18-1626
TAX TYPE: INCOME TAX
TAX YEAR: 2015 & 2016
DATE SIGNED: 2/18/2020
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 18-1626 Account No. ##### Tax Type: Individual Income Tax Tax Years: 2015 & 2016 Judge: Chapman

Presiding:
Lawrence C. Walters, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYERS, Attorney
TAXPAYER-1, Taxpayer
TAXPAYER-2, Taxpayer
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on DATE, 2020. Based upon the evidence and testimony, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is Utah individual income tax.

2. The tax years at issue are 2015 and 2016 (which may be referred to as the "audit period").

3. TAXPAYER-1 & TAXPAYER-2 ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessments of Utah individual income taxes for the 2015 and 2016 tax years.

4. On DATE, 2018, the Division issued Notices of Deficiency and Audit Change ("Statutory Notices") to the taxpayers, in which it imposed taxes and interest (calculated as of DATE, 2018),[1] as follows:

Year	Tax	Penalties	Interest	Total
2015	$$$$$	$$$$$	$$$$$	$$$$$
2016	$$$$$	$$$$$	$$$$$	$$$$$

5. Because the parties agreed to waive an Initial Hearing, this matter proceeded directly to a Formal Hearing.

6. The taxpayers had lived in Utah for many years until DATE, 2014, when they and their two daughters (who were AGE and AGE years of age)[2] moved to FOREIGN COUNTRY, where TAXPAYER-1 had accepted a job. TAXPAYER-1 lived in FOREIN COUNTRY throughout the 2015 and 2016 tax years at issue and continues to live there as of the date of the Formal Hearing. The taxpayers, however, experienced marital problems in 2015, which led to TAXPAYER-2 and the taxpayers' two daughters returning to the United States in DATE 2015. The taxpayers had leased a home they both owned in CITY-1, Utah (the taxpayers' "Utah home") to tenants for a one-year period beginning on DATE, 2014. At a result, TAXPAYER-2 and the taxpayers' two daughters initially stayed with TAXPAYER-2's parents in STATE-1 upon their return to the United States in 2015. The tenants of the Utah home vacated the home on DATE, 2015, which led to TAXPAYER-2 and the taxpayers' two daughters moving into the taxpayers' Utah home on DATE, 2015. Except for occasional trips outside of Utah, TAXPAYER-2 and the taxpayers' two daughters lived in the Utah home from DATE, 2015 until mid-2017.[3]

7. For the 2015 and 2016 tax years, the taxpayers filed United States federal income tax returns ("federal returns") and Utah income tax returns, all of which were filed with a status of married filing jointly.[4]

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1 Respondent's Exhibit 1. Interest continues to accrue until any tax liability is paid. No penalties were imposed.
2 The taxpayers have no other children.
3 Testimony of taxpayers.
4 Respondent's Exhibits 2, 3, 4, and 5.

8. For the 2015 tax year, the taxpayers filed a Utah part-year resident return. On the Form TC-40B accompanying the 2015 Utah return, the taxpayers reported a Utah part-year residency period from DATE 2015 to DATE, 2015, and they allocated to Utah $$$$$ of their total 2015 federal adjusted gross income ("FAGI") of $$$$$.[5] The taxpayers contend that their CPA incorrectly reported them to be Utah part-year resident individuals from DATE, 2015 to DATE, 2015 on their 2015 Form TC-40B, but that the CPA correctly allocated to Utah $$$$$ of their 2015 FAGI. The taxpayers explain that they filed their 2015 Utah return to show that TAXPAYER-1 was a Utah nonresident individual for all of 2015 and that none of the income that he earned in FOREIGN COUNTRY throughout 2015 was subject to Utah taxation.

9. The taxpayers also contend that TAXPAYER-2 is a Utah nonresident individual for all of 2015, but that it may be acceptable for the Commission to find her to be a Utah part-year resident individual for the DATE, 2015 to DATE, 2015 portion of 2015 that she and her two daughters lived in the Utah home. The taxpayers contend that because TAXPAYER-2 was not employed after she returned to the United States in mid-2015 and because they had already allocated to Utah all of their 2015 Utah source income on the 2015 Form TC-40B, their tax liability would be the same whether TAXPAYER-2 is a 2015 Utah full-year nonresident individual or a 2015 Utah part-year resident from DATE, 2015 to DATE, 2015.

10. For the 2016 tax year, the taxpayers also filed a Utah part-year resident return. On the Form TC-40B accompanying the 2016 Utah return, the taxpayers reported a Utah part-year residency period from DATE, 2016 to DATE, 2016, and they allocated to Utah $$$$$ of their total 2016 FAGI of $$$$$.[6] The taxpayers contend that their CPA also incorrectly showed them to be Utah part-year resident individuals for the DATE, 2016 to DATE, 2016 period reported on their 2016 Form TC-40B, but that the CPA correctly allocated to Utah $$$$$ of their 2016 FAGI. The taxpayers explain that they filed their 2016 Utah return to show that

5 Respondent's Exhibit 2.
6 Respondent's Exhibit 4.

TAXPAYER-1 was a Utah nonresident individual for all of 2016 and that none of the income that he earned in FOREIGN COUNTRY throughout 2016 was subject to Utah taxation.

11. The taxpayers also contend that TAXPAYER-2 is a Utah full-year nonresident individual, but that it may be acceptable for the Commission to find her to be a 2016 Utah full-year resident individual. The taxpayers contend that because TAXPAYER-2 was not employed during 2016 (except for a short period as a substitute teacher as a favor to a friend) and because they had already allocated to Utah all of their 2016 Utah source income on the 2016 Form TC-40B, their tax liability would be the same whether TAXPAYER-2 is a 2016 Utah full-year nonresident individual or a Utah full-year resident individual.

12. The Division, however, determined that under Utah Code Ann. §59-10-136 (2015-2016), both taxpayers are domiciled in Utah for all of 2015 and 2016. As a result, the Division also determined that both taxpayers were Utah resident individuals for all of the 2015 and 2016 tax years (pursuant to UCA §59-10-103(1)(q)(i)(A)), and it imposed Utah income tax on all income that both taxpayers received for the 2015 and 2016 tax years.[7]

13. The taxpayers married in YEAR. The taxpayers testified that although they experienced marital difficulties in 2015 and have primarily lived separately since DATE 2015, they have not been legally separated or divorced at any time since they married in YEAR. TAXPAYER-2 testified that she had asked the taxpayers' CPA whether she should become legally separated from her husband and that the CPA had advised her not to.

14. The taxpayers were not born or raised in Utah. In 2008, the taxpayers first moved to Utah,

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7 For the portions of 2015 and 2016 that the taxpayers are Utah resident individuals, they would be entitled to a credit against their Utah tax liability for income taxes imposed by another state (pursuant to UCA §59-10-1003 (2015-2016)). The Division did not apply this credit because no other state imposed income taxes on the taxpayers' 2015 or 2016 income. The taxpayers indicated that FOREIGN COUNTRY imposed income taxes on the income they earned in FOREIGN COUNTRY. However, in *Steiner v. Utah State Tax Comm'n*, 2019 UT 47, the Utah Supreme Court has found that the Subsection 59-10-1003 credit does not apply to income taxes imposed by a foreign country.

where both of them accepted employment as educators at a private school. The taxpayers testified that because TAXPAYER-1 was interested in a "head of school" position and because no such position was available in Utah, he started searching for such positions outside of Utah. Eventually, TAXPAYER-1 was offered a three-year contract for a head of school position at the FOREIGN COUNTRY CITY-1 American School in FOREIGN COUNTRY, which he accepted. As a result, the taxpayers quit their Utah jobs in 2014 and moved to FOREIGN COUNTRY in DATE 2014. From DATE 2014 to the first half of 2015, TAXPAYER-2 was also employed at the FOREIGN COUNTRY CITY-1 American School.

15. The taxpayers testified that when they moved to FOREIGN COUNTRY in 2014, they intended the move to be permanent and that neither of them had any intention of returning to Utah. The taxpayers obtained FOREIGN COUNTRY residency permits to live in FOREIGN COUNTRY.[8]

16. However, the taxpayers unexpectedly experienced marital problems in 2015, which led to TAXPAYER-2 quitting her job at the FOREIGN COUNTRY CITY-1 American School and returning to the United States with her daughters in DATE 2015. TAXPAYER-2 testified that upon returning to the United States in DATE 2015, she was in a crisis situation and that she was in a transitory period where she did not have an intent to establish a domicile anywhere. She testified that she and TAXPAYER-1 were trying to figure out whether they would reunite, but that she never had any intention of remaining in Utah permanently, which is one reason why she never looked for a job in Utah. She testified that she returned to the taxpayers' Utah home in 2015 because there was no other place for her to go. She further testified that she returned to FOREIGN COUNTRY around DATE 2017 to see if the taxpayers could save their marriage, but during this time that she lived in FOREIGN COUNTRY, she accepted a job in STATE-2. In 2018, TAXPAYER-2 moved to STATE-2, where she still lives and works.

17. TAXPAYER-2 testified that once she returned to the United States in DATE 2015, she

8 Petitioner's Exhibit 1, pp. 19-20 and 26-28; Respondent's Exhibit 13.

primarily lived at the taxpayers' Utah home until DATE 2017, because one or both of the taxpayers' two daughters were attending private school in Utah from around DATE 2015 to DATE 2017. As a result, it appears that beginning on DATE, 2015, TAXPAYER-2 was present in Utah for more than 30 days of the DATE, 2015 to DATE, 2015 portion of 2015; more than 30 days of 2016; and more than 30 days of the DATE, 2017 to DATE 2017 portion of 2017. No evidence was submitted to show otherwise.

18. TAXPAYER-1 testified that subsequent to moving to FOREIGN COUNTRY in 2014, he would return to the United States more than 30 days in a calendar year and that he was present in Utah for portions of these visits. However, he also testified that it is unlikely that he was present in Utah for more than 30 days in a calendar year subsequent to 2014.

19. Based on the foregoing, the Commission finds that between DATE, 2015 and DATE 2017, at least one of the taxpayers was present in Utah for more than 30 days during each of the 2015, 2016, and 2017 calendar years.

20. On their 2015 and 2016 federal returns, the taxpayers claimed only their two daughters as dependents.[9] The taxpayers testified that neither of their daughters attended a Utah public kindergarten, elementary, or secondary school during any portion of 2015 or 2016, but that their daughters attended a private school in FOREIGN COUNTRY for the first half of 2015 and a private school in Utah for the last half of 2015 and for all of 2016. In addition, the taxpayers testified that neither they nor their daughters attended a Utah institution of higher education during any portion of 2015 or 2016.

21. The taxpayers testified that around the time they moved to Utah in 2008, they purchased the Utah home in both of their names. Until recently, the Utah home was owned by both taxpayers. In 2019 or 2020, the taxpayers started dividing up their assets, at which time they put the Utah home in the name of TAXPAYER-2 only. As of the date of the Formal Hearing, TAXPAYER-2 still owns the Utah home.

9 Respondent's Exhibits 3 and 5.

22. TAXPAYER-2 testified that the Utah home is a single-family residence that is approximately ##### square feet in size. The taxpayers indicated that TAXPAYER-1's employer in FOREIGN COUNTRY provided a home there for TAXPAYER-1 and his family to live in. The home in FOREIGN COUNTRY was a four-floor condominium with four bedrooms that was as large as or larger than the taxpayers' Utah home.

23. TAXPAYER-1 testified that since he moved to FOREIGN COUNTRY in 2014, he has never lived in the Utah home. No information was provided as to where TAXPAYER-1 would stay when he visited Utah in years subsequent to 2014.

24. From DATE, 2014 to DATE, 2015, the taxpayers leased the Utah home to tenants who used the home as the tenants' primary residence.[10] TAXPAYER-2 testified that the taxpayers leased the Utah home to these tenants unfurnished. As a result, when the taxpayers moved to FOREIGN COUNTRY in 2014, they shipped some of their furniture and other personal belongings to FOREIGN COUNTRY and put the rest in storage in Utah. When TAXPAYER-2 and the taxpayers' daughters returned to the taxpayers' Utah home in DATE 2015, they moved the furniture and other personal belongings from storage into the Utah home and had some of the furniture and other personal belongings in FOREIGN COUNTRY shipped back to Utah.

25. TAXPAYER-2 testified that during the DATE, 2015 to DATE, 2016 portion of the audit period that she and the taxpayers' two daughters lived in the Utah home, the home was not listed for sale or lease. TAXPAYER-2 stated that the taxpayers kept the Utah home because it is a good investment. The Utah home was empty between DATE 2017 (when TAXPAYER-2 returned back to FOREIGN COUNTRY) and DATE 2018. Since DATE 2018, the Utah home has been rented to tenants.

26. The Utah home received the residential exemption from property taxes for all of 2015 and 2016.[11] TAXPAYER-2 testified that in 2017 (before returning to FOREIGN COUNTRY), she called

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10 Testimony of taxpayers; Petitioner's Exhibit 1, pp. 10-18; Respondent's Exhibits 11 and 12.

11 Respondent's Exhibit 10. Utah Code Ann. §59-2-103(2) (2016) provides that ". . . the fair market value of residential property located within the state is allowed a residential exemption equal to a 45% reduction in the value of the property[,]" while Utah Code Ann. §59-2-102(36)(a) (2016) defines "residential

COUNTY (the "County" in which the Utah home is located) and asked for the residential exemption to be removed from the Utah home, at which time the exemption was removed for the 2017 tax year. TAXPAYER-2 testified that she had the exemption removed once the taxpayers' CPA told her about the exemption because receiving the exemption was contrary to her intent for Utah not to be her permanent home. TAXPAYER-2 testified that she had not asked the County to remove the residential exemption from the Utah home prior to 2017, and no evidence was provided to suggest that TAXPAYER-1 had asked the County to remove the residential exemption from the Utah home prior to TAXPAYER-2's 2017 request.

27. On page 3 (Part 7) of each of the 2015 and 2016 Utah income tax returns, a taxpayer is asked to enter an "X" if "you are a Utah residential property owner and declare you no longer qualify to receive a residential exemption authorized under UC §59-2-103 for your primary residence[.]" The taxpayers did not enter an "X" on this portion of their 2015 or 2016 Utah income tax return.[12]

28. During 2015 and 2016, the taxpayers appear to have used addresses in FOREIGN COUNTRY, Utah, STATE-2, and/or STATE-1. TAXPAYER-2 testified that during 2015, the taxpayers would have used a STATE-1 address to file their 2014 federal and Utah returns. It appears that the taxpayers filed their 2015 federal and Utah returns in 2016. On the 2015 returns, the taxpayers used a Utah address on the Utah return and a STATE-2 address on the federal return.[13] It appears that the taxpayers filed their 2016 federal and Utah returns in 2017. The taxpayers used a STATE-2 address on both of their 2016 federal and Utah returns.[14]

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property" 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. Subsections 59-2-103(2) and 59-2-102(36)(a) were amended and/or renumbered during the 2015 and 2016 tax years at issue. However, any amendment to the language cited in this paragraph was nonsubstantive.

12 Testimony of RESPONDENT; Respondent's Exhibits 2 and 4.

13 Respondent's Exhibits 2 and 3. It is unclear why the taxpayers used a STATE-2 address prior to TAXPAYER-2 moving to STATE-2 in 2018.

14 Respondent's Exhibits 4 and 5.

29. When the taxpayers moved to FOREIGN COUNTRY in DATE 2014, they sold the motor vehicles that they had owned in Utah. No information was provided as to whether the taxpayers owned a vehicle in FOREIGN COUNTRY. However, when TAXPAYER-2 returned to the United States in DATE 2015, she purchased a vehicle in her name in STATE-1, which she registered in STATE-1. Soon after TAXPAYER-2 started living in the taxpayers' Utah home on DATE, 2015, she registered this vehicle in Utah. In 2016, TAXPAYER-2 bought another vehicle in her name for one of her daughters to drive, which TAXPAYER-2 also registered in Utah.[15]

30. Each of the taxpayers had a Utah driver's license during 2015 and 2016, and each of the taxpayers obtained a STATE-2 driver's license during 2017 or 2018.[16] In addition, the taxpayers testified that each of them registered to vote in STATE-2 in 2017.

31. Each of the taxpayers registered to vote in Utah in 2008. TAXPAYER-1 voted in Utah in 2008, 2010, and 2012, and he has not voted in Utah since 2012. TAXPAYER-2 voted in Utah in 2008, 2010, 2012, and 2016, and she has not voted in Utah since 2016. While TAXPAYER-2 did not vote in Utah during the 2015 tax year at issue, she did vote in Utah by mail in the DATE 2016 election.[17]

32. In addition, both parties provided evidence to show actions taken by the COUNTY clerk's office ("clerk's office") in regards to each of the taxpayers' Utah voter registrations. For TAXPAYER-1, this evidence shows that on DATE, 2013 and DATE, 2014, the clerk's office took two actions that were each described as "changed status from active to inactive."[18] Subsequently, on DATE, 2016, the clerk's office took another action described as "status was inactive changed to removable."[19]

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15 Testimony of taxpayers; Respondent's Exhibit 15.

16 Testimony of taxpayers; Petitioner's Exhibit 1, pp. 21-25; Respondent's Exhibit 14.

17 Petitioner's Exhibit 1, pp. 1-9; Respondent's Exhibits 7 and 8.

18 Neither party provided information to show why the clerk's office took the identical action in regards to TAXPAYER-1 Utah voter registration on both DATE, 2013 and DATE, 2014, even though it appears that the clerk's office took no other action in regards to his Utah voter registration between these dates.

19 Petitioner's Exhibit 1, pp. 7-9; Respondent's Exhibits 8 and 9.

33. As to what these actions of the clerk's office mean, RESPONDENT testified that an individual who is in an "active" or "inactive" status is registered to vote and can vote in Utah elections. RESPONDENT added, however, that a ballot will not be sent by mail to an individual in "inactive" status, which results in an individual in "inactive" status having to vote in person. In addition, RESPONDENT explained that an individual whose status has been changed to "removable" is no longer registered to vote in Utah. RESPONDENT explanation of these terms is consistent with information that the Division has obtained from the Utah Lieutenant Governor's office and has provided to the Commission in prior appeals, specifically: 1) that when a Utah registered voter has little voting activity or when a Utah clerk receives information that a Utah registered voter may have moved, the Utah clerk generally mails the voter a confirmation card on which the clerk informs the voter that records indicate that the voter may have moved and on which the clerk asks for a new address; 2) that if the voter does not respond to the confirmation card, the voter is classified as an "inactive voter;" 3) that an "inactive voter" is still considered to be registered to vote in Utah and can vote if the voter goes to the polls (an "inactive voter," however, will not receive mailings such as voter identification cards and mail-in ballots); and 4) that if an "inactive voter" does not vote within the next four years, the clerk removes the voter from the Utah voter registration rolls (which is the action described as "made removable and placed in state holding area due to inactivity").[20]

34. The taxpayers have not refuted any of the "active," "inactive," and "removable" information that the Division has provided in regards to Utah voter registration.[21] As a result, it appears that TAXPAYER-

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20 *See, e.g., USTC Appeal No. 18-793* (Initial Hearing Order Feb. 22, 2019). This and other selected Commission decisions can be reviewed in a redacted format on the Commission's website at https://tax.utah.gov/commission-office/decisions.

21 Furthermore, it appears that the Division's explanation reflects, at least in substantial part, Subsection 20A-2-305(2)(c), which provides that a Utah county clerk shall remove a voter's name from the official Utah voter register if: 1) the county clerk obtains evidence that the voter's residence has changed; 2) the county clerk mails notice to the voter as required by Section 20A-2-306; 3) the county clerk receives no response from the voter or does not receive information that confirms the voter's residence; and 4) 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

1 was registered to vote in Utah for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016 (during which he was in an "inactive" status); but that he was not registered to vote in Utah for the DATE, 2016 to DATE, 2016 portion of 2016. In addition, the taxpayers testified that neither of them was registered to vote anywhere other than Utah during 2015 or 2016. For these reasons, the Commission finds that TAXPAYER-1 was registered to vote in Utah for all of 2015 and from DATE, 2016 to DATE, 2016; that he was not registered to vote in Utah from DATE, 2016 to DATE, 2016; and that he was not registered to vote anywhere other than Utah during 2015 or 2016.

35. As to TAXPAYER-2, the information from the clerk's office shows that on DATE, 2013 and DATE, 2014, the clerk's office also took two actions that were each described as "changed status from active to inactive."[22] Subsequently, on DATE, 2016, the clerk's office took another action described as "status was inactive changed to active."[23]

36. Again, the taxpayers have not refuted any of the information that the Division has provided in regards to Utah voter registration. As a result, it appears that TAXPAYER-2 was registered to vote in Utah for all of 2015 and 2016 (including the DATE, 2015 to DATE, 2016 period that she was in an "inactive" status and the DATE, 2016 to DATE, 2016 period she was in an "active" status). As a result, the Commission finds that TAXPAYER-2 was registered to vote in Utah for all of 2015 and 2016; and that she was not registered to vote anywhere other than Utah during 2015 or 2016.

37. The information about TAXPAYER-2's Utah voting registration also shows that on DATE 2, 2017 (after the audit period and around the time TAXPAYER-2 returned to FOREIGN COUNTRY), the clerk's office took an action in regards to her Utah voting registration described as "status was active changed to removable." TAXPAYER-2 testified that she asked the clerk's office to terminate her Utah voter

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notice.

22 Again, neither party provided information to show why the clerk's office took the identical action in regards to TAXPAYER-2 Utah voter registration on both DATE, 2013 and DATE, 2014, even though it appears that the clerk's office took no other action in regards to her Utah voter registration between these dates.

registration in 2017 (around the same time that she had asked the County to remove the residential exemption from the Utah home) on the advice of the taxpayers' CPA and because being registered to vote in Utah was contrary to her intent for Utah not to be her permanent home. No evidence was provided to suggest that TAXPAYER-2 ever asked the clerk's office to terminate her Utah voter registration prior to 2017.

38. As to voting in Utah in DATE 2016, TAXPAYER-2 stated that she voted in this election because she had a strong desire to vote in the 2016 presidential race. She explained that she was not interested in the 2016 local Utah races and that she had no idea that voting in Utah might impact the taxpayers' tax liability.

39. The Division claims that both taxpayers are considered to be domiciled in Utah for all of 2015 and 2016 under Subsection 59-10-136(2)(b). The Division claims that the Subsection 59-10-136(2)(b) presumption has arisen for all of 2015 and 2016 because TAXPAYER-2 was registered to vote in Utah throughout these years and because the taxpayers have not rebutted this presumption. The Division claims that the Subsection 59-10-136(2)(b) presumption has not been rebutted because the taxpayers have not shown that TAXPAYER-1 registered to vote somewhere other than Utah during these years or that she asked for her name to be removed from the Utah voter registry prior to or during 2015 or 2016. As a result, the Division asks the Commission to sustain its assessment in its entirety.[24]

40. REPRESENTATIVE FOR TAXPAYERS, the taxpayers' attorney, contends that for Utah income tax purposes, "domicile" is not "defined" in Utah law. As a result, he contends that for Utah income tax purposes, the Commission should apply "domicile" in the same manner that the Utah Court of Appeals applied "domicile" in *Mower v. Nibley*, 382 P.3d 614, 2016 UT App 174 (Utah Ct. App. 2016). In *Mower*, the issue before the Court was whether Utah could exercise general personal jurisdiction over an individual who

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23 Petitioner's Exhibit 1, pp. 3-9; Respondent's Exhibits 7 and 9.

24 The Division also explained how the taxpayers may also be considered to be domiciled in Utah for portions of 2015 and for all or portions of 2016 under other subsections of Section 59-10-136. However, Subsection 59-10-136(2)(b) is the only subsection of Section 59-10-136 under which the Division argued that

lived in FOREIGN COUNTRY (in regards to a lawsuit filed against this individual in a Utah court). To decide the general personal jurisdiction issue, the Court ruled that it must "look at the individual's domicile" and noted that "under federal jurisprudence, 'an individual has only one domicile,' which 'usually requires bodily presence plus an intention to make the place one's home'" (citations omitted).

41. Because TAXPAYER-1 lived in FOREIGN COUNTRY during 2015 and 2016 and because he had the intention to make FOREIGN COUNTRY, not Utah, his home during these years, REPRESENTATIVE FOR TAXPAYERS contends that the Commission should apply "domicile" for Utah income tax purposes in the same manner that the Court applied "domicile" in *Mower* for general personal jurisdiction purposes and find that TAXPAYER-1 is not domiciled in Utah for income tax purposes for any portion of 2015 and 2016. In addition, REPRESENTATIVE FOR TAXPAYERS contends that because TAXPAYER-2 never intended Utah to be her home after she moved to FOREIGN COUNTRY in 2014 (including the DATE, 2015 to DATE, 2016 period she lived in the taxpayers' Utah home), she, too, was domiciled in FOREIGN COUNTRY for all of 2015 and 2016 because FOREIGN COUNTRY is the last place that she lived where she had the requisite intent to make that place her home (before moving to STATE-2 in 2018).[25]

42. REPRESENTATIVE FOR TAXPAYERS stated that because the manner in which the Court applied "domicile" in *Mower* involves intent, a relationship exists between this application of "domicile" and Utah's pre-2012 income tax laws concerning "domicile." Nevertheless, in regards to Section 59-10-136 (Utah's income tax law that became effective for tax year 2012 and is applicable to this appeal), REPRESENTATIVE FOR TAXPAYERS contends that intent should also be taken into account when

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both taxpayers would be considered to be domiciled in Utah for the entirety of the audit period.

25 As discussed earlier, REPRESENTATIVE FOR TAXPAYERS stated that as an alternative, the Commission could find TAXPAYER-2 to be a Utah resident individual for part of 2015 and all of 2016 without such a finding affecting the allocation of income to Utah that the taxpayers reported on their 2015 and 2016 Utah returns.

determining whether an individual has sufficiently rebutted a presumption found in Section 59-10-136. REPRESENTATIVE FOR TAXPAYERS argues that limiting the factors that can rebut a Subsection 59-10-136(2) presumption to ones that relate to the specific presumption at issue without taking into account an individual's intent is improper, especially where Section 59-10-136 is a tax imposition statute that must be construed strictly in favor of a taxpayer (pursuant to UCA §59-1-1417(2) (2015-2016)).

43. REPRESENTATIVE FOR TAXPAYERS also contends that Section 59-10-136 is unconstitutional. REPRESENTATIVE FOR TAXPAYERS recognizes that the Commission is not authorized to determine whether a Utah statute is unconstitutional, but presented constitutional arguments in order to preserve these arguments for possible future court proceedings.[26]

44. As will be explained in more detail later in the decision, both taxpayers are considered to be domiciled in Utah for all of 2015 and 2016 under Section 59-10-136(2)(b). Accordingly, under Subsection 59-10-103(1)(q)(i)(A), both taxpayers are Utah resident individuals for all of 2015 and 2016.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2016)[27], "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

26 *See, e.g., Nebeker v. Utah State Tax Comm'n*, 34 P.3d 180, 2001 UT 74 (Utah 2001), in which the Utah Supreme Court stated that "'[i]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments'" (citations omitted). As a result, the Commission will not discuss the taxpayers' constitutional arguments any further.

27 All substantive law citations are to the 2016 version of Utah law. Unless otherwise noted, the substantive law remained the same during the 2015 and 2016 tax years.

(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 2015 and 2016 tax years at issue), UCA §59-10-136 provides for the determination of "domicile," as follows:[28]

(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

28 Effective for tax year 2018, the Utah Legislature amended Section 59-10-136 in Senate Bill 13 (2019) ("SB 13"). However, it is the version of Section 59-10-136 in effect during the 2015 and 2016 tax years that is applicable to this appeal.

(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."[29] 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:[30]

> (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. Utah Code Ann. §20A-2-305 provides for names to be removed or not be removed from the

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29 *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.

30 In SB 13 (2019), the Utah Legislature also amended Section 59-2-103.5. Again, however, the SB 13

official voter register, as follows in pertinent part:

> (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)[31] the 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;
> (f) 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
> (g) 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.
>
> . . . .

6. Where a change of residence occurs, Utah Code Ann. §20A-2-306 provides for names to be removed or to not be removed from the official voter register, as follows in pertinent part:

> (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).

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amendments have no applicability to the 2015 and 2016 tax years at issue in this appeal.

31 Effective May 9, 2017, Subsection 20A-2-305(2)(e) was deleted from the statute. However, it is the 2015 and 2016 versions of this statute that are pertinent to this appeal.

(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.

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Signature of Voter"

. . . .

(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 clerk may list that voter as inactive.
(ii) An inactive voter shall be allowed to vote, sign petitions, and have all other privileges of a registered voter.
(iii) A county is not required to send routine mailings to inactive voters and is not required to count inactive voters when dividing precincts and preparing supplies.

7. For the instant matter, UCA §59-1-1417 (2020) provides guidance concerning burden of proof

and statutory construction, 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.
> (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
> (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
> (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

CONCLUSIONS OF LAW

1. Subsection 59-1-1417(1) provides that the burden of proof is on the petitioner in Tax Commission proceedings, with the exception of three specific circumstances that are not applicable to this appeal. Accordingly, the taxpayers have the burden of proof in this matter.

2. The Division contends that both taxpayers were Utah resident individuals for all of 2015 and 2016. The taxpayers, however, contend neither taxpayer was a Utah resident individual for any portion of 2015 or 2016. For 2015 and 2016, 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").

3. The Division does not assert that the taxpayers are Utah resident individuals for all of 2015 and 2016 under the 183 day test. Instead, the Division contends that the taxpayers are 2015 and 2016 Utah full-year resident individuals under the domicile test. Accordingly, the Commission must apply the facts to the

Utah income tax domicile law that is applicable for the 2015 and 2016 tax years to determine whether the taxpayers are considered to be domiciled in Utah for all of 2015 and 2016 (as the Division contends); or whether the taxpayers are not considered to be domiciled in Utah for any portion of 2015 and 2016 (as the taxpayers contend).

4. For the 2015 and 2016 tax years, Section 59-10-136 contains four subsections addressing when a taxpayer is considered to have income tax domicile in Utah (Subsections (1), (2), (3), and (5)) and a fifth subsection addressing when a taxpayer is not considered to have income tax domicile in Utah (Subsection (4)).[32] REPRESENTATIVE FOR TAXPAYERS contends that because there is no wording in Section 59-10-136 or any other section of Utah law that "defines" the word "domicile" for Utah income tax purposes, the Commission should look elsewhere to determine the meaning of the word "domicile" for these purposes. Specifically, REPRESENTATIVE FOR TAXPAYERS contends that the Commission should look to the manner in which "domicile" is applied for federal jurisprudence purposes, which is based, in part, on an individual's intent and which the Utah Court of Appeals used for Utah general personal jurisdiction purposes in *Mower*. Even though wording such as "domicile means . . ." is not found in Section 59-10-136, the Commission, nevertheless, finds that Section 59-10-136 does prescribe those circumstances that do constitute and those that do not constitute "domicile" for Utah income tax purposes.

5. Furthermore, "domicile" is prescribed or applied differently for different Utah purposes. For example, in Utah Code Ann. §41-1a-202(1), the Utah Legislature provides that "domicile" for motor vehicle registration purposes is "the place: (i) where an individual has a fixed permanent home and principal establishment; (ii) to which the individual if absent, intends to return; and (iii) in which the individual and his

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32 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.

family voluntarily reside, not for a special or temporary purpose, but with the intention of making a permanent home." Similarly, in Utah Code Ann. §23-13-2(13), the Utah Legislature provides that "domicile" for wildlife resources purposes is, in part, "the place: (i) where an individual has a fixed permanent home and principal establishment; (ii) to which the individual if absent, intends to return; and (iii) in which the individual, and the individual's family voluntarily reside, not for a special or temporary purpose, but with the intention of making a permanent home." For these specific purposes, the Utah Legislature has provided for "domicile" to be applied in ways where an individual's intent is considered in determining their domicile for these purposes, which is similar to how "domicile" is applied for federal jurisprudence purposes and how it was applied in the pre-2012 Utah income tax laws that the Utah Legislature replaced with Section 59-10-136 beginning with tax year 2012.

6. As a result, the Utah Legislature clearly intended for "domicile" to be prescribed or applied differently for Utah income tax purposes beginning with tax year 2012 than it had been prescribed or applied for this purpose prior to 2012 and is currently prescribed or applied for federal jurisprudence purposes and other Utah purposes. Accordingly, to determine whether the taxpayers are considered to be domiciled in Utah for income tax purposes for the 2015 and 2016 tax years, the Commission will make its determination based on the various income tax domicile provisions found in Section 59-10-136, not the federal jurisprudence application of "domicile" that was applied in *Mower* for general personal jurisdiction purposes. To do otherwise would ignore the plain language of Section 59-10-136 and result in the use of other criteria not enacted by the Utah Legislature for Utah income tax purposes. The Commission will begin its analysis of Section 59-10-136 with a discussion of Subsection 59-10-136(5)(b).

7. 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 filed their 2015 and 2016 federal income tax returns with a status of married filing jointly, not separately. In addition, the taxpayers were not legally separated or divorced during any portion of 2015 or 2016. Accordingly, for purposes of Section 59-10-136, each taxpayer is considered to have a spouse for all of the 2015 and 2016 tax years.

8. Subsection 59-10-136(4). The taxpayers do not meet all of the conditions of Subsection 59-10-136(4)(a) in order *not* to be considered to be domiciled in Utah for any portion of 2015 or 2016. This subsection applies to an individual if the individual and the individual's spouse are both "absent from the state" for at least 761 consecutive days, if a number of other listed conditions are also met. For reasons discussed below, several conditions of the Subsection 59-10-136(4)(a) exception from domicile have not been met.

9. First, Subsection 59-10-136(4)(a)(i) requires that *both* taxpayers be absent from Utah for at least 761 consecutive days. Both of the taxpayers moved from Utah to FOREIGN COUNTRY in DATE 2014. While TAXPAYER-1 continued to live in FOREIGN COUNTRY throughout 2015 and 2016, TAXPAYER-2 returned to Utah on DATE, 2015, and she was present in Utah for more than 30 days of the remainder of 2015 and more than 30 days of 2016 and 2017. For purposes of the Subsection 59-10-136(4) exception from Utah domicile, Subsection 59-10-136(4)(c) provides that an "absence" from Utah: 1) **begins** on the later of the date: the individual leaves this state; or the individual's spouse leaves this state; and 2) **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. Because both taxpayers left Utah in DATE 2014, a period of absence from Utah began in DATE 2014 for both taxpayers.

10. Subsequently, TAXPAYER-2 returned to Utah on DATE, 2015, and she remained in Utah for more than 30 days of the remainder of 2015. Accordingly, pursuant to Subsection 59-10-136(4)(c)(ii), the

period of absence that *began* for both taxpayers in DATE 2014 *ended* for both taxpayers on DATE, 2015.[33] The period between DATE 2014 and DATE, 2015 is less than 761 consecutive days. Furthermore, TAXPAYER-2 continued to live in Utah during 2016 and until DATE 2017. As a result, it does not appear that another period where both taxpayers were absent from Utah would begin until TAXPAYER-2 returned to FOREIGN COUNTRY in DATE 2017. For these reasons, the Subsection 59-10-136(4)(a)(i) condition requiring an absence of 761 or more days has not been met by either taxpayer for any portion of the 2015 or 2016 tax years at issue.

11. Second, for a 761-day or more period of absence, Subsection 59-10-136(4)(a)(ii)(A) requires the neither taxpayer return to Utah for more than 30 days in a calendar year. Again, because TAXPAYER-2 returned to Utah on DATE, 2015, and was present in Utah for more than 30 days of the remainder of 2015 and more than 30 days of 2016 and 2017, neither taxpayer would meet the Subsection 59-10-136(4)(a)(ii)(A) condition for a 761-day or more period that includes any portion of the 2015 or 2016 tax year.

12. Third, the Subsection 59-10-136(4)(a)(ii)(D) condition requires that neither the individual nor the individual's spouse claim a Utah residential exemption for that individual's or individual's spouse's primary residence. For the Subsection 59-10-136(4)(a)(ii)(D) condition *not* to be met in regards to the Utah home, two elements must exist. First, one or both of the taxpayers must have claimed the residential exemption on the Utah home. Second, the Utah home on which one or both of the taxpayers claimed the residential exemption 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). If both of these elements exist while the

33 The Commission is aware that TAXPAYER-1 did not return to Utah in 2015. However, Subsection 59-10-136(4)(c)(ii) provides that a period of absence for an individual ends on the date the individual or the individual's spouse returns to Utah and remains in Utah for more than 30 days in a calendar year. Because the taxpayers are considered "spouses" for Section 59-10-136 and because TAXPAYER-1 spouse returned to Utah on DATE, 2015, and remained in Utah for more than 30 days of the remainder of the 2015 calendar year, TAXPAYER-1 period of absence also ends on DATE, 2015.

taxpayers owned the Utah home, the Subsection 59-10-136(4)(a)(ii)(D) condition will not have been met for the period these elements exist.

13. Before determining if the taxpayers meet these two elements, the Commission must first consider what effect leasing the Utah home to tenants from DATE, 2014 to DATE, 2015 has on its analysis of Subsection 59-10-136(4)(a)(ii)(D) for the 2015 and 2016 tax years. Subsection 59-10-136(6) provides that claiming a residential exemption may not be considered in determining income tax domicile if the home for which the exemption is claimed is the primary residence of a tenant. Because the taxpayers leased the Utah home to tenants who used the home as the tenants' primary residence from DATE, 2014 to DATE, 2015, the Subsection 59-10-136(4)(a)(ii)(D) condition is met for the DATE, 2015 to DATE, 2015 portion of the audit period, regardless of whether the two elements listed in the prior paragraph exist.[34]

14. However, the Utah home was not leased to tenants between the DATE, 2015 and DATE, 2016 portion of the audit period. Accordingly, the Commission must determine if the two elements discussed earlier exist in order to determine whether or not the taxpayers met the Subsection 59-10-136(4)(a)(ii)(D) condition for any portion of the remaining DATE, 2015 to DATE, 2016 period.

15. As to the first element, because the taxpayers received the residential exemption on the Utah home for the DATE, 2015 to DATE, 2016 period that remains at issue, they are considered to have claimed the residential exemption on the home for this period. Subsection 59-2-103(2) generally provides that a Utah residential property will receive a %%%%% residential exemption, while Subsection 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

34 Even though the Subsection 59-10-136(4)(a)(ii)(D) condition has been met for the DATE 2015 to DATE, 2015 portion of audit period, the taxpayers have not met all of the Subsection 59-10-136(4)(a) conditions necessary for them not to be considered domiciled in Utah for this period under Subsection 59-10-136, because they do not meet Subsection 59-10-136(4)(a)(i) or 59-10-136(4)(a)(ii)(A) for any portion of 2015 or 2016.

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).

16. 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. Furthermore, in those Utah counties that require an application, receiving the residential exemption after filing the application also constitutes a claim to the exemption.[35] No evidence was proffered to suggest that COUNTY requires an application before it applies the residential exemption to a residential property or, if it does, that the County applied the residential exemption to the Utah home without the taxpayers' having filed an application to receive the exemption. As a result, because the taxpayers received the residential exemption on their Utah home for the DATE, 2015 to DATE, 2016 period that remains at issue for Subsection 59-10-136(4)(a)(ii)(D), the Commission finds that the taxpayers claimed the residential exemption on this home for this period. Accordingly, the first element for the Subsection 59-10-136(4)(a)(ii)(D) condition not to be met exists for this period.

17. As to the second element, for purposes of Section 59-10-136, the Utah home is considered to be the taxpayers' "primary residence" for the DATE, 2015 to DATE, 2016 period that remains at issue, regardless of whether TAXPAYER-1 lived in FOREIGN COUNTRY for this period. 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

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35 On the other hand, in a county that requires an application, receiving the residential exemption without filing an application does not constitute a claim to the exemption. Under such circumstances, the first element would not exist, and the Subsection 59-10-136(4)(a)(ii)(D) condition would be met. In addition, the first element would not exist and the Subsection 59-10-136(4)(a)(ii)(D) condition would be met for an individual if the property receiving the residential exemption was in the name of the individual but had been sold under contract to someone else. *See, e.g., USTC Appeal 16-1368* (Initial Hearing Order Apr. 18, 2018).

individual's spouse claims the residential exemption is considered their "primary residence" unless one or both of the property owners take affirmative steps to: 1) file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence; *and* 2) declare on the property owner's Utah individual income tax return for the taxable year for which the property owner no longer qualifies to receive the residential exemption, that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence.

18. Prior to or during 2015 or 2016, the taxpayers never filed a written statement to notify COUNTY that their Utah home did not qualify for the residential exemption for these years. In addition, the taxpayers never declared on page 3 of a Utah return that they no longer qualified to receive the residential exemption for their Utah home. Accordingly, pursuant to Subsection 59-2-103.5(4), the taxpayers' Utah home is considered to be their "primary residence" during the DATE, 2015 to DATE, 2016 period that remains at issue for Subsection 59-10-136(4)(a)(ii)(D). Because the taxpayers meet both of these elements for the DATE, 2015 to DATE, 2016 period that remains at issue, they have not met the Subsection 59-10-136(4)(a)(ii)(D) condition for any portion of this period. [36]

19. In summary, because the taxpayers do not meet all of the Subsection 59-10-136(4)(a) conditions for any portion of 2015 or 2016, the Subsection 59-10-136(4)(a) domicile exception would not apply to either taxpayer for any portion of these years. As a result, the Commission must analyze whether the taxpayers *are* considered to have domicile in Utah for 2015 and 2016 under one or more of the remaining subsections of Section 59-10-136 (i.e., under Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), and (3)). If an

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

individual meets the criteria found in *any one* of these subsections, that individual is considered to be domiciled in Utah, even if the individual does not meet the criteria found in any of the other subsections. Because the only subsection of Section 59-10-136 under which the Division contends that both taxpayers are considered to be domiciled in Utah for all of 2015 and 2016 is Subsection 59-10-136(2)(b), the Commission will begin the remainder of its analysis with this subsection.

20. Subsection 59-10-136(2)(b). Under this subsection, 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. For reasons discussed earlier, the Commission has found that TAXPAYER-1 was registered to vote in Utah for all of 2015 and for the DATE, 2016 to DATE, 2016 portion of 2016; and that TAXPAYER-2 was registered to vote in Utah for all of 2015 and 2016. As a result, both taxpayers will be considered to be domiciled in Utah for all of 2015 and 2016 under Subsection 59-10-136(2)(b), unless they are able to rebut this presumption.[37]

21. Because Subsection 59-10-136(2)(b) 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.[38] However, the Legislature

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37 The Commission is aware that TAXPAYER-1 was not registered to vote in Utah for all of 2016. However, Subsection 59-10-136(2)(b) provides that an individual is presumed to be domiciled in Utah if either that individual *or* that individual's spouse is registered to vote in Utah. TAXPAYER-1 is an individual whose spouse (i.e., TAXPAYER-2) was registered to vote in Utah for all of 2015 and 2016. As a result, this presumption arises for *both* taxpayers for all of 2015 and 2016. 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 their spouse is considered to have domicile in Utah.

38 The Legislature did not provide that being registered to vote in Utah 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).

has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-136(2)(b) presumption. As a result, it is left to the Commission, consistent with the structure and language of Section 59-10-136, to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

22. The taxpayers ask the Commission to find that they have rebutted the Subsection 59-10-136(2)(b) presumption for all of 2015 and 2016 because they have demonstrated an intent to change their domicile to FOREIGN COUNTRY for this period. REPRESENTATIVE FOR TAXPAYERS contends that the taxpayers should be able to rebut a Subsection 59-10-136(2) presumption by showing that they would not be considered to be domiciled in Utah under the federal jurisprudence definition of "domicile," which he notes is a definition that has a relationship with Utah's pre-2012 income tax laws concerning "domicile." As a result, the taxpayers' argument relies on intent and considering an individual's contacts with various states when determining whether they are considered to be domiciled in Utah, as was done under Rule 52 (prior to Section 59-10-136 becoming effective for tax year 2012) and is done under Subsection 59-10-136(3)(b) (if an individual is not considered to be domiciled in Utah under Subsection 59-10-136(1) or (2)).

23. The Commission has previously found that an individual has not rebutted a Subsection 59-10-136(2) 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 Legislature's "new" law little or no effect, which the Commission declines to do.[39]

24. 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).[40]

25. To allow an individual to rebut a Subsection 59-10-136(2) presumption by showing that they could be considered to be domiciled outside of Utah using domicile factors found in Rule 2 and/or Rule 52, Subsection 59-10-136(3), or some other source such as the federal jurisprudence definition of "domicile" would clearly frustrate the plain meaning of Section 59-10-136. The Subsection 59-10-136(2) presumptions involve three specific factors: 1) claiming the residential exemption on a Utah residential property (the Subsection 59-10-136(2)(a) presumption); 2) being registered to vote in Utah (the Subsection 59-10-136(2)(b) presumption); and 3) asserting Utah residency on a Utah income tax return (the Subsection 59-10-136(2)(c) presumption).

26. Prior to Section 59-10-136 becoming effective for tax year 2012, the three factors that the Utah Legislature described and set forth as rebuttable presumptions in Subsection 59-10-136(2) (as well as the two education factors described in Subsection 59-10-136(1)) had been among the numerous and non-exhaustive list of factors that the Commission had used to determine income tax domicile for years prior to 2012 (as set forth in Rule 2 and/or Rule 52).[41] In Section 59-10-136, however, the Utah Legislature established a hierarchy of specific factors described in Subsections 59-10-136(1) and (2) to establish income tax domicile, with the education factors creating an absolute indication of domicile and the three Subsection 59-10-136(2) factors creating rebuttable presumptions of domicile. Thus, each of the factors described in

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39 *See, e.g., USTC Appeal No. 15-1857* (Initial Hearing Order Aug. 26, 2016).

40 *See, e.g., USTC Appeal No. 15-1857*. This conclusion is further supported by the plain language of Subsection 59-10-136(3)(a), which provides that a person may be considered to be domiciled in Utah subject to Subsection 59-10-136(3)(b) "if the requirements of Subsection (1) or (2) are not met[.]" As a result, the provisions of Subsection 59-10-136(3)(b) only come into play if neither Subsection 59-10-136(1) nor one of the presumptions of Subsection 59-10-136(2) is met.

41 Prior to tax year 2012, Rule 2(1)(b) had provided that for purposes of determining income tax domicile, "an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation" and that Rule 52 "provides a *non-exhaustive* list of factors or objective evidence determinative of domicile"

Subsections 59-10-136(1) and (2) were given greater import than they had received in establishing income tax domicile for years prior to 2012 (when each of these factors was merely one of the many factors with which domicile was determined).[42]

27. As a result, it is clear that the Legislature intended that an individual meeting one of the factors described in Subsection 59-10-136(1) would, with limited exception, be considered to be domiciled in Utah; and that an individual meeting one of the factors described and set forth as a rebuttable presumption in Subsection 59-10-136(2) might be considered to be domiciled in Utah, regardless of whether that individual would otherwise be deemed to be domiciled somewhere other than Utah under a more traditional domicile test (such as the one found in Rule 2 and/or Rule 52 or the federal jurisprudence test). To find that a Subsection 59-10-136(2) presumption can be rebutted by showing that the individual would not be considered to be domiciled in Utah under some more traditional type of domicile test does not consider the Subsection 59-10-136(2) presumptions in concert with the structure and language of Section 59-10-136 as a whole and would frustrate the plain meaning of Section 59-10-136.[43]

28. Because Section 59-10-136 clearly provides that a Subsection 59-10-136(2) presumption cannot be rebutted by showing that the individual would not be considered to be domiciled in Utah under some more traditional type of domicile test, the Subsection 59-1-1417(2) guidance concerning the statutory construction of a taxing statute is not applicable in reaching this conclusion.

(emphasis added).

42 The factors that were given greater import in Subsections 59-10-136(1) and (2) are generally based on an individual or individual's spouse availing themselves of certain benefits of being a resident of Utah, such as having their 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.

43 For example, if the taxpayers' argument were to be accepted, it is arguable that an individual whose only contact with Utah was claiming the residential exemption on a vacation home located in Utah could continue to do so without any Utah income tax consequences if the individual showed that they would be considered to have domicile outside of Utah based on some sort of traditional income tax domicile criteria.

29. Moreover, relying on the limited and exhaustive list of 12 factors described in Subsection 59-10-136(3)(b) to rebut a Subsection 59-10-136(2) presumption would: 1) be contrary to the express language of Subsection 59-10-136(3)(a), which provides that the Subsection 59-10-136(3)(b) factors should be used to determine domicile only "if the requirements of Subsection (1) or (2) are not met[;]" and 2) be contrary to the plain meaning of Section 59-10-136 as a whole by allowing the hierarchy of factors set forth in Subsection 59-10-136(2) to be rebutted by satisfying a list of factors set forth in Subsection 59-10-136(3) that are lower in the hierarchy of domicile factors established by the Legislature.

30. As a result, when a Subsection 59-10-136(2) presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not. For example, if an individual is registered to vote in Utah, the Commission has found that the Subsection 59-10-136(2)(b) presumption can be rebutted by showing that the individual registered to vote elsewhere relatively soon after moving away from Utah.[44] After the taxpayers moved to FOREIGN COUNTRY in 2014, however, neither of them registered to vote anywhere else until 2017, when they registered to vote in STATE-2. Although not expressly discussed, it is possible that neither taxpayer could register to vote in FOREIGN COUNTRY. However, it is clear that they could register to vote in a state other than Utah while living in FOREIGN COUNTRY, because TAXPAYER-1 registered to vote in STATE-2 in 2017 while he was living and working in FOREIGN COUNTRY. Furthermore, registering to vote in STATE-2 in 2017 (approximately three years after moving to FOREIGN COUNTRY in 2014) is insufficient to rebut the Subsection 59-10-136(2)(b) presumption for the 2015 and 2016 tax years at issue, especially where TAXPAYER-2 started residing in Utah again in 2015 and where she voted in Utah in 2016. As a result, the taxpayers have not rebutted the Subsection 59-10-136(2)(b) presumption by showing that they registered to vote somewhere other than Utah.

31. In addition, the Commission has found that the Subsection 59-10-136(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.[45] No evidence was provided to show that both taxpayers asked for their names to be removed from the Utah voter registry prior to or during the 2015 and 2016 tax years. That TAXPAYER-2 asked for her name to be removed from the Utah voter registry in 2017 (subsequent to the tax years at issue) is insufficient to rebut the Subsection 59-10-136(2)(b) presumption, especially where she voted in Utah in DATE 2016.

32. Furthermore, the Commission has found that the Subsection 59-10-136(2)(b) 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.[46] The taxpayers, however, did not argue that Utah voting laws provided for TAXPAYER-2's name to be removed from the Utah voter registry prior to its removal in 2017, much less prior to or during the 2015 and 2016 tax years.

33. The Commission has also found that it might find that the Subsection 59-10-136(2)(b) presumption is rebutted if an individual moves from Utah to a state that does not require voter registration prior to voting and if the individual eventually votes in that state.[47] No evidence was provided to show that the taxpayers ever voted in FOREIGN COUNTRY. Furthermore, even if the taxpayers have voted in STATE-2 since registering to vote there in 2017, the taxpayers have not shown that STATE-2 allows an individual who moves there to vote in a STATE-2 election without having registered to vote in STATE-2. For these reasons

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44 *See, e.g., USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016).
45 *See, e.g., USTC Appeal No. 18-793* (Initial Hearing Order Feb. 22, 2019).
46 *See, e.g., USTC Appeal No. 18-539* (Initial Hearing Order Apr. 30, 2019).
47 *See, e.g., USTC Appeal No. 17-1552* (Initial Hearing Order Feb. 7, 2019).

and because TAXPAYER-2 voted in Utah in DATE 2016, the Subsection 59-10-136(2)(b) presumption is not rebutted by showing that one can vote in STATE-2 without being registered to do so.

34. On the other hand, the Commission has found that an individual cannot rebut the Subsection 59-10-136(2)(b) presumption by showing that they did not vote in Utah during the tax year at issue. The Commission has reached this decision, at least in part, because the Utah Legislature elected to use voting registration, not actual voting, as the criterion that could trigger domicile under Subsection 59-10-136(2)(b).[48] As a result, that neither taxpayer voted in Utah during the 2015 tax year is insufficient to rebut the Subsection 59-10-136(2)(b) presumption for any portion of 2015 or 2016, especially where TAXPAYER-2 voted in Utah during the audit period.

35. TAXPAYER-2 explained that she voted in Utah in DATE 2016 only because she was interested in voting in the 2016 presidential race and that she was not interested in any of the local Utah races. The Commission, however, does not find these reasons to be sufficient to rebut the Subsection 59-10-136(2)(b) presumption. The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(b) presumption. The taxpayers, however, have not proffered sufficient arguments or evidence to rebut the Subsection 59-10-136(2)(b) presumption for any portion of the 2015 and 2016 tax years for which it has arisen in regards to both of them. Accordingly, under Subsection 59-10-136(2)(b), both taxpayers are considered to be domiciled in Utah for all of the 2015 and 2016 tax years, including that portion of 2015 that they both lived outside of Utah.

36. Because both taxpayers have been found to be domiciled in Utah for all of 2015 and 2016 under Subsection 59-10-136(2)(b), there is no need to analyze the remaining subsections of Section 59-10-136 (i.e., Subsections (1), (2)(a), (2)(c), and (3)) to resolve this case. However, some observations about these remaining subsections may be useful.

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48 *See, e.g., USTC Appeal No. 15-720.*

37. Subsection 59-10-136(1). Under this subsection, an individual is considered to be domiciled in Utah if a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on their federal return is enrolled in a Utah public kindergarten, elementary, or secondary school (subject to an exception found in Subsection 59-10-136(1)(b)); or if the individual or the individual's spouse is a resident student enrolled in a Utah institution of higher education. On the taxpayers' 2015 and 2016 federal returns, the taxpayers claimed their two daughters as dependents. However, neither of the taxpayers' dependents was enrolled in a Utah public kindergarten, elementary, and/or secondary school for any portion of 2015 or 2016. In addition, neither taxpayer was enrolled in a Utah institution of higher education during 2015 or 2016. Accordingly, neither taxpayer is considered to be domiciled in Utah for any portion of 2015 or 2016 under Subsection 59-10-136(1)(a).

38. Subsection 59-10-136(2)(a). Subsection 59-10-136(2)(a) provides that an individual is presumed to be domiciled in Utah if the individual or the individual's spouse claims a property tax residential exemption for that individual or individual's spouse's primary residence, unless the presumption is rebutted. For reasons discussed earlier in regards to Subsection 59-10-136(4), the two elements necessary for this presumption to arise exist for the DATE, 2015 to DATE, 2016 portion of the audit period. Accordingly, under Subsection 59-10-136(2)(a), both taxpayers will be considered to be domiciled in Utah from DATE, 2015 to DATE, 2016, unless they are able to rebut the presumption for this period.

39. Because Subsection 59-10-136(2)(a) is a rebuttable presumption, the Legislature also 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. Again, however, because the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-136(2)(a) presumption, it is left to the Commission, consistent with the structure and

language of Section 59-10-136, to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

40. For reasons explained earlier in regards to the Subsection 59-10-136(2)(b) presumption, an individual also cannot rebut the Subsection 59-10-136(2)(a) 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) or some more traditional type of domicile test (such as the federal jurisprudence test); or because he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b).

41. Again, when a Subsection 59-10-136(2) presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not. For example, where the Subsection 59-10-136(2)(a) presumption has arisen in regards to claiming the residential exemption, the Commission has found that this presumption can be rebutted by showing that the property owner asked the county to remove the exemption, and the county failed to do so.[49] In the instant case, however, no evidence was provided to suggest that the taxpayers contacted COUNTY and asked it to remove the residential exemption from their Utah home prior to or during the DATE, 2015 to DATE, 2016 portion of the audit period for which the Subsection 59-10-136(2)(b) presumption has arisen. Furthermore, asking the County in 2017 (subsequent to the 2015 and 2016 years at issue) to remove the residential exemption beginning with tax year 2017 is insufficient to rebut the Subsection 59-10-136(2)(a) presumption that has arisen for periods in 2015 and 2016.

42. The Commission has also found that the Subsection 59-10-136(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 appropriate county directly).[50] No evidence was proffered, however, to show that the taxpayers declared on a Utah income tax return that their Utah home no longer qualified for the residential exemption for any portion of 2015 or 2016.

43. In addition, the Commission has found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was 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).[51] The taxpayers, however, admitted that their Utah home was not listed for sale at any time during the DATE, 2015 to DATE, 2016 period for which the Subsection 59-10-136(2)(a) presumption has arisen. Furthermore, TAXPAYER-2 and the taxpayers' two daughters lived in the Utah home for this period.

44. Furthermore, the Commission has found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was listed for rent, 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 rent) and if the home would continue to qualify for the residential exemption by being rented to tenants who would use the home as the tenants' primary residence (i.e., not being rented to tenants who would not use the home as their primary residence, such as a short-term rental).[52] The taxpayers, however, admitted that their Utah home was not listed for rent at any time during the DATE, 2015 to DATE, 2016 period for which the Subsection 59-10-136(2)(a) presumption has arisen. In addition, again, TAXPAYER-2 and the taxpayers' two daughters lived in the Utah home for this period.

45. The Commission has also found that the Subsection 59-10-136(2)(a) presumption would be rebutted for that period that a home was under its initial construction (not a remodel) and until it received a

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49 *See, e.g., USTC Appeal No. 17-1589* (Initial Hearing Order Aug. 8, 2018).
50 *See, e.g., USTC Appeal No. 17-812* (Initial Hearing Order Mar. 13, 2018).
51 *See, e.g., USTC Appeal No. 15-1332* (Initial Hearing Order Jun. 27, 2016).

52 *See, e.g., USTC Appeal No. 17-758* (Initial Hearing Order Jan. 26, 2018).

certificate of occupancy, if the home would be used as a primary residence upon its completion.[53] These circumstances, however, do not apply in the instant case.

46. On the other hand, the Commission has previously found that the Subsection 59-10-136(2)(a) presumption is not rebutted because an individual had never heard of the residential exemption or did not know that they were receiving the residential exemption.[54] The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. The taxpayers, however, have not proffered sufficient arguments or evidence to rebut the Subsection 59-10-136(2)(a) presumption for any portion of the DATE, 2015 to DATE, 2016 portion of the audit period for which it has arisen. Accordingly, under Subsection 59-10-136(2)(a), the taxpayers are considered to be domiciled in Utah for the DATE, 2015 to DATE, 2015 portion of 2015 and for all of 2016.

47. <u>Subsection 59-10-136(2)(c)</u>. This subsection provides that an individual is presumed to be domiciled in Utah if the individual or the individual's spouse asserts Utah residency on a Utah income tax return, unless the presumption is rebutted. On their 2015 Utah return, the taxpayers asserted Utah residency from DATE, 2015 to DATE, 2015. On their 2016 Utah return, the taxpayers asserted Utah residency from DATE, 2016 to DATE, 2016. Accordingly, under Subsection 59-10-136(2)(c), both taxpayers would also be considered to be domiciled in Utah from DATE, 2015 to DATE, 2015, and from DATE, 2016 to DATE, 2016 (unless they were able to rebut this presumption).

48. <u>Subsection 59-10-136(3)</u>. 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). Subsection 59-10-136(3), however, is only applicable "if the requirements of Subsection (1) or (2) are not met[.]" Because the Commission has already found that both taxpayers would be considered to be

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53 *See, e.g., USTC Appeal No. 17-1589.*

54 *See, e.g., USTC Appeal No. 15-1582.*

domiciled in Utah for the entirety of the audit period under Subsection 59-10-136(2)(b), Subsection 59-10-136(3) has no applicability to this case.

49. Conclusion. Because each taxpayer is considered to be domiciled in Utah for all of 2015 and 2016 under Subsection 59-10-136(2)(b) and is not considered to *not* be domiciled in Utah for any portion of these years under Subsection 59-10-136(4), each taxpayer is considered to be domiciled in Utah for all of 2015 and 2016. Consequently, pursuant to Subsection 59-10-103(1)(q)(i)(A), each taxpayer is a Utah resident individual for all of the 2015 and 2016 tax years. For these reasons, the Commission should sustain the Division's assessments for the 2015 and 2016 tax years in their entireties.

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessments for the 2015 and 2016 tax years in their entireties. 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: 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. §§59-1-601et seq. and 63G-4-401 et seq.