17-832
TAX TYPE: INCOME TAX
TAX YEAR: 2013, 2014, 2015
DATE SIGNED: 10/31/2018
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. 17-832 Account No. ##### Tax Type: Income Tax Years: 2013, 2014 & 2015 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1, Taxpayer
For Respondent: REPRESENTATIVE FOR 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 August 28, 2018.

TAXPAYERS ("Petitioners" or "taxpayers")[1] have appealed Auditing Division's (the "Division") assessments of Utah individual income taxes for the 2013, 2014, and 2015 tax years. On April 11, 2017, the Division issued Notices of Deficiency and Audit Change ("First Statutory Notices") to the taxpayers, in which it imposed additional tax and interest (calculated as of May 11, 2017),[2] as follows:

Year	Tax	Penalties	Interest	Total
2013	$$$$$	$0.00	$$$$$	$$$$$
2014	$$$$$	$0.00	$$$$$	$$$$$

1 TAXPAYER-2 and TAXPAYER-1 were married during the tax years at issue, but are now divorced.
2 Interest continues to accrue until any tax liability is paid. No penalties were imposed.

2015	$$$$$	$0.00	$$$$$	$$$$

For each of the 2013, 2014, and 2015 tax years, the taxpayers filed a federal return with a status of married filing jointly. The taxpayers, however, lived separately for most of the years at issue. TAXPAYER-1 lived and worked in Utah throughout the 2013, 2014, and 2015 tax years. On the other hand, TAXPAYER-2 only lived in Utah at the beginning of 2013. In early 2013, TAXPAYER-2 moved from Utah to STATE-1 for several months to attend a truck driving course. On May 5, 2013, after TAXPAYER-2 had completed the truck driving course, he moved to STATE-2 for work.[3] It appears that TAXPAYER-2 lived and worked in STATE-2 from May 5, 2013 to December 31, 2013, and for all of the 2014 and 2015 tax years.

For the 2013, 2014, and 2015 tax years, the taxpayers filed joint STATE-2 returns on which each of them claimed to be a STATE-2 full-year nonresident (i.e., neither of the taxpayers claimed to be a STATE-2 resident for any portion of the three years at issue). In addition, on all three of these STATE-2 returns, each of the taxpayers entered Utah as the "name of other state."[4] On these returns, the taxpayers only allocated to STATE-2 the income that TAXPAYER-2 earned in STATE-2.

For the 2013, 2014, and 2015 tax years, the taxpayers also filed joint Utah returns. Accompanying each of these returns was a Form TC-40B on which they reported a Utah part-year residency.[5] On each of these Forms TC-40B, the taxpayers only allocated to Utah the income that TAXPAYER-1 earned in Utah.

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3 TAXPAYER-1 proffered that TAXPAYER-2 only earned income in 2013 in STATE-2 (i.e., he did not earn any income in 2013 while he was living in Utah or while he was attending the truck driving course in STATE-1).

4 The STATE-2 returns have separate spaces for each married individual to report his or her STATE-2 residency status and, for a taxpayer who is not a STATE-2 full-year resident, to report the "name of other state" and/or enter the dates of residence in STATE-2. TAXPAYER-1 indicated that she does not know why the taxpayers' former accountant would have completed the STATE-2 returns in this manner.

5 Unlike the STATE-2 return, Utah's Form TC-40B does not have separate spaces for each married individual to report his or her residency. TAXPAYER-1 proffers that by reporting a Utah part-year residency on each of the taxpayers' 2013, 2014, and 2015 Utah returns, the taxpayers were attempting to show that TAXPAYER-1 was a Utah resident individual throughout all three years, and that TAXPAYER-2 was a Utah resident individual from January 1, 2013 to May 4, 2013, and a Utah nonresident individual from May 5, 2013 to December 31, 2013, and for all of 2014 and 2015.

The Division, however, determined that both taxpayers were domiciled in Utah for all of 2013, 2014, and 2015 and, thus, that both taxpayers were Utah full-year resident individuals for these years. As a result, the Division changed the taxpayers' 2013, 2014, and 2015 Utah part-year resident returns to Utah full-year resident returns and assessed the taxpayers accordingly. On the First Statutory Notices, however, the Division did not allow credits for the income taxes that the taxpayers paid to STATE-2 for the 2013, 2014, and 2015 tax years.[6] As a result, to reflect these credits, the Division issued amended Statutory Notices and Audit Change on July 25, 2017 ("Second Statutory Notices"), in which it imposed revised amounts of tax and interest (calculated as of August 24, 2017),[7] as follows:

Year	Tax	Penalties	Interest	Total
2013	$$$$$	$0.00	$$$$$	$$$$$
2014	$$$$$	$0.00	$$$$$	$$$$$
2015	$$$$$	$0.00	$$$$$	$$$$$

The Division asks the Commission to find that both taxpayers are considered to be domiciled in Utah for all of 2013, 2014, and 2015, and to sustain its revised assessments, as reflected by the Second Statutory Notices, in their entireties.

The taxpayers, however, contend that TAXPAYER-2 was not domiciled in Utah and was not a Utah resident individual once he moved to STATE-2 on May 5, 2013. As a result, the taxpayers ask the Commission to find that they correctly filed their 2013, 2014, and 2015 Utah returns and to reverse the Division's assessments in their entireties.

APPLICABLE LAW

6 For that period that an individual is a Utah resident individual, he or she is entitled to a credit against his or her Utah tax liability for income taxes paid to another state. *See* Utah Code Ann. §59-10-1003 (2013-2015).

7 Again, interest continues to accrue until any tax liability is paid, and no penalties were imposed.

1. Under Utah Code Ann. §59-10-104(1) (2015)[8], "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 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;

8 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.

(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."[9] 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:[10]

> (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:

9 *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 Subsection 59-2-103.5(4) does not apply when determining the "primary residence" of a tenant.

10 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.

> (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. UCA §59-1-401(14) (2018) provides that "[u]pon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part."

6. Utah Admin. Rule R861-1A-42 ("Rule 42") (2018) provides guidance concerning the waiver of penalties and interest, as follows in pertinent part:

> . . . .
>
> (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
>
> (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
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> (a) Timely Mailing…
>
> (b) Wrong Filing Place…
>
> (c) Death or Serious Illness…
>
> (d) Unavoidable Absence…
>
> (e) Disaster Relief…
>
> (f) Reliance on Erroneous Tax Commission Information…
>
> (g) Tax Commission Office Visit…
>
> (h) Unobtainable Records…
>
> (i) Reliance on Competent Tax Advisor…
>
> (j) First Time Filer…
>
> (k) Bank Error…
>
> (l) Compliance History. . . .
>
> (m) Employee Embezzlement…
>
> (n) Recent Tax Law Change…
>
> (4) Other Considerations for Determining Reasonable Cause.
>
> (a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:

(i) whether the commission had to take legal means to collect the taxes;
(ii) if the error is caught and corrected by the taxpayer;
(iii) the length of time between the event cited and the filing date;
(iv) typographical or other written errors; and
(v) other factors the commission deems appropriate.

(b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.

(c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.

(d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

7. 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;

(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. At issue is whether the taxpayers were both Utah full-year resident individuals for the 2013, 2014, and 2015 tax years. The taxpayers admit that TAXPAYER-1 was a Utah full-year resident individual for these three years. The taxpayers, however, contend that TAXPAYER-2 was not a Utah resident individual from May 5, 2013 to December 31, 2013 of the 2013 tax year or for any portion of the 2014 and 2015 tax years. For the 2013, 2014, and 2015 tax 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 argue that TAXPAYER-2 was a Utah full-year resident individual for the 2013, 2014, or 2015 tax year under the 183 day test. Instead, the Division asserts that TAXPAYER-2 was a Utah full-year resident individual for each of these years under the domicile test. As a result, the Commission will apply the facts to the domicile law in effect for 2013, 2014, and 2015 to determine whether both taxpayers are Utah full-year resident individuals for these years (as the Division contends) or whether TAXPAYER-2 was a Utah nonresident individual from May 5, 2013 to December 31, 2013 of the 2013 tax year, and for all of the 2014 and 2015 tax years (as the taxpayers contend).

I. Additional Facts.

The taxpayers were married in 2005. In August 2015, TAXPAYER-1 filed for divorce from TAXPAYER-2 in Utah, and the taxpayers' divorce became final in 2016. TAXPAYER-1 proffered that no court issued a decree or order approving a petition for temporary separation or separate maintenance or other similar decree or order prior to 2016 when a court entered a decree of divorce that finalized the taxpayers' divorce.

The taxpayers have one child, a son, who was born during 2014. The taxpayers claimed their son as their only dependent on their 2014 and 2015 federal returns, and they did not claim any dependents on their 2013 federal return. The taxpayers' son did not attend a Utah public kindergarten, elementary, or secondary school during any of the years at issue. In addition, neither of the taxpayers attended a Utah institution of higher education during any of the 2013, 2014, and 2015 tax years at issue.

Prior to the 2013 tax year, the taxpayers, together, purchased a home in CITY, Utah (the "Utah home").[11] Both of the taxpayers owned the Utah home for all of the 2013 and 2014 tax years. For the 2015 tax year, both taxpayers owned the Utah home until the spring of 2015, when TAXPAYER-1 became the sole owner of the home. TAXPAYER-1 remained the sole owner of the Utah home for the remainder of 2015. The Utah home received the residential exemption from property taxation for all three tax years at issue.[12]

The taxpayers admit that TAXPAYER-1 was registered to vote in Utah throughout the 2013, 2014, and 2015 tax years, but they contend that she did not vote in Utah during any of these years. The taxpayers also contend that TAXPAYER-2 was not registered to vote in Utah during the 2013, 2014, and 2015 tax years. The Division did not refute the taxpayers' contention that TAXPAYER-1 did not vote during the 2013, 2014, and 2015 tax years, or that TAXPAYER-2 was not registered to vote in Utah during any portion of the 2013, 2014, and 2015 tax years.

TAXPAYER-1 had a Utah driver's license throughout the 2013, 2014, and 2015 tax years. TAXPAYER-2 had a Utah driver's license before he moved to STATE-2 in May 2013. However, on or around the May 5, 2013 date that TAXPAYER-2 moved to STATE-2, he obtained a STATE-2 driver's license. The taxpayers owned two motor vehicles during 2013, 2014, and 2015. TAXPAYER-1 drove one of these vehicles, while TAXPAYER-2 drove the other one. Both of these motor vehicles were registered in Utah throughout 2013, 2014, and 2015, including the motor vehicle that TAXPAYER-2 took with him to STATE-2.

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11 The Utah home is approximately ##### square feet in size and has three bedrooms and two baths (but no basement). While living and working in STATE-2, TAXPAYER-2 lived in the basement of his parents' home, and he paid rent to his parents. After TAXPAYER-2 moved to STATE-2 and before TAXPAYER-1 filed for divorce, the taxpayers would visit each other occasionally in either Utah or STATE-2.

12 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 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.

Throughout the 2013, 2014, and 2015 tax years, TAXPAYER-1 was a member of a church in Utah, but she was not a member of any other organization or club. TAXPAYER-2 was not a member of a church or any other organization or club during the years at issue. During 2013, 2014, and 2015, TAXPAYER-1 received mail only in Utah, while TAXPAYER-2 received mail in both Utah and STATE-2. The taxpayers used a Utah address to file all of their 2013, 2014, and 2015 federal, STATE-2, and Utah income tax returns.

II. Domicile Test for the 2013, 2014, and 2015 Tax Years.

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 2013, 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)).[13]

A. Subsection 59-10-136(5)(b). For a married individual, it is often necessary, as in this case, to first 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 59-10-136 if: 1) the individual is legally separated or divorced from the individual's spouse; or 2) if the individual and the individual's spouse file federal income tax returns with a status of married filing separately. The taxpayers did not file 2013, 2014, and 2015 federal income tax returns with a status of married filing separately. They filed federal returns with a status of married filing jointly for these years. As a result, each taxpayer will be considered to have a spouse throughout 2013, 2014, and 2015, unless the taxpayers are

13 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.

considered to be "legally separated or divorced" sometime during these years, pursuant to Subsection 59-10-136(5)(b)(i).

Utah divorce laws are found in Title 30, Chapter 3 of the Utah Code. Utah Code Ann. §30-3-1 provides that after a petition for divorce is filed, the court may issue a decree of divorce. The taxpayers admit that a court did not issue a decree of divorce until 2016. In addition, an informational website about Utah courts indicates that "parties are not divorced until the judge signs the decree."[14] Because the taxpayers, who have the burden of proof, have not shown that a judge signed a decree of divorce to dissolve their marriage prior to 2016, the taxpayers are not considered to have been "divorced" at any point during the 2013, 2014, and 2015 tax years at issue.

Remaining at issue is whether the taxpayers were "legally separated" during 2013, 2014, or 2015, where the taxpayers lived separately for most of 2013 and all of 2014 and 2015 and where TAXPAYER-1 filed for divorce in August 2015. The term "legally separated" is not defined in Utah law. However, living separately 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."[15] As a result, it is clear that the taxpayers were not "legally separated" prior to TAXPAYER-1's filing for divorce in August 2015.

Furthermore, the taxpayers are not considered to be "legally separated" beginning in August 2015 merely because TAXPAYER-1 filed for divorce. First, had the Utah Legislature intended Subsection 59-10-136(5)(b)(i) to be satisfied merely by *filing* a petition for divorce, it could have easily stated so in the statute,

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14 *See* https://www.utcourts.gov/howto/divorce/.

15 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 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*

but it did not. Instead, the Legislature used language that clearly provides that a married person must be either "legally separated" or "divorced" before he or she is not considered to have a spouse under Subsection 59-10-136(5)(b)(i).

Second, 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."[16] This information appears to be consistent with Utah law concerning "separate maintenance," which is 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 admit, however, that a court did not enter a decree of separate maintenance at any time prior to their divorce becoming final in 2016.

However, there may be other ways to be considered "legally separated." 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." In addition, Subsection 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." As a result, the Commission believes that a married couple should also be considered "legally separated" if they obtain a temporary separation order, as permitted under Section 30-3-4.5. The taxpayers, however, admit that they did not obtain one these orders either.

Based on the foregoing, the Commission finds that in order to be "legally separated or divorced" for purposes of Subsection 59-10-136(5)(b)(i), a Utah court must have issued a decree or order approving a petition for temporary separation, separate maintenance, or divorce; or a court of a different jurisdiction must

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*v. Parents Helping Parent*s, 947 P.2d 658, 662 (Utah 1997); *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995)).

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

have issued a decree or order approving a similar type of petition.[17] Because no such decree or order was entered for the taxpayers prior to 2016, the taxpayers are not considered to be "legally separated or divorced" for any portion of the 2013, 2014, and 2015 tax years. Moreover, the taxpayers have not shown that the term "legally separated or divorced," as used in Subsection 59-10-136(5)(b)(i) should be interpreted differently. Accordingly, for purposes of determining whether each taxpayer is considered to be domiciled in Utah during the 2013, 2014, and 2015 tax years, each taxpayer is considered to have a spouse throughout these years.

B. Subsection 59-10-136(4). The taxpayers do not argue that they are *not* considered to be Utah domiciliaries under Subsection 59-10-136(4) for any of the periods at issue. However, for this subsection to apply to an individual, the individual *and* the individual's spouse must meet a number of criteria, one of which is that both spouses must be absent from Utah for 761 or more consecutive days. Regardless of whether TAXPAYER-2 was absent from Utah for 761 or more days beginning sometime in 2013, TAXPAYER-1 lived in Utah throughout 2013, 2014, and 2015. Because TAXPAYER-1 was not absent from Utah for 761 or more consecutive days that included any portion of the 2013, 2014, and 2015 tax years, this subsection would not apply to either taxpayer for the years at issue, regardless of whether the taxpayers met all of the other criteria listed in Subsection 59-10-136(4)(a)(ii).[18]

Because the taxpayers are not considered to *not* be domiciled in Utah under Subsection 59-10-136(4), the Commission must analyze whether the taxpayers are considered to be domiciled in Utah for the 2013, 2014, and 2015 tax years under 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 a person meets the criteria found in *any one* of these subsections, that

17 This conclusion is consistent with the Commission's prior decision in *USTC Appeal No. 17-514* (Initial Hearing Order Jan. 8, 2018).

18 It also appears that the taxpayers also do not meet the Subsection 59-10-136(4)(a)(ii)(D) criterion concerning the claiming of a Utah residential exemption from property taxation. However, the Commission will not discuss the residential exemption any further in the context of Subsection 59-10-136(4) because the Commission has already found that this subsection is not applicable to the taxpayers and because the Commission will discuss the exemption in more detail when Subsection 59-10-136(2)(a) is analyzed below.

person is considered to be domiciled in Utah, even if the person does not meet the criteria found in any of the other subsections.[19]

C. Subsection 59-10-136(2)(a). This subsection provides that an individual is presumed to be domiciled in Utah if the individual or the individual's spouse claims a Utah residential exemption from property taxation for that individual or individual's spouse's primary residence, unless the presumption is rebutted. For the presumption to arise, two elements must exist. First, the Utah home must have received the residential exemption for the 2013, 2014, and 2015 tax years. Second, the Utah home 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).[20]

As to the first element, the Utah home received the residential exemption for each of the 2013, 2014 and 2015 tax years while it was owned by one or both of the taxpayers. As to the second element, when Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a Utah property on which an individual or an individual's spouse claims the residential exemption is considered to be 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

19 It is clear that the taxpayers would not be considered to be domiciled in Utah during 2013, 2014, and 2015 under Subsection 59-10-136(1) because they had no dependents who attended a Utah public kindergarten, elementary, or secondary school and because neither taxpayer attended a Utah institution of higher education during these years. Regardless, the Commission must determine whether the taxpayers are considered to be domiciled in Utah during 2013, 2014, and 2015 under one or more of the other subsections of Section 59-10-136.

20 The Commission notes that Subsection 59-10-136(6) provides that claiming the Utah residential exemption may not be considered when determining an individual's domicile if the exemption is claimed for the primary residence of a *tenant*. TAXPAYER-1, however, lived in the Utah home throughout the years at issue, and the Utah home was not the primary residence of a tenant. Accordingly, Subsection 59-10-136(6) does not apply.

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 also met the second element of Subsection 59-10-136(2)(a) because they did not file a written statement informing COUNTY (i.e., the county in which the Utah home is located) that the Utah home no longer qualified for the residential exemption or declare on page 3 of their 2013, 2014, or 2015 Utah return that they no longer qualified to receive the residential exemption for their Utah home. Accordingly, the taxpayers' Utah home is considered to be the "primary residence" of one or both of the taxpayers throughout the 2013, 2014, and 2015 tax years. Because the taxpayers meet both of these elements for all of 2013, 2014, and 2015, the Subsection 59-10-136(2)(a) presumption has arisen for these years, and the taxpayers will both be considered to be domiciled in Utah for all of 2013, 2014, and 2015 unless they are able to rebut the presumption.[21]

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.[22] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-

21 Even though TAXPAYER-1 was the only one of the taxpayers who owned the Utah home from August 2015 through the remainder of the 2015 tax year, the Subsection 59-10-136(2)(a) presumption still arises for both taxpayers for all of 2013, 2014, and 2015 because this subsection provides that an individual is presumed to be domiciled in Utah if either that *individual or that individual's spouse* claims a Utah residential exemption for the i*ndividual's or individual's spouse's* primary residence. Furthermore, where the presumption has arisen for both taxpayers, the taxpayers cannot rebut the presumption for only one of the taxpayers. Either the presumption is rebutted for both taxpayers, or the presumption is not rebutted for both taxpayers. This conclusion is supported by Subsection 59-10-136(5)(a), which provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah.

22 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 Subsection 59-10-136(2)(a) presumption would be rebutted if an individual asked a county to remove the residential exemption, and the county failed to implement the individual's request. Neither taxpayer, however, asked COUNTY to remove the residential exemption from the Utah home for the 2013, 2014, or 2015 tax year. Furthermore, the Commission has found that the Subsection 59-10-136(2)(a) presumption can 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.[23] In the instant case, however, the taxpayers did not list their Utah home for sale during any portion of the 2013, 2014, or 2015 tax year.

Furthermore, the Commission has also found that the Subsection 59-10-136(2)(a) presumption is not rebutted where an individual had never heard of the residential exemption or did not know that he or she was receiving the residential exemption.[24] The Commission has also 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.[25]

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23 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.

24 *See; e.g.*, the Commission's decisions in *USTC Appeal No. 15-720* (Initial Hearing Order May 6, 2016); and *USTC Appeal No. 15-1582* (Initial Hearing Order Aug. 26, 2016).

25 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

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).[26]

The taxpayers have not proffered any convincing argument to rebut the Subsection 59-10-136(2)(a) presumption that has arisen for both of them for all of 2013, 2014, and 2015, especially where TAXPAYER-1 lived in the Utah home during all of the these years. Accordingly, both taxpayers are considered to be domiciled in Utah for all of 2013, 2014, and 2015 under Subsection 59-10-136(2)(a).

D. Other Subsections of Section 59-10-136. Because the Commission has found both taxpayers to be domiciled in Utah for all of 2013, 2014, and 2015 under Subsection 59-10-136(2)(a), the Commission need not address the other remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(b), (2)(c), and (3)) to resolve this appeal. However, it may prove helpful to make some cursory observations about these remaining 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. TAXPAYER-1 was registered to vote in Utah for all of 2013, 2014, and 2015. As a result, the Subsection 59-10-136(2)(b) presumption has arisen in regards to both taxpayers, and both taxpayers would also be considered to be

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solely from the factors found in Rule 52.

26 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. Regardless, as will be explained later in the decision, the taxpayers met a preponderance of the 12 factors of Subsection 59-10-136(3)(b) for all three years at issue.

domiciled in Utah for all of 2013, 2014, and 2015 under Subsection 59-10-136(2)(b), unless this presumption is rebutted in regards to both taxpayers.[27]

Under 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. The taxpayers reported a Utah part-year residency on each of their 2013, 2014, and 2015 Utah returns. As a result, the Subsection 59-10-136(2)(c) presumption arises for both taxpayers for those portions of the 2013, 2014, and 2015 tax years that they reported a Utah part-year residency on their Utah returns for these years, unless they are able to rebut the presumption. Even though the taxpayers may not be considered to be domiciled in Utah for all of the 2013, 2014, and 2015 tax years under Subsection 59-10-136(2)(c), they are still considered to be Utah full-year resident individuals for these years under one or more of the other subsections of Section 59-10-136.

Lastly, 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). A cursory review of the 12 factors indicates that the taxpayers' joint and/or separate actions meet a preponderance of the relevant factors for the entirety of the 2013, 2014, and 2015 tax years.[28] As a result, if both taxpayers had not

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27 Even if TAXPAYER-1 did not vote in Utah during 2013, 2014, or 2015, this alone would be insufficient to rebut the Subsection 59-10-136(2)(b) presumption. In *USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016), the Commission found that the Subsection 59-10-136(2)(b) presumption was not rebutted for the period that an individual was registered to vote in Utah, but had not voted in Utah. The Commission explained that it reached this conclusion, at least in part, because the Utah Legislature elected to use voting registration, not actual voting, as the criterion that could trigger domicile.

28 For example, when determining whether an individual is considered to be domiciled in Utah under Subsection 59-10-136(3)(b), the first factor to be considered is "whether the individual or the individual's spouse has a driver license in this state" (pursuant to Subsection 59-10-136(3)(b)(i)). Because of the use of the word "or" in this factor, an individual meets this factor if either *the individual or the individual's spouse* has a Utah driver's license. Admittedly, TAXPAYER-2 obtained a STATE-2 driver's license in May 2013 and retained this license for the remainder of 2013 and all of 2014 and 2015. However, TAXPAYER-1 had a Utah driver's license during all of 2013, 2014, and 2015. As a result, when determining the taxpayers' domicile under Subsection 59-10-136(3)(b), *both* taxpayers would meet the Subsection 59-10-136(3)(b)(i) factor for all of 2013, 2014, and 2015.

already been found to be domiciled in Utah for the 2013, 2014, and 2015 tax years under another subsection of Section 59-10-136, it appears that that they would have been found to be domiciled in Utah for these years under Subsection 59-10-136(3).

E. Domicile Summary. For reasons discussed above, both taxpayers are considered to be domiciled in Utah for all of 2013, 2014, and 2015. As a result, both taxpayers are Utah resident individuals for all of 2013, 2014, and 2015, and all income that they received for these years is subject to Utah taxation (subject to a credit for income taxes paid to another state).

III. Other Arguments.

The taxpayers suggest that Utah should not tax the income that TAXPAYER-2 earned in STATE-2. Pursuant to Subsection 59-10-104(1) and Subsection 59-10-103(1)(w), however, all of a Utah resident individual's federal adjusted gross income is subject to Utah income taxation, subject to certain subtractions and additions not applicable to this case. The Commission acknowledges that Utah Code Ann. §59-10-117(2)(c) provides that "a salary, wage, commission, or compensation for personal services rendered outside this state may not be considered to be derived from Utah sources[.]" In accordance with Subsection 59-10-117(1) and Utah Code Ann. §59-10-116, however, Subsection 59-10-117(2)(c) only applies to a Utah nonresident individual. Because both taxpayers have been found to be Utah resident individuals for all of 2013, 2014, and 2015, Subsection 59-10-117(2)(c) does not apply to either of them for these years. Accordingly, all of the taxpayers' 2013, 2014, and 2015 income is subject to Utah taxation, even if some of this income was earned outside of Utah.

IV. Waiver of Interest.

In the event that the Commission found both taxpayers to be Utah resident individuals for the years at issue, the taxpayers questioned whether the interest that was imposed and is still accruing could be modified. In Subsection 59-1-401(14), the Commission is authorized to waive penalties and interest upon a showing of

reasonable cause. The Commission has adopted Rule 42 to provide guidance as to when reasonable cause exists to waive penalties and interest. Because no penalties were imposed, the Commission need not consider whether reasonable cause exists to waive penalties. However, the Commission will determine whether reasonable cause exists to waive interest.

Rule 42(2) provides that interest is waived only if a taxpayer shows that the Tax Commission gave the taxpayer erroneous information or took inappropriate action that contributed to the taxpayer's error.[29] The taxpayers do not assert that they filed Utah part-year resident individual returns for 2013, 2014, and 2015 because of erroneous information they received from the Tax Commission or because of any inappropriate actions that the Commission took. As a result, reasonable cause does not exist to waive interest in this case.

V. Conclusion.

Based on the foregoing, both taxpayers are Utah resident individuals for all of 2013, 2014, and 2015. As a result, the Commission should sustain the assessments that the Division has imposed in the Second Statutory Notices for these years.

Kerry R. Chapman
Administrative Law Judge

29 The Rule 42 criteria to waive interest are more stringent than the rule's criteria to waive penalties because a taxpayer has had use of money that should have been paid to the state and because of the time value of this money.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the assessments that the Division has imposed for the 2013, 2014, and 2015 tax years, as reflected in the Second Statutory Notices, 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.