TAX TYPE: INCOME TAX
TAX YEAR: 2015
DATE SIGNED: 8/20/2020
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER 1 AND TAXPAYER 2 Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 18-1375 Account No. #### Tax Type: Income Tax Tax Year: 2015 Judge: Marshall

Presiding:

John Valentine, Commission Chair
Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: RESRESENTATIVE FOR TAXPAYERS, Enrolled Agent
TAXPAYER 1
TAXPAYER 2
For Respondent: RESPONDANT 1, Director, Auditing Division
RESPONDANT 2, Income Tax Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on DATE, in accordance with Utah Code Ann. §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The Taxpayers filed a married-filing joint federal income tax return for the 2015 tax year. The Taxpayers reported federal adjusted gross income of $$$$$. The Taxpayers claimed one dependency exemption on their 2015 federal return. (Exhibit R-7).
2. The Taxpayers filed a part-year resident Utah Individual Income Tax Return for the 2015 tax year. The Taxpayers asserted they were residents of Utah from DATE through DATE. (Exhibit R-8).
3. The Division issued a Notice of Deficiency and Audit Change to the Taxpayers on June 27, 2018 for the 2015 tax year. (Exhibit R-1).

4. The Division assessed audit tax of $$$$$ and interest of $$$$$ through DATE.[1] The Division did not assess audit penalties. (Exhibit R-1).
5. The Division changed the return type from non/part-year resident to full-year resident including all of the Taxpayers joint income for the entire year of 2015, reduced the Utah adjusted gross income on a part-year or nonresident return from $$$$$ to $$$$$, and reduced the total AGI on a part-year or nonresident return from $$$$$ to $$$$$. (Exhibit R-1).
6. The Taxpayers timely appealed the Notice of Deficiency on July 25, 2018. (Pleadings).
7. It is the Division's position that the Taxpayers were domiciled in Utah, and thus all of their 2015 income is taxable to Utah, regardless of its source.
8. It is the Taxpayers' position that they were part-year residents of Utah in 2015.
9. The Taxpayers moved to Utah in 2014 and lived in a rental property in CITY 1.
10. TAXPAYER 1 accepted an offer of employment in FOREIGN COUNTRY 1. He lived in FOREIGN COUNTRY 1 from DATE through DATE. TAXPAYER 1 obtained a work permit from the Ministry of Interior as well as a driver license in FOREIGN COUNTRY 1. He also leased a 1,600 square foot residence in CITY 1, FOREIGN COUNTRY 1. (Exhibit R-6).
11. TAXPAYER 2 did not move to FOREIGN COUNTRY 1 with TAXPAYER 2. She remained in Utah throughout 2015.
12. Taxpayers' stated intention was that TAXPAYER 2 would join TAXPAYER 1 in FOREIGN COUNTRY 1, but could not do so immediately. TAXPAYER 1 explained that he needed to have a residence permit for three months before he could request one for TAXPAYER 2, which would take approximately three months to obtain. However, due to an unexpected medical issue with one of their DEPENDENTS, the Taxpayers made the decision that TAXPAYER 1 would return from FOREIGN COUNTRY 1, and they would remain in the United States.
13. The Taxpayers were married, and not legally separated or divorced, for all of 2015.
14. The Taxpayers' claimed a DEPENDENT as a dependent on their 2015 federal income tax return. DEPENDENT was not enrolled in a Utah public kindergarten, elementary, or secondary school. The Taxpayers' DEPENDENT claimed as a dependency exemption was enrolled as a student at UNIVERSITY. The Taxpayers' DEPENDENT paid resident tuition. (Exhibits R-5 and R-7).
15. The Taxpayers were not enrolled in an institution of higher education in the State of Utah in 2015.
16. The Taxpayers purchased a townhome located in CITY 2, Utah. The Taxpayers indicated they closed on the property on DATE. The Taxpayers purchased the townhome as a residence for their DEPENDENT, who was a student at UNIVERSITY. The Taxpayers intended for their

[1] Interest continues to accrue on any unpaid balance.

DEPENDENT to live there rent-free and to rent the remaining bedrooms in the townhome to other students.

17. The Taxpayers furnished the townhome in CITY 2. TAXPAYER 2 moved from the rental property in CITY 1 to the CITY 2 townhome. She testified that she started moving into the townhome in DATE. When TAXPAYER 1 returned from FOREIGN COUNTRY 1, he moved into the townhome.
18. The townhome located in CITY 2 received the primary residential exemption for the 2015 tax year. The market value of the property was identified as $$$$$ for the 2015 tax year, and the taxable value was $$$$$. This indicates that the property received the primary residential exemption. (Exhibit R-2).
19. The Taxpayers' representative argued that the primary residential exemption is not indicative of domicile for the Taxpayers because it was their DEPENDENTS primary residence. He noted that an owner residing in the property is not required for a property to qualify for the primary residential exemption. (Exhibit P-1).
20. The Division's representative argued that the Taxpayers' DEPENDENT would not be considered a tenant of the CITY 2 townhome. He argued that the Taxpayers used the home and had access to it from the time of purchase, and that the townhome in CITY 2 was a joint residence with the Taxpayers and their DEPENDENT.
21. TAXPAYER 1 was registered to vote in Utah in 2015. TAXPAYER 1 registered to vote in Utah on DATE. It appears that on DATE, TAXPAYER 1 voter record was updated changing his address from CITY 1 to CITY 2, and the source listed was his driver license. (Exhibit R-3).
22. TAXPAYER 2 registered to vote in Utah on DATE, after the audit period. (Exhibit R-3).
23. The Taxpayers' representative argued that voter registration is not an effective indication of residency for overseas households. He stated that individuals overseas are instructed to register to vote in their last place of domicile in the United States, and that had the Taxpayers stayed in FOREIGN COUNTRY 1 permanently, as they intended, registering to vote in Utah would have been the correct procedure.
24. The Taxpayers provided information taken from "The Voter Help Desk," which was linked from voteinfo.utah.gov, which states, "US citizens living outside of the US register and vote in the state and county where they last established residence (domicile) in the US before moving outside of the country." (Exhibit P-2).
25. "The Voter Help Desk" information provides, "[t]o register to vote and request an absentee ballot as an overseas voter, you must submit the Voter Registration/Absentee Ballot Request form (also known as the Federal Post Card Application, or CFPCA." (Exhibit P-2).

26. The Division's representative noted that had the Taxpayers been absent from Utah for at least 761 days, then TAXPAYER 1 voter registration would not have created the rebuttable presumption of domicile.
27. When asked by the Commission, the Division's representative stated that he did not know whether the Uniform Overseas Voting Act would effectively rebut the presumption of domicile in this case. He asked the Commission for guidance on the issue.
28. The Division's representative argued that Subsection (3) of Utah Code Ann. §59-10-136 does not apply in this case, because the Taxpayers are presumed domiciled in Utah under provisions of Subsection 59-10-136(2). However, he noted that there are several of the factors enumerated in Subsection (3) that would indicate domicile in Utah.
29. The Division's representative noted that the following factors under Subsection (3)(b) would indicate domicile in Utah for the Taxpayers:
    a. TAXPAYER 1 was issued a Utah driver license on DATE. It appears a new license was issued to TAXPAYER 1 on DATE changing the address from the rental property in CITY 1 to the town home in CITY 2. (Exhibit R-4).
    b. TAXPAYER 2 was issued a Utah driver license on DATE. It appears a duplicate license was issued to TAXPAYER 2 on DATE. (Exhibit R-4).
    c. The Taxpayers' vehicles were registered in Utah. TAXPAYER 1 indicated that his truck was in storage while he was in FOREIGN COUNTRY 1.
    d. The Taxpayers' DEPENDENT, who was claimed as a dependent on their federal return, was enrolled at UNIVERSITY, and paid resident tuition. (Exhibit R-5).
    e. The Taxpayers used the CITY 2 address for mail, government publications, and/or other correspondence in 2015. (Exhibit R-5).
    f. The Taxpayers used the CITY 2 address on their federal and state income tax returns for the 2015 tax year.[2] (Exhibits R-5, R-7, and R-8).

APPLICABLE LAW

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

The term "state taxable income" is defined in Utah Code Ann. §59-10-103(1)(w), below in pertinent part:

> (i) subject to Section 59-10-1404.5, for a resident individual, means the resident individual's adjusted gross income after making the:
> (A) additions and subtractions required by Section 59-10-114; and

[2] No evidence was provided regarding the Taxpayers' 2014 federal or state income tax returns, which would have been filed during the 2015 tax year in question.

(B) adjustments required by Section 59-10-115…

"Resident individual" is defined in Utah Code Ann. §59-10-103(1)(q), as follows:

(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.

The factors considered for determination of domicile are addressed in Utah Code Ann. §59-10-136, as set forth below:

(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.

If a property does not qualify to receive the primary residential exemption, the property owner is required to take certain steps, outlined in Utah Code Ann. §59-2-103.5, below in pertinent part:

(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) A property owner is not required to file a written statement or make the declaration described in Subsection (4) if the property owner:

(a) changes primary residences;

(b) qualified to receive a residential exemption authorized under Section 59-2-103 for the residence that was the property owner's former primary residence; and

(c) qualifies to receive a residential exemption authorized under Section 59-2-103 for the residence that is the property owner's current primary residence.

Utah Code Ann. §20A-2-305 provides for removal of a voter's name from the official voter register, as follows:

(1) The county clerk may not remove a voter's name from the official register because the voter has failed to vote in an election.
(2) The county clerk shall remove a voter's name from the official register if:
  (a) the voter dies and the requirements of Subsection (3) are met;
  (b) the county clerk, after complying with the requirements of Section 20A-2-306, receives written confirmation from the voter that the voter no longer resides within the county clerk's county;
  (c) the county clerk has:
    (i) obtained evidence that the voter's residence has changed;
    (ii) mailed notice to the voter as required by Section 20A-2-306;
    (iii) (A) received no response from the voter; or
      (B) not received information that confirms the voter's residence; and
    (iv) the voter has failed to vote or appear to vote in an election during the period beginning on the date of the notice described in Section 20A-2-306 and ending on the day after the date of the second regular general election occurring after the date of the notice;
  (d) the voter requests, in writing, that the voter's name be removed from the official register;
  (e) the county clerk receives notice that a voter has been convicted of any felony or a misdemeanor for an offense under this title and the voter's right to vote has not been restored as provided in Section 20A-2-101.3 or 20A-2-101.5; or
  (f) the county clerk receives notice that a voter has registered to vote in another state after the day on which the voter registered to vote in this state.
(3) The county clerk shall remove a voter's name from the official register within five business days after the day on which the county clerk receives confirmation from the Department of Health's Bureau of Vital Records that the voter is deceased.

Utah Code Ann. §20A-2-306 addresses the removal of names from the official voter register where a change of residence occurs, as set forth below:

(1) A county clerk may not remove a voter's name from the official register on the grounds that the voter has changed residence unless the voter:
  (a) confirms in writing that the voter has changed residence to a place outside the county; or
  (b) (i) has not voted in an election during the period beginning on the date of the notice required by Subsection (3), and ending on the day after the date of the second regular general election occurring after the date of the notice; and
    (ii) has failed to respond to the notice required by Subsection (3).
(2) (a) When a county clerk obtains information that a voter's address has changed and it appears that the voter still resides within the same county, the county clerk shall:
    (i) change the official register to show the voter's new address; and
    (ii) send to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.

(b) When a county clerk obtains information that a voter's address has changed and it appears that the voter now resides in a different county, the county clerk shall verify the changed residence by sending to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.

(3) Each county clerk shall use substantially the following form to notify voters whose addresses have changed: "VOTER REGISTRATION NOTICE

We have been notified that your residence has changed. Please read, complete, and return this form so that we can update our voter registration records. What is your current street address?

_____

Street City County State Zip

If you have not changed your residence or have moved but stayed within the same county, you must complete and return this form to the county clerk so that it is received by the county clerk no later than 30 days before the date of the election. If you fail to return this form within that time:

- you may be required to show evidence of your address to the poll worker before being allowed to vote in either of the next two regular general elections; or

- if you fail to vote at least once from the date this notice was mailed until the passing of two regular general elections, you will no longer be registered to vote. If you have changed your residence and have moved to a different county in Utah, you may register to vote by contacting the county clerk in your county.

_____

Signature of Voter"

"The portion of your voter registration form that lists your driver license or identification card number, social security number, email address, and the day of your month of birth is a private record. The portion of your voter registration form that lists your month and year of birth is a private record, the use of which is restricted to government officials, government employees, political parties, or certain other persons.

You may apply to the lieutenant governor or your county clerk to have your entire voter registration record classified as private."

(4) (a) Except as provided in Subsection (4)(b), the county clerk may not remove the names of any voters from the official register during the 90 days before a regular primary election and the 90 days before a regular general election.

(b) The county clerk may remove the names of voters from the official register during the 90 days before a regular primary election and the 90 days before a regular general election if:

(i) the voter requests, in writing, that the voter's name be removed; or

(ii) the voter has died.

(c) (i) After a county clerk mails a notice as required in this section, the county clerk may list that voter as inactive.

(ii) If a county clerk receives a returned voter identification card, determines that there was no clerical error causing the card to be returned, and has no further information to contact the voter, the county clerk may list that voter as inactive.

(iii) An inactive voter shall be allowed to vote, sign petitions, and have all other privileges of a registered voter.

(iv) A county is not required to send routine mailings to an inactive voter and is not required to count inactive voters when dividing precincts and preparing supplies.

The Uniform Military and Overseas Voter Act defines the following terms, relevant to this proceeding in Utah Code Ann. §20A-16-102, below, in pertinent part:

As used in this chapter:

(1) "Covered voter" means:
  (a) a uniformed-service voter or an overseas voter who is registered to vote in the state; or
  (b) a uniformed-service voter whose voting residence is in the state and who otherwise satisfies the state's voter eligibility requirements…
(6) "Overseas voter" means a United States citizen who is outside the United States…

Utah Code Ann. §20A-16-302 provides the methods for registering to vote under the Uniform Military and Overseas Voter Act, as follows:

(1) To apply to register to vote, in addition to any other approved method, a covered voter may use a federal postcard application or the application's electronic equivalent.
(2) (a) A covered voter may use the declaration accompanying a federal write-in absentee ballot to apply to register to vote simultaneously with the submission of the federal write-in absentee ballot, if the declaration is received by the Thursday immediately before the election.
  (b) If the declaration is received after the Thursday immediately before the election, the declaration shall be treated as an application to register to vote for subsequent elections.
(3) (a) The lieutenant governor shall ensure that the electronic transmission system in Subsection 20A-16-201(3) is capable of accepting both a federal postcard application and any other approved electronic registration application sent to the appropriate election official.
  (b) The voter may use the electronic transmission system or any other approved method to register to vote.

Utah Code Ann. §20A-16-401(5) provides that a "covered voter" affirmatively indicates their status as such to receive the benefits of the Uniform Military and Overseas Voter Act, below:

(5) To receive the benefits of this chapter, a covered voter shall inform the appropriate election official that the voter is a covered voter by:
  (a) the use of a federal postcard application or federal write-in absentee ballot;
  (b) the use of an overseas address on an approved voter registration application or ballot application; or
  (c) the inclusion on an approved voter registration application or ballot application of other information sufficient to identify the voter as a covered voter.

Under Utah Code Ann. §59-1-1417(1), the burden of proof is generally upon the petitioner in proceedings before the commission, 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.

CONCLUSIONS OF LAW

A. The Taxpayer has the burden of proof in this matter under Utah Code Ann. §59-1-1417.

B. Utah Code Ann. §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[.]" The Legislature enacted domicile legislation that became effective beginning with the 2012 tax year, and was in effect for the 2015 audit year at issue. Utah Code Ann. §59-10-136 addresses when an individual is considered to have domicile in Utah. It 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)).

C. The Taxpayers are each other's spouse for the years at issue. Utah Code Ann. §59-10-136(5)(a) provides that if an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is also considered to have domicile in this state. Subsection (5)(b) provides that an individual is not considered to have a spouse if the individual is legally separated or divorced from the spouse, or the individual and individual's spouse claim married filing separate filing status for purposes of filing a federal individual income tax return for the year in question. The Taxpayers filed a 2015 federal return with a married filing joint status. The Taxpayers testified that they were not legally separated or divorced during the audit period.

D. Subsection (4) of Utah Code Ann. §59-10-136 provides that an individual is not considered to have domicile in the State of Utah if certain qualifications are met. The Taxpayers do not meet the qualifications of Subsection (4) for reasons including that TAXPAYER 2 remained in Utah for all of 2015 and TAXPAYER 1 was only absent from Utah from DATE through DATE. Additionally, the

primary residential exemption was in place for the townhome in CITY 2 commencing on DATE through the rest of the tax year of 2015.

E. The Taxpayers are not domiciled in Utah under the provisions of Utah Code Ann. §59-10-136(1). If a dependent claimed on the individual's or individual's spouse's federal income tax return is enrolled in a Utah public kindergarten, elementary, or secondary school, the individual is considered domiciled in Utah. The Taxpayers' DEPENDENT, although claimed as a dependent on their 2015 federal return, was not enrolled in a Utah public kindergarten, elementary, or secondary school because she attended college during 2015. Additionally, if an individual or individual's spouse is a resident student enrolled in an institution of higher education in Utah, the individual is considered domiciled in Utah. The Taxpayers asserted neither of them was enrolled as a resident student in a Utah institution of higher education.

F. The Taxpayers are domiciled in Utah from DATE through DATE because the townhome in CITY 2 received the primary residential property tax exemption for the 2015 tax year. Utah Code Ann. §59-10-136(2)(a) provides as follows:

> (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…

Utah Code Ann. §59-2-103(2) generally provides that a Utah residential property will receive a 45% residential exemption, while Utah Code Ann. §59-2-103.5(1) provides that a county may, at its option, require a property owner to file an application before the property receives the exemption. As a result, when the residential exemption was created by the Utah Legislature, this enactment generally added a claim for the exemption to the bundle of rights acquired with the purchase of residential property, unless the relevant county adds the second step of requiring formal application in order to receive the benefit of the exemption. The claim persists until the property is relinquished through the sale of the property or until the residential exemption is removed from the property (either by action of the county or the property owner). Therefore, simply owning a residential property in a Utah county that does not require an application (which includes most Utah counties) generally asserts an enduring claim to the residential exemption. COUNTY 1, where the Taxpayers' townhome is located, does not require an application to receive the primary residential exemption.

The presumption of domicile under Utah Code Ann. §59-10-136(2)(a) arises for the Taxpayers as the CITY 2 townhome received the primary residential exemption. The Commission notes that the provisions of Subsection (6) do not preclude the Subsection (2)(a) presumption from arising. Subsection 59-10-136(6) provides that "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."[3]

The Taxpayers argued that their DEPENDENT was a tenant of the CITY 2 townhome, and that the property qualified for the primary residential exemption on that basis. The Taxpayers' stated intention was that their DEPENDENT would live in the townhome rent-free, and that the remaining bedrooms would be rented out to other UNIVERSITY students. However, the Taxpayers' stated intentions differ from what actually transpired in 2015. The townhome was TAXPAYER 2 residence from DATE through DATE. She testified that she started moving the Taxpayers' furnishings and belongings from the rental property in CITY 1 to the CITY 2 townhome in DATE, and that she resided in the CITY 2 townhome. Further, the townhome was TAXPAYER 1 residence from DATE through DATE, as his testimony was that he moved into the CITY 2 townhome upon his return from FOREIGN COUNTRY 1. Subsection (6) must be read in concert with, not in isolation from, Utah Code Ann. §59-10-136(2)(a). To find that the Subsection (6) exception applies where the owner of a home receiving the residential exemption continues to live in the home, ignores the plain meaning of Subsection 59-10-136(2)(a). The Commission finds that the Subsection (6) exception does not apply for the 2015 year at issue in this appeal.

A Utah 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 certain affirmative steps. First, the property owner must 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. Second, the property owner must declare on their Utah individual income tax return for the taxable year that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence. This could have been done when the Taxpayers filed their original part-year resident Utah Individual Income tax Return for the 2015 tax year. The Taxpayers are both presumed domiciled in Utah under Utah Code Ann. §59-10-136(2)(a) because neither of them had asked the county to remove this exemption from the townhome, and the Taxpayers had not checked the proper box on Part 7 of their Utah individual income tax return to indicate they were no longer qualified to receive this property tax exemption.

[3] Utah Code Ann. §59-10-136(4)(a)(ii)(D) requires 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." However, Utah Code Ann. §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.

The Legislature did not provide what circumstances are sufficient to rebut the presumption in Subsection (2)(a), leaving it to the Commission to determine which circumstances are sufficient to rebut the presumption. The Commission has held in prior cases that taxpayers failed to rebut the presumption of domicile even though they were unaware that they were receiving the primary residential exemption.[4] Likewise, the Commission has previously found that retroactively removing the primary residential exemption and paying the difference in property tax is insufficient to rebut the presumption of domicile.[5] The Commission has found that the Subsection (2)(a) presumption was rebutted where an individual whose home was receiving the residential exemption disclosed on their Utah income tax return that the home no longer qualified for the exemption (even if the individual did not contact the county directly).[6] In addition, the Commission has found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home is listed for sale, but only if the home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for sale).[7][8] The Taxpayers have not provided any information to rebut the presumption of domicile created under this Subsection, and thus are domiciled in Utah under Utah Code Ann. §59-10-136(2)(a) from February 13, 2015 through December 31, 2015.

G. The Taxpayers are presumed domiciled in Utah because TAXPAYER 1 was registered to vote in Utah in 2015. Utah Code Ann. §59-10-136(2)(b) provides as follows:

> There is a rebuttable presumption that an individual is considered to have domicile in this state if:
> (b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration…

TAXPAYER 1 was registered to vote in Utah for all of 2015. His voter registration in Utah creates a rebuttable presumption of domicile. The Tax Commission has considered what would rebut and what does not rebut the Subsection (2)(b) presumption of Utah domicile in many prior appeal decisions. The Commission has found that an individual cannot rebut the Subsection (2)(b) presumption by showing that they did not vote in Utah during the tax year at issue. Factors found to rebut the presumption include a showing that the individual registered to vote in the state to which they moved relatively soon after moving there. The Commission has also found that the Subsection (2)(b) presumption can be rebutted if the individual who is registered to vote in Utah requested for their name to be removed from the Utah voter registry and the local county clerk or other official who received the request did not remove the individual's name from the registry. In addition, the

[4] *See* Appeal nos. 14-30 and 15-720.
[5] *See* Appeal nos. 15-1582 and 17-1787.
[6] S*ee* Appeal No. 17-812.
[7] S*ee* Appeal No. 15-1332.
[8] The Commission notes that it may recognize additional grounds for rebuttal in future cases.

Commission found the presumption can be rebutted from the date that Utah voting laws provide for an individual's name to be removed from the Utah voter registry and a local county clerk does not immediately remove their name from the registry.[9] Because Utah Code Ann. §59-10-136(2)(b) provides that there is a presumption of domicile in Utah if the individual, or the individual's spouse is registered to vote in Utah, both TAXPAYER 1 AND TAXPAYER 2 are presumed domiciled in Utah for all of 2015 because TAXPAYER 1 was registered to vote in Utah. The Taxpayers have not rebutted the presumption of domicile based on any of the above-mentioned circumstances.

The Taxpayer's representative argued that voter registration should not be used to determine domicile in Utah because it was proper for TAXPAYER 1 to be registered to vote in Utah while he was overseas. The Utah Legislature has adopted the Uniform Military and Overseas Voter Act ("UMOVA") in Title 20A, Chapter 16 of the Utah Code to enact the federal Uniformed and Overseas Citizens Absentee Voting Act. The question of whether registering to vote in accordance with UMOVA rebuts the presumption of domicile in Utah Code Ann. §59-10-136(2)(b) is one of first impression before the Commission. The Commission has previously recognized that provisions of federal law, specifically the Servicemembers Civil Relief Act, may rebut the presumptions in Utah Code Ann. §59-10-136(2).[10] The Commission declines to rule on whether being registered to vote in accordance with UMOVA is sufficient to rebut the presumption of domicile under Subsection (2)(b) in this case, as explained in further detail below.

TAXPAYER 1 may be considered a "covered voter" and would be entitled to vote under UMOVA if he otherwise qualifies under the Act. Utah Code Ann. §20A-16-102(1) defines a "covered voter" as, "[a] uniformed-service voter or an overseas voter who is registered to vote in the state…" An "overseas voter" is defined in Utah Code Ann. §20A-16-102(6) as a United States citizen who is outside the United States. TAXPAYER 1 voter registration history provided in Exhibit R-3 shows that he is a United States citizen. From the period of DATE through DATE he was in FOREIGN COUNTRY 1, which is outside of the United States. It appears that for the period of DATE through DATE, TAXPAYER 1 would be considered a "covered voter."

Utah Code Ann. §20A-16-302 provides the methods for "covered voters" to register to vote under UMOVA, as follows:

> (3) To apply to register to vote, in addition to any other approved method, a covered voter may use a federal postcard application or the application's electronic equivalent.
> (4) (a) A covered voter may use the declaration accompanying a federal write-in absentee ballot to apply to register to vote simultaneously with the submission of

[9] The Commission notes that it may find additional grounds for rebuttal in future cases.
[10] *See* Appeal No. 17-789. Prior Commission decisions are available online at tax.utah.gov/commission-office/decisions.

the federal write-in absentee ballot, if the declaration is received by the Thursday immediately before the election.

(b) If the declaration is received after the Thursday immediately before the election, the declaration shall be treated as an application to register to vote for subsequent elections.

(3) (a) The lieutenant governor shall ensure that the electronic transmission system in Subsection 20A-16-201(3) is capable of accepting both a federal postcard application and any other approved electronic registration application sent to the appropriate election official.

(b) The voter may use the electronic transmission system or any other approved method to register to vote.

In this case, TAXPAYER 1 was registered to vote in Utah prior to his move to FOREIGN COUNTRY 1. Utah Code Ann. §20A-16-302(1) provides that an individual can use the federal postcard application, or electronic equivalent, in addition to any other approved method, to apply to register to vote as a covered voter. The Taxpayers have provided no evidence that TAXPAYER 1 registered using the federal postcard application. The statute does not specify what constitutes an "approved method" of voter registration The Taxpayer has the burden of proof in this matter, and has not shown that TAXPAYER 1 was registered to vote as a covered voter through an "approved method."

The Commission concludes that merely being registered to vote in Utah is not sufficient for a "covered voter" to vote under and be covered under the provisions of UMOVA. While the use of the federal postcard application is not required, if a covered voter does not use the federal postcard application, they are required to affirmatively indicate their status as a "covered voter" using one of the other statutory methods. Utah Code Ann. §20A-16-401(5) provides as follows:

(5) To receive the benefits of this chapter, a covered voter shall inform the appropriate election official that the voter is a covered voter by:

(a) the use of a federal postcard application or federal write-in absentee ballot;

(b) the use of an overseas address on an approved voter registration application or ballot application; or

(c) the inclusion on an approved voter registration application or ballot application of other information sufficient to identify the voter as a covered voter.

The Taxpayers have the burden of proof in this matter, and have not provided any evidence to show that TAXPAYER 1 informed the appropriate election official that he was a "covered voter" who was entitled to the benefits of UMOVA. The only evidence offered is that he registered to vote in a prior year and prior to his move out of the country. A review of the voter registration history provided by the Division as Exhibit R-3 does not indicate that TAXPAYER 1 informed the election official that he was a covered voter. Under the specific facts of this case, the Commission finds that the Taxpayers have not rebutted the presumption of domicile under Utah Code Ann. §59-10-136(2)(b), as the

Taxpayers have not shown that TAXPAYER 1 was registered to vote in accordance with the provisions of UMOVA.

H. The Taxpayers are presumed domiciled in Utah from DATE through DATE under Subsection 59-10-136(2)(c) because they filed a part-year resident Utah individual income tax return for the 2015 tax year, declaring they were residents of Utah for that period. Utah Code Ann. §59-10-136(2)(c) provides as follows:

> There is a rebuttable presumption that an individual is considered to have domicile in this state if:
> (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.

The Commission declines to analyze whether the Taxpayers have rebutted the presumption of domicile under Utah Code Ann. §59-10-136(2)(c), as the Commission has already concluded the Taxpayers were domiciled in Utah for all of 2015 under Subsections (2)(a) and/or (2)(b) of Utah Code Ann. §59-10-136.

I. The factors found in Utah Code Ann. §59-10-136(3) are not applicable in this case. Subsection (3) sets forth a number of facts and circumstances that when considered in totality may support a finding that an individual is domiciled in Utah. Subsection (3)(a) specifically provides, "[i]f 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…" certain requirements are met. In this case, the requirements of Subsection (2) have been met.[11] To rely upon the limited and exhaustive list of factors in Subsection (3) to rebut a Subsection (2) presumption is both contrary to the express language of Utah Code Ann. §59-10-136(3)(a) and contrary to the plain meaning of Utah Code Ann. §59-10-136 as a whole. By allowing the factors in Subsection (3) to be used to rebut a presumption in Subsection (2) upends the hierarchical nature of Utah Code Ann. §59-10-136 as established by the legislature. Almost all of the factors to which the Legislature gave greater import in Subsections (1) and (2) are based on an individual, or an individual's spouse availing themselves of certain benefits of being a resident of Utah. These include having a dependent attend a Utah public school, being enrolled as a resident student at a Utah institution of higher education, receiving a property tax benefit in the form of a residential exemption, or being registered to vote in Utah.

[11] Because the Taxpayers are domiciled in Utah for all of 2015 under Utah Code Ann. §59-10-136(2)(a), (2)(b), and/or (2) (c), the Commission declines to analyze the factors in Subsection (3)(b) in determining the Taxpayers' domicile.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the Taxpayers were domiciled in Utah for all of the 2015 tax year and sustains the Division's audit assessment of tax and interest. It is so ordered.

DATED this _____day of _____, 2020.

John L. Valentine
Commission Chair

Michael J. Cragun

Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

Notice of Appeal Rights and Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be assessed. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.