position that they properly filed their 2013 Utah part-year resident return. The taxpayers also contend that they properly filed 2014 and 2015 Utah nonresident returns and, thus, are in disagreement with the Division concerning these two years. For these reasons, the taxpayers ask the Commission not only to reverse the Division's 2013 assessment, but also to reverse the Division's 2014 and 2015 assessments.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2015)[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.

2 It is noted that had the taxpayers paid income taxes on their income to another state, the taxpayers would have been entitled to claim a credit against any Utah tax liability, pursuant to Utah Code Ann. §59-10-1003 (2015). However, because STATE-1 does not impose a state income tax, it appears that this credit does not apply to the taxpayers' circumstances.

3 All substantive law citations are to the 2015 version of Utah law. Unless otherwise noted, the substantive law remained the same during the 2013, 2014, and 2015 tax years.

. . . .

3. Effective for tax year 2012 (and applicable to the 2013, 2014, and 2015 tax years at issue), UCA §59-10-136 provides for the determination of "domicile," as follows:

> (1) (a) An individual is considered to have domicile in this state if:
> (i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
> (ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.
> (b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:
> (i) is the noncustodial parent of a dependent:
> (A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and
> (B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and
> (ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).
> (2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
> (a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;
> (b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or
> (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.
> (3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:
> (i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
> (ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
> (b) The determination of whether an individual is considered to have domicile in this state under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:

(i) whether the individual or the individual's spouse has a driver license in this STATE;
(ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state;
(iii) the nature and quality of the living accommodations that the individual or the individual's spouse has in this state as compared to another state;
(iv) the presence in this state of a spouse or dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return;
(v) the physical location in which earned income as defined in Section 32(c)(2), Internal Revenue Code, is earned by the individual or the individual's spouse;
(vi) the state of registration of a vehicle as defined in Section 59-12-102 owned or leased by the individual or the individual's spouse;
(vii) whether the individual or the individual's spouse is a member of a church, a club, or another similar organization in this state;
(viii) whether the individual or the individual's spouse lists an address in this state on mail, a telephone listing, a listing in an official government publication, other correspondence, or another similar item;
(ix) whether the individual or the individual's spouse lists an address in this state on a state or federal tax return;
(x) whether the individual or the individual's spouse asserts residency in this state on a document, other than an individual income tax return filed under this chapter, filed with or provided to a court or other governmental entity;
(xi) the failure of an individual or the individual's spouse to obtain a permit or license normally required of a resident of the state for which the individual or the individual's spouse asserts to have domicile; or
(xii) whether the individual is an individual described in Subsection (1)(b).

(4) (a) Notwithstanding Subsections (1) through (3) and subject to the other provisions of this Subsection (4), an individual is not considered to have domicile in this state if the individual meets the following qualifications:
(i) except as provided in Subsection (4)(a)(ii)(A), the individual and the individual's spouse are absent from the state for at least 761 consecutive days; and
(ii) during the time period described in Subsection (4)(a)(i), neither the individual nor the individual's spouse:
(A) return to this state for more than 30 days in a calendar year;
(B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
(C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
(D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or

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

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

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

(i) begins on the later of the date:

(A) the individual leaves this state; or

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

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

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

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

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

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

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

(A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and

(B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).

(5) (a) If an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state.

(b) For purposes of this section, an individual is not considered to have a spouse if:

(i) the individual is legally separated or divorced from the spouse; or

(ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.

(c) Except as provided in Subsection (5)(b)(ii), for purposes of this section, an individual's filing status on a federal individual income tax return or a return filed under this chapter may not be considered in determining whether an individual has a spouse.

(6) For purposes of this section, whether or not an individual or the individual's spouse claims a property tax residential exemption under Chapter 2, Property Tax Act, for the residential

> property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this state.

4. In Section 59-10-136, two subsections require the Commission to determine whether the property for which an individual or an individual's spouse claims a residential exemption is that individual's or individual spouse's "primary residence."[4] To assist in determining whether a property is considered the "primary residence" of the individual or individual's spouse who claimed the exemption, the Legislature enacted new property tax provisions at the same time it enacted the new domicile law in Section 59-10-136. Specifically, to assist in the determination of Utah income tax domicile of a property owner, Utah Code Ann §59-2-103.5(4) provides, as follows:[5]

> (4) Except as provided in Subsection (5), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, the property owner shall:
>
> (a) file a written Statement with the county board of equalization of the county in which the property is located:
>
> (i) on a form provided by the county board of equalization; and
>
> (ii) notifying the county board of equalization that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence; and
>
> (b) declare on the property owner's individual income tax return under Chapter 10, Individual Income Tax Act, for the taxable year for which the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence.

5. For the instant matter, UCA §59-1-1417(1) (2018) 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;

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

5 Effective for the 2015 tax year, Subsection 59-2-103.5(4) was renumbered and amended. The amendments to Subsection 59-2-103.5(4) that were effective for tax year 2015 were nonsubstantive.

> (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. Based on the parties' agreement concerning the 2013 tax year, the Commission will reverse the Division's 2013 assessment. The parties, however, disagree concerning the 2014 and 2015 tax years. While the parties agree that the taxpayers were Utah nonresident individuals from January 1, 2014 to August 3, 2014, the parties disagree concerning the remainder of 2014 and all of 2015. The Division contends that the taxpayers were Utah resident individuals from August 3, 2014 to December 31, 2014, and for all of the 2015 tax year, while the taxpayers contend that they were not. For the years remaining at issue, 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 argue that either taxpayer is a Utah resident individual for any portion of 2014 or 2015 under the 183 day test. Instead, the Division asserts that both taxpayers are Utah resident individuals from August 3, 2014 to December 31, 2014, and for all of 2015 under the domicile test. As a result, the Commission must apply the facts to the domicile law in effect for these years to decide whether the taxpayers are considered to be domiciled in Utah for these periods (as the Division contends) or whether the taxpayers are not considered to be domiciled in Utah for these periods (as the taxpayers contend).

I. Facts.

The taxpayers have been married for many years. During the 2014 and 2015 tax years that remain at issue, the taxpayers were not legally separated or divorced. In addition, during 2014 and 2015, the taxpayers' children were grown, and the taxpayers did not claim any dependents on their 2014 and 2015 federal returns. Neither of the taxpayers attended a Utah institution of higher education during 2014 or 2015.

The taxpayers lived and worked in CITY-1, Utah for many years until 2010, when TAXPAYER-1 moved to STATE-1 to work in a STATE-1 title insurance agency. At this time, TAXPAYER-2 (who worked for an OCCUPATION in CITY-2, Utah) decided to continue living in the taxpayers' "CITY-1 home." TAXPAYER-2 continued to live in the CITY-1 home until May 31, 2013, when she, too, moved to STATE-1. From the time TAXPAYER-1 moved to STATE-1 in 2010 until TAXPAYER-2 moved to STATE-1 in 2013, TAXPAYER-1 would return to Utah on weekends. Once TAXPAYER-2 moved to STATE-1 in 2013, the taxpayers continued to return to Utah on occasion, but not every weekend.

The taxpayers explained that they did not list their CITY-1 home for sale when TAXPAYER-2 moved to STATE-1 in 2013 because the home was located on acreage that has been in TAXPAYER-2's family for generations and on which other family members lived (including TAXPAYER-2's mother and brother). As a result, the taxpayers decided to keep their CITY-1 home and its ##### acres of land until such time that a family member could purchase it. The taxpayers explained that they built the CITY-1 home on TAXPAYER-2's family's land in YEAR, and that the home and its ##### acres of land was segregated into a separate parcel that only the taxpayers owned. The taxpayers continued to own the CITY-1 home until September 2016, when they sold it to their son for around $$$$$. During the 2014 and 2015 tax years that remain at issue, the CITY-1 home received the residential exemption from property taxation.[6]

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6 For all 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

When TAXPAYER-1 moved to STATE-1 in 2010, he first rented an apartment and later rented a condominium. When TAXPAYER-2 moved to STATE-1 in 2013, the taxpayers continued to live in this rented condominium until September 2015, when they purchased a home in STATE-1. Immediately before the May 31, 2013 date that TAXPAYER-2 moved to STATE-1, the taxpayers had a large yard sale at the CITY-1 home at which they sold most of the furniture from the CITY-1 home. Because the taxpayers took the rest of the furniture and other personal property from the CITY-1 home to STATE-1, the CITY-1 home was vacant when TAXPAYER-2 moved to STATE-1 on May 31, 2013.

Soon after TAXPAYER-2 moved to STATE-1 in 2013, the taxpayers' daughter and her family moved into the taxpayers' CITY-1 home (after the daughter and her husband sold the home in which they had previously been living). The taxpayers' daughter and her family moved their own furniture into the CITY-1 home and had intended to eventually purchase it. However, the daughter's husband obtained a job in STATE-2 in 2014, which required the family to move to STATE-2 on August 2, 2014. The daughter and her family moved their furniture to STATE-2 at this time. As a result, beginning on August 3, 2014, the taxpayers' CITY-1 home remained unfurnished without anyone living in it until the taxpayers' son was finally able to purchase it in September 2016.

The taxpayers explained that although they did not come to Utah every weekend once TAXPAYER-2 moved to STATE-1, they continued to come to Utah to "check" on their CITY-1 home and visit their family. In a letter to the Division dated May 3, 2017, the taxpayers indicated that they came to Utah three to four days a month (which would equate to 36 to 48 days a year).[7] When the taxpayers would visit Utah in 2014 and

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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.

7 At the hearing, the taxpayers stated that since TAXPAYER-2 moved to STATE-1 in 2013, there may be months in which they have only spent two days in Utah. The taxpayers, however, have the burden of proof in this matter, and they did not provide detailed information about the actual number of days they have spent in Utah since mid-2013. As a result, the Commission finds that taxpayers' statement in their May 3, 2017 letter to be the most convincing evidence about the number of days they have spent in Utah. Accordingly, the Commission finds that the taxpayers were present in Utah between 36 and 48 days in both 2014 and 2015.

2015 (including the period the taxpayers' daughter and her family resided in the CITY-1 home), the taxpayers would stay at TAXPAYER-2's mother's home, which was located on a parcel adjacent to their CITY-1 home. The taxpayers also explained that their son would mow the lawn of their CITY-1 home and check on the vacant home while they were living and working in STATE-1.

The taxpayers further explained that once their daughter and her family moved to STATE-2 in August 2014, they did not list their CITY-1 home for sale because it was decided that their son would eventually purchase it. However, the taxpayers' son did not place his own home for sale until April 2016 or purchase the CITY-1 home until September 2016 (shortly after his own home sold). The taxpayers explain that their son decided that he could not afford to sell his own home and purchase the taxpayers' CITY-1 home until 2016 because the son's home was "underwater" and could not be sold without a loss until 2016.

As of the date of the hearing, the taxpayers continue to live and work in STATE-1. TAXPAYER-1 has worked only in STATE-1 since moving there in 2010, and TAXPAYER-2 has worked only in STATE-1 since moving there in 2013. Neither taxpayer has voted in Utah since 2012, nor both taxpayers registered to vote in STATE-1 in late 2013. In addition, TAXPAYER-2 relinquished her Utah driver's license and obtained a STATE-1 driver's license in December 2013, while TAXPAYER-1 relinquished his Utah driver's license and obtained a STATE-1 driver's license in September 2014. The taxpayers changed the registrations of their two vehicles from Utah to STATE-1 in late 2013, and the vehicles continued to be registered in STATE-1 during the 2014 and 2015 tax years that remain at issue.

The taxpayers had their church membership moved from a Utah unit of their church to a STATE-1 unit of their church on September 22, 2013. During the years at issue, neither taxpayer was a member of a club or other organization. Once TAXPAYER-2 moved to STATE-1 in 2013, the taxpayers had most of their mail changed from their Utah address to their STATE-1 address. Utility bills for the taxpayers' CITY-1 home, however, continued to be sent to the CITY-1 home. Because the mailbox at the taxpayers' CITY-1 home was

located next to TAXPAYER-2's mother's mailbox, TAXPAYER-2's mother would collect the taxpayers' mail and, as necessary, arrange for it to be sent to the taxpayers in STATE-1.

The taxpayers' 2013, 2014, and 2015 federal and Utah returns were all filed using a STATE-1 address. The taxpayers did not complete the "Property Owner's Residential Exemption Termination Declaration" portion of any Utah return they filed (which is found on page 3 of the TC-40 for the 2012 and subsequent tax years). This declaration provides that "[i]f you are a Utah residential property owner and declare you no longer qualify to receive a residential exemption authorized under UC §59-2-103 for your primary residence, enter 'X' and enter the county code where the residence is located. . . ." At the hearing, REPRESENTATIVE FOR TAXPAYERS, who prepared the taxpayers' returns, indicated that until the Division issued its assessments to the taxpayers, he did not know that this declaration even existed on the TC-40.

II. Domicile Test for the 2014 and 2015 Tax Years that Remain at Issue.

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 2014 and 2015 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]

A. Section 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 *not* considered to have a spouse for purposes of Section 59-10-

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 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.

136 if the individual is legally separated or divorced from the individual's spouse or if the individual and the individual's spouse file federal income tax returns with a status of married filing separately. Neither of these circumstances applies to the taxpayers for any portion of 2014 or 2015 because the taxpayers were not legally separated or divorced and because they filed joint federal returns for these years. Accordingly, for each of the 2014 and 2015 tax years, each taxpayer is considered to have a spouse for purposes of Section 59-10-136.

B. Subsection 59-10-136(4). The taxpayers do not argue that they are *not* considered to be Utah domiciliaries for any of the periods at issue under Subsection 59-10-136(4). This subsection applies to individuals who are "absent from the state" for at least 761 consecutive days, if a number of listed conditions are all met. The taxpayers have been absent from Utah for more than 761 days since TAXPAYER-2 moved to STATE-1 in mid-2013. In addition, they meet some of the other conditions listed in Subsection 59-10-136(4)(a)(ii), but not all of them.

First, the taxpayers do not meet the Subsection 59-10-136(4)(a)(ii)(A) condition that "neither the individual or individual's spouse . . . return to [Utah] for more than 30 days in a calendar year[.]" As discussed earlier, it appears that both taxpayers have returned to Utah approximately 36 to 48 days per calendar year since mid-2013 (as stated in a letter the taxpayers submitted to the Division). The taxpayers have not proffered any evidence that is sufficient to rebut this statement and meet their burden of proof to show that they, combined, were not in Utah for more than 30 days in a calendar year during a 761-day period of absence that would encompass the periods that remain at issue. Accordingly, the taxpayers do not meet this condition for either the 2014 or 2015 tax year.

Second, once the taxpayers' daughter and her family moved out of the taxpayers' CITY-1 home on August 2, 2014, the taxpayers no longer meet the Subsection 59-10-136(4)(a)(ii)(D) condition that "neither the individual or individual's spouse . . . claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence[.]" For the 2014 and 2015 years that

remain at issue, this condition is satisfied from January 1, 2014 to August 2, 2014 (the period the CITY-1 home was the primary residence of the taxpayers' daughter and her family), because Subsection 59-10-136(6) provides that for purposes of Section 59-10-136, "whether or not an individual or the individual's spouse claims a property tax residential exemption . . . for the residential property that is the primary residence of a tenant of the individual or the individual's spouse may not be considered in determining domicile in this STATE-1."[9]

However, beginning on August 3, 2014 (once the CITY-1 home was no longer the primary residence of a tenant), the taxpayers do not meet the Subsection 59-10-136(4)(a)(ii)(D) condition because they claimed a Utah "residential exemption for [their] primary residence." Admittedly, the taxpayers did not live in the CITY-1 home in 2014 or 2015. Regardless, for reasons explained below, the CITY-1 home is still considered to be the taxpayers' "primary residence" for purposes of Subsection 59-10-136(4)(a)(ii)(D) under the circumstances present in this case.

When Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a property on which an individual or an individual's spouse claims the residential exemption is considered their "primary residence" unless one or both of the property owners take affirmative steps to: 1) file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence; and 2) declare on the property owner's Utah individual income tax return for the taxable year for which the property owner no longer qualifies to receive the residential exemption, that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence. The taxpayers did not file any such written Statement in 2014 or 2015 with COUNTY (the

9 In prior appeals, the Commission has found that a "tenant," for purposes of Subsection 59-10-136(6), may include a person who the property owner arranges to live in the property owner's Utah residence in order to maintain and look after it, even if this person has not signed a lease and pays no rent. *See, e.g., USTC Appeal No. 15-1063* (Initial Hearing Order Aug. 26, 2016). Redacted copies of this and other selected decisions can be viewed on the Commission's website at https://tax.utah.gov/commission-office/decisions.

county in which their CITY-1 home is located), nor did the taxpayers declare on page 3 of a Utah return they filed that they no longer qualified to receive the residential exemption for their CITY-1 home. As a result, the CITY-1 home is considered to be the taxpayers' "primary residence" from August 3, 2014 to December 31, 2014, and for all of 2015. For this reason and because the taxpayers claimed the residential exemption on the CITY-1 home for the 2014 and 2015 tax years, the taxpayers do not meet the Subsection 59-10-136(4)(a)(ii)(D) condition from August 3, 2014 to December 31, 2014, or for any portion of 2015.[10]

Because the taxpayers do not meet all of the conditions set forth in Subsection 59-10-136(4) from August 3, 2014 to December 31, 2014, or for any portion of 2015, the taxpayers do not qualify to *not* be considered to be domiciled in Utah for these periods that remain at issue. Accordingly, the Commission must analyze whether the taxpayers *are* considered to have domicile in Utah for the periods still at issue under one or more of the remaining subsections of Section 59-10-136 (i.e., under Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), and (3)). If an individual meets the criteria found in *any one* of these subsections, that individual is considered to be domiciled in Utah, even if the individual does not meet the criteria found in any of the other subsections.

C. Subsection 59-10-136(1). This subsection provides that an individual is considered to be domiciled in Utah if: 1) a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on their federal return is enrolled in a Utah public kindergarten, elementary, or secondary school; or 2) the individual or the individual's spouse is enrolled in a Utah institution of higher education. Neither of these circumstances are applicable to the taxpayers during 2014 or 2015. Accordingly, under this subsection, the taxpayers are not considered to be domiciled in Utah for the periods that remain at issue.

10 At the hearing, the taxpayers argue that they can "rebut" their claiming the residential exemption on their CITY-1 home. The residential exemption condition found in Subsection 59-10-136(4)(a)(ii)(D), however, is not a rebuttable presumption that can be rebutted (unlike the residential exemption presumption found in Subsection 59-10-136(2)(a), which can be rebutted and which will be discussed in more detail later in the decision).

D. Subsection 59-10-136(2)(a). This subsection provides that an individual or an individual's spouse is presumed to be domiciled in Utah if the individual or the individual's spouse claims a property tax residential exemption for that individual or individual's spouse primary residence, unless the presumption is rebutted. For the presumption to arise, two elements must exist. First, one or both of the taxpayers must have claimed the residential exemption on a Utah home that one or both of them own. Second, the Utah home on which the residential exemption is claimed must be considered the "primary residence" of one or both of the taxpayers in accordance with the guidance provided in Subsection 59-2-103.5(4). For reasons discussed earlier in regards to Subsection 59-10-136(4)(a)(ii)(D), both of these elements exist from August 3, 2014 to December 31, 2014, and for all of 2015.[11] Accordingly, the Subsection 59-10-136(2)(a) presumption has arisen, and the taxpayers will both be considered to be domiciled in Utah for these periods unless they are able to rebut the presumption.[12]

Because Subsection 59-10-136(2)(a) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual whose actions give rise to this presumption *is* considered to have domicile in Utah, but also for there to be circumstances where an individual whose actions give rise to this presumption *is not* considered to have domicile in Utah.[13] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-

11 For reasons also discussed in regards to Subsection 59-10-136(4)(a)(ii)(D), the Subsection 59-10-136(2)(a) presumption does not arise for the January 1, 2014 to August 2, 2014 period that the CITY-1 home was the primary residence of a "tenant."

12 Even if only one of the taxpayers had owned the CITY-1 home during the 2014 and 2015 tax years, the Subsection 59-10-136(2)(a) presumption would still have arisen in regards to both taxpayers because 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. This conclusion is supported by 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 individual's spouse is considered to have domicile in this state."

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

136(2)(a) presumption. 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. This circumstance is not present in the instant case. 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 which would qualify for the exemption upon being sold.[14] In the instant case, the taxpayers did not list the CITY-1 home for sale after TAXPAYER-2 moved to STATE-1 in mid-2013 or after the taxpayers' daughter and her family moved out of the home on August 2, 2014.

The taxpayers explained that they did not list the home for sale because they only wanted to sell it to a family member and because no family member was able to purchase it until September 2016. The CITY-1 home, however, sat vacant for more than two years after the taxpayers' daughter and her family moved out of it in August 2014. Where the taxpayers did not list the CITY-1 home for sale, the Commission does not find that the Subsection 59-10-136(2)(a) presumption is rebutted due to the taxpayers holding on to the CITY-1 home until such time that their son could sell his former home and purchase the CITY-1 home. The taxpayers' son did not even take steps to purchase the CITY-1 home until April 2016, when he listed his former home for sale.

The Commission has also 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

14 The Commission has found that listing a vacant Utah home for sale may be sufficient to rebut the Subsection 59-10-136(2)(a) presumption, in part, because Utah Admin. Rule R884-24P-52(6)(f) 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.

receiving the residential exemption. This determination would also apply where a taxpayer's accountant was not aware of the income tax consequences of a taxpayer claiming the residential exemption on a primary residence. 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 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.[15]

Similarly, the Commission has found that an individual cannot rebut a Subsection 59-10-136(2) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). If the Commission were to do so, one could argue that the Commission was giving no meaning to the Subsection 59-10-136(2) presumptions (i.e., that it was determining domicile as though the Subsection 59-10-136(2) presumptions did not exist).[16]

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. The taxpayers, however, have not proffered any convincing arguments to rebut the Subsection 59-10-136(2)(a) presumption that has arisen from August 3, 2014 to December 31, 2014, and for all of 2015. From August 3, 2014 to December 31, 2014, and for all of 2015, the taxpayers continued to benefit from claiming the residential exemption on their CITY-1 home and being taxed

15 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 tax years solely from the factors found in Rule 52.

16 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 Subsection 59-10-136(1) or one of the presumptions of Subsection 59-10-136(2) does not apply.

at a lower tax rate. For these reasons, the circumstances of this case do not warrant the Commission's finding that the taxpayers have rebutted the Subsection 59-10-136(2)(a) presumption. Accordingly, under Subsection 59-10-136(2)(a), both taxpayers are considered to be domiciled in Utah from August 3, 2014 to December 31, 2014, and for all of 2015.

E. Other Subsections of Section 59-10-136. Because the taxpayers have both been found to be domiciled in Utah from August 3, 2014 to December 31, 2014, and for all of 2015, they are Utah domiciliaries for these periods regardless of whether they are also considered to be domiciled in Utah for these periods under another subsection of Section 59-10-136. However, it may be helpful to make some observations about these other subsections.

Subsection 59-10-136(2)(b) provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah. Prior to the 2014 and 2015 tax years that remain at issue, both taxpayers had registered to vote in STATE-1. As a result, under this subsection, the Commission would not have considered them to be domiciled in Utah for the periods still at issue (i.e., from August 3, 2014 to December 31, 2014, and for all of 2015), regardless of whether the taxpayers had also terminated their Utah voter registrations or not.[17]

Subsection 59-10-136(2)(c) provides that an individual is presumed to be domiciled in Utah if the individual or the individual's spouse asserts Utah residency on a Utah return. Neither taxpayer asserted Utah residency on a 2014 or 2015 Utah return. Accordingly, neither taxpayer is considered to be domiciled in Utah for any portion of 2014 or 2015 under this subsection.

17 The Commission notes that the taxpayers did not register to vote in STATE-1 until late 2013. As a result, some questions still exist as to whether the taxpayers were registered to vote in Utah from June 1, 2013 (the first day that the taxpayers claimed to be Utah nonresidents on their 2013 Utah return) until late 2013 (when they registered to vote in STATE-1). However, because the Division now agrees that the taxpayers were Utah nonresident individuals from June 1, 2013 to August 2, 2014 (which includes this June 1, 2013 to late 2013 period), the Commission will not address whether the taxpayers would be considered to be domiciled for this period under Subsection 59-10-136(2)(b) any further in this decision.

Even if an individual is not considered to be domiciled in Utah under Subsection (1), (2)(a), (2)(b), or (2)(c), he or she may still be considered to be domiciled in Utah based on a preponderance of the evidence relating to 12 specific facts and circumstances listed in Subsection 59-10-136(3)(b). Neither party addressed these 12 factors. However, a cursory review of the 12 factors indicates that the taxpayers' actions do not meet a preponderance of the relevant factors during any portion of 2014 or 2015. Accordingly, neither taxpayer would be considered to have domicile in Utah for any of 2014 or 2015 under Subsection 59-10-136(3).

III. Conclusion.

The parties agree that the Division's 2013 assessment should be reversed in its entirety. In addition, for reasons discussed earlier, both taxpayers are considered to be domiciled in Utah from August 3, 2014 to December 31, 2014, and for all of 2015. As a result, both taxpayers are considered to be Utah resident individuals for from August 3, 2014 to December 31, 2014, and for all of 2015, and all income that they earned during these periods is subject to Utah taxation. For these reasons, the Commission should reverse the Division's 2013 assessment; order the Division to amend its 2014 assessment to reflect the taxpayers' being Utah nonresident individuals from January 1, 2014, to August 2, 2014, and Utah resident individuals from August 3, 2014 to December 31, 2014; and sustain the Division's 2015 assessment.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission reverses the Division's 2013 assessment and sustains its 2015 assessment. As to the 2014 tax year, the Commission finds that the taxpayers are Utah resident individuals from August 3, 2014 to December 31, 2014, but are Utah nonresident individuals from January 1, 2014 to August 2, 2014. The Division is ordered to amend its 2014 assessment accordingly. 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-1, Utah 84134

or emailed to:

taxappeals@utah.gov

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

DATED this _____ day of _____, 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.