TAX TYPE: INDIVIDUAL INCOME TAX
TAX YEAR: 2015 AND 2016
DATE SIGNED: 7/28/2020
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. 18-1736 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: TAXPAYER 1, Taxpayer (by telephone)
For Respondent: REPRESENTATIVE FOR RESPONDANT, Assistant Attorney General (by telephone)
RESPONDENT, from Auditing Division (by telephone)

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on DATE. 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 and 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, 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),[1] as follows:

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

5. On DATE, the Commission issued its Initial Hearing Order in this matter, after which the taxpayers asked to proceed to a Formal Hearing.

6. The taxpayers had lived in Utah for many years until DATE, when they and their small children moved to STATE 1 (where TAXPAYER 1 had accepted a different job from his employer).[2] While TAXPAYER 1 moved to STATE 1 first (around DATE), TAXPAYER 2 and the taxpayers' children remained in Utah until approximately DATE, after which they, too, moved to STATE 1. Both taxpayers lived in STATE 1 from approximately DATE to DATE, after which they moved back to Utah (where TAXPAYER 1 accepted another job with his employer). The taxpayers and their children lived in Utah for the DATE to DATE portion of the 2016 tax year, and they have continued to live in Utah as of the date of the Formal Hearing.

7. For the 2015 and 2016 tax years, the taxpayers filed United States federal income tax returns, ("federal returns"), Utah income tax returns, and STATE 1 income tax returns, all of which were filed with a status of married filing jointly.[3]

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 that they were Utah part-year residents

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1 Respondent's Exhibit 1 (pp. 7-10). Interest continues to accrue until any tax liability is paid. No penalties were imposed.

2 It does not appear that TAXPAYER 2 was employed during 2015 or 2016 because the only wages the taxpayers reported on their tax returns for these years were wages earned by TAXPAYER 1. Respondent's Exhibit 1 (pp. 26, 42, 44, and 58).

3 Respondent's Exhibit 1 (pp. 1-6, 26-41, and 44-57).

from DATE to DATE, and they allocated to Utah $$$$$ of their total 2015 federal adjusted gross income ("FAGI") of $54,661.[4] The taxpayers indicate that they erroneously declared themselves to be Utah resident individuals from DATE to DATE, because this is the period that they contend that they were Utah nonresident individuals (i.e., that they were residents of STATE 1). The taxpayers indicate that they had intended to declare on the Utah return that they were both Utah resident individuals for the DATE to DATE portion of 2015. In addition, the taxpayers contend that even though they misstated the period of their Utah residency on their 2015 Utah return, they allocated their 2015 income to Utah based on their being Utah resident individuals for the DATE to DATE portion of 2015.

9. For the 2015 tax year, the taxpayers also filed a 2015 part-year STATE 1 income tax return, which shows that STATE 1 imposed $$$$$ of 2015 STATE 1 income taxes on the taxpayers. On their 2015 STATE 1 return, the taxpayers reported that they were STATE 1 residents from DATE to DATE, and they allocated to STATE 1 $$$$$ of their 2015 FAGI of $$$$$.[5]

10. For the 2016 tax year, the taxpayers 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 to DATE, and they allocated to Utah $$$$$ of their total 2016 FAGI of $$$$$.[6] The taxpayers

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4 Respondent's Exhibit 1 (pp. 1-3).

5 Respondent's Exhibit 1 (pp. 39-41). It is unclear why the taxpayers declared themselves to be STATE 1 residents beginning on DATE, when they contend that they were Utah resident individuals through DATE. Regardless, at the hearing, TAXPAYER 1 clarified that the taxpayers considered themselves to be Utah resident individuals from DATE to DATE.

In addition, of their 2015 FAGI of $$$$$, the taxpayers allocated $$$$$ to Utah and $$$$$ to STATE 1 (the sum of which is $$$$$). It appears that the taxpayers did not allocate %%%%% of their FAGI between Utah and STATE 1, at least in part, because they allocated all or almost all of their 2015 business losses to both states. On their 2015 federal return, the taxpayers reported business losses of $$$$$. While the taxpayers allocated all $$$$$ of these business losses to STATE 1 on their 2015 STATE 1 return, they also allocated $$$$$ of these business losses to Utah on their 2015 Utah return. Respondent's Exhibit 1 (pp. 3, 26, and 41). At the hearing, TAXPAYER 1 could not explain why the taxpayers allocated their business losses in this manner.

6 Respondent's Exhibit 1 (pp. 4-6).

stated that they filed their 2016 Utah return in this matter to show that they were Utah nonresident individuals from DATE to DATE, and Utah resident individuals from DATE to DATE.

11. For the 2016 tax year, the taxpayers filed a 2016 *full-year* STATE 1 income tax return, on which they reported their 2016 FAGI to be $$$$$. The STATE 1` return also shows that STATE 1 imposed $$$$$ of income taxes on the taxpayers for the 2016 tax year.[7] At the hearing, the taxpayers explained that they erroneously declared themselves to be 2016 full-year STATE 1 residents and that they should have filed as 2016 part-year STATE 1 residents.

12. At the hearing, the taxpayers clarified that their position is that they both were Utah resident individuals only for the DATE to DATE, and DATE to DATE portions of the audit period. 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) (2015-2016)), and it issued assessments in which it imposed Utah income tax on all income that both taxpayers received for the 2015 and 2016 tax years.[8]

13. At the hearing, however, the Division indicated that it has modified its position in regards to the 2016 tax year. While the Division still contends that the taxpayers are Utah full-year resident individuals for the 2015 tax year, the Division now contends that the taxpayers are Utah resident individuals only for the DATE to DATE, and DATE to DATE portions of 2016 (i.e., the Division concedes that the taxpayers were not Utah resident individuals for the DATE to DATE portion of 2016). The Division, however, has not calculated what the taxpayers' 2016 Utah tax liability would be if the Commission accepts

7 Respondent's Exhibit 1 (pp. 56-57).

8 Respondent's Exhibit 1 (pp. 7-10). 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)). In its assessments, the Division allowed a credit of $$$$$ for the 2015 tax year and a credit of $$$$$ for the 2016 tax year (which are equal to the amounts of 2015 and 2016 income taxes imposed by STATE 1).

its new position concerning 2016. Instead, the Division asks the Commission to order the Division to revise its 2016 assessment to reflect that the taxpayers are Utah resident individuals from DATE to DATE, and from DATE to DATE. The Division also asks the Commission to sustain its 2015 assessment as issued.

14. The taxpayers were both born and raised in Utah. The taxpayers married in 2008, and they have not been legally separated or divorced since their marriage. Neither of the taxpayers attended an institution of higher education during 2015 or 2016. The taxpayers have ##### DEPENDENTS that they claimed as dependents on their 2015 and 2016 federal income tax returns. The taxpayers' oldest ##### DEPENDENTS were born in Utah in DATE and DATE. The taxpayers' youngest DEPENDENT was born in STATE 1 in DATE. Prior to their move to STATE 1 in DATE, neither of the taxpayers' oldest ##### DEPENDENTS was enrolled in a Utah public school. During the DATE to DATE period the taxpayers lived in STATE 1) the taxpayers' oldest DEPENDENT attended a private preschool until the fall of DATE, when she started attending a STATE 1 public elementary school; and 2) the taxpayers' second oldest DEPENDENT attended a private preschool during DATE. Once the taxpayers moved back to Utah on DATE, the taxpayers' oldest DEPENDENT was enrolled in a Utah public elementary school from DATE to DATE, and neither of the taxpayers' youngest two children was enrolled in a Utah public school.[9]

15. When the taxpayers decided to move to STATE 1 in early DATE, they listed their home in CITY 1, Utah (the "Utah home") for sale with a real estate broker sometime in DATE. During the audit period, the taxpayers owned the Utah home from DATE to sometime in DATE, when it sold. TAXPAYER 1 could not remember exactly when in DATE that the home sold, but he indicated that it was empty from DATE (when TAXPAYER 1 and the taxpayers' children moved to STATE 1) until it sold in DATE. TAXPAYER 1 also indicated that he and/or his wife and children lived in the Utah home from the time it was listed for sale in DATE until TAXPAYER 2 and the taxpayers' children moved to STATE 1 on DATE.

9 Respondent's Exhibit 1 (pp. 26 and 44); TAXPAYER 1'S testimony.

16. Neither party knew whether the Utah home received the residential exemption from property taxation for the DATE to DATE portion of the audit period that the taxpayers owned it.[10] As will be explained in more detail later in the decision, the taxpayers have the burden of proof in this matter. Because the taxpayers have not shown that the Utah home did not receive the residential exemption for the DATE to DATE portion of the audit period that they owned it, the Commission finds that the Utah home received the residential exemption for this portion of the audit period.[11]

17. The taxpayers' Utah home was a single-family rambler with approximately 2,400 square feet of living space. While living in STATE 1 between DATE and DATE, the taxpayers rented a two-story home that was similar in quality and size to the Utah home. After the taxpayers moved back to Utah on DATE, the taxpayers and their children lived with TAXPAYER 1'S parents in his parents' Utah home for all of DATE. TAXPAYER 1 stated that while he and his wife lived in STATE 1, he returned to Utah two times for no more than a week per visit and that TAXPAYER 2 returned to Utah no more than four or five times for no more than one week per visit.[12]

18. During the DATE to DATE, and DATE to DATE periods that the taxpayers lived in Utah, they used a Utah mailing address only. During the DATE to DATE period the taxpayers lived in STATE

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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 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.

11 That the Commission is finding that the Utah home received the residential exemption for the DATE to DATE portion of the audit period has no impact on the Commission's decision because the Commission is finding that the taxpayers are domiciled in Utah for all of 2015 (as well as portions of 2016) under the Utah voter registration presumption of Subsection 59-10-136(2)(b) (as will be discussed later in the decision).

12 Testimony of TAXPAYER 1.

1 (which is less than 600 days), the taxpayers used a STATE 1 address for all purposes other than income tax purposes. For income tax purposes, the taxpayers used a Utah address while they lived in STATE 1. Specifically, on all federal, Utah, and STATE 1 income tax returns that the taxpayers filed during 2015 and 2016, the taxpayers used a Utah address. In addition, the taxpayers received Forms W-2 at a Utah address during 2015 and 2016.[13]

19. The taxpayers did not obtain STATE 1 driver's licenses during 2015 or 2016. Instead, the taxpayers retained their Utah driver's licenses throughout 2015 and 2016. In addition, each of the taxpayers renewed their Utah driver's license during the DATE to DATE period they lived in STATE 1. TAXPAYER 1 renewed his Utah driver's license on DATE, while TAXPAYER 2 renewed her Utah driver's license on DATE.[14]

20. During the DATE to DATE period the taxpayers lived in Utah, the taxpayers leased a motor vehicle that was registered in Utah. Upon moving to STATE 1 in DATE, the taxpayers took the MOTOR VEHICLE 1 with them to STATE 1. The taxpayers did not change the MOTOR VEHICLE'S 1 registration from Utah to STATE 1. TAXPAYER 1, however, indicated that when the MOTOR VEHICLE 1'S lease expired later in 2015, the taxpayers leased a MOTOR VEHICLE 2 that they registered in STATE 1. TAXPAYER 1 could not recall when in 2015 the taxpayers stopped leasing the MOTOR VEHICLE 1 and started leasing the MOTOR VEHICLE 2.[15]

21. TAXPAYER 1 testified that soon after moving to STATE 1, the taxpayers determined that they needed a second vehicle, which resulted in their leasing a MOTOR VEHICLE 3 that they registered in STATE 1. After leasing the MOTOR VEHICLE 3, the taxpayers had two motor vehicles for the remainder of the audit period. TAXPAYER 1 could not remember the date on which the taxpayers leased

13 Respondent's Exhibit 1 (pp. 1-6 and 26-59); Testimony of TAXPAYER 1.
14 Respondent's Exhibit 1 (pp. 21-25).
15 Testimony of TAXPAYER 1.

MOTOR VEHICLE 3. In addition, no information was provided as to whether the taxpayers registered their two vehicles in Utah for the DATE to DATE period they lived in Utah.

22. During the DATE to DATE, and DATE to DATE portions of the audit period that the taxpayers lived in Utah, they attended a Utah unit of their church. During the DATE to DATE portion of the audit period that the taxpayers lived in STATE 1, the taxpayers attended a STATE 1 unit of their church. The taxpayers had their church records transferred from Utah to STATE 1 after moving to STATE 1, and the taxpayers had church callings while they lived in STATE 1. During 2015 and 2016, neither of the taxpayers was a member of a club or other similar organization.[16]

23. TAXPAYER 1 first registered to vote in Utah in DATE, while TAXPAYER 2 first registered to vote in Utah in DATE. The last time that either of the taxpayers voted in Utah was in DATE. TAXPAYER 1 explained that the taxpayers only voted in the DATE election because they wanted to vote for a specific presidential candidate who was running. In addition, he explained that neither he nor TAXPAYER 2 was aware of any reason to terminate their Utah voter registration when they moved to STATE 1.[17]

24. The Division provided evidence to show actions taken by a COUNTY clerk's office ("clerk's office") in regards to each of the taxpayers' Utah voter registrations. For each of the taxpayers, this evidence shows that on DATE, the clerk's office took an action that is described as "changed status from active to inactive." Subsequently, on DATE, the clerk's office took another action for each of the taxpayers that is described as "made removable."[18]

25. 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.

16 Testimony of TAXPAYER 1.
17 Respondent's Exhibit 1 (pp. 16-20); Testimony of Mr. Egan.
18 Respondent's Exhibit 1 (pp. 16-20).

RESPONDENT also 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 two election cycles, the clerk removes the voter from the Utah voter registration rolls (which is the action described as “made removable”).[19]

26. The taxpayers have not refuted any of the “active,” “inactive,” and “made removable” information that the Division has provided in regards to Utah voter registration.[20] As a result, it appears that both taxpayers were registered to vote in Utah for all of DATE and for the DATE to DATE portion of 2016 (during which they were both in an “inactive” status); but that neither of the taxpayers was registered to vote in Utah for the DATE to DATE portion of 2016.

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19 *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.

20 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 notice.

27. In addition, TAXPAYER 1 admitted that neither of the taxpayers ever registered to vote in STATE 1 and did not provide any information to suggest that either of the taxpayers was registered to vote anywhere other than Utah in 2015 or 2016. For these reasons, the Commission finds that: 1) both taxpayers were registered to vote in Utah for all of 2015 and from DATE to DATE 2) neither taxpayer was registered to vote in Utah from DATE to DATE; and 3) neither taxpayer was registered to vote anywhere other than Utah during 2015 or 2016.

28. For the DATE to DATE portion of 2016, the Division contends that both taxpayers are considered to be domiciled in Utah under Subsection 59-10-136(1) (because their oldest DEPENDENT attended a Utah public school for this period) and under Subsection 59-10-136(2)(c) (because they declared themselves to be Utah resident individuals for this period on their 2016 Utah return and because they have not rebutted the Subsection 59-10-136(2)(c) presumption that has arisen for this period).

29. In addition, for all of 2015 and for the DATEto DATE portion of 2016, the Division contends that both taxpayers are considered to be domiciled in Utah under Subsection 59-10-136(2)(b) because they were both registered to vote in Utah and have not rebutted the Subsection 59-10-136(2)(b) presumption for these periods. The Division further claims that the Subsection 59-10-136(2)(b) presumption has arisen for the DATE to DATE portion of 2016 that the taxpayers were also registered to vote in Utah, but that the Subsection 59-10-136(2)(b) presumption is rebutted for this portion of 2016 because a Utah county clerk could have legally removed their names from the Utah voter registry on DATE. For these reasons, the Division: 1) asks the Commission to find that the taxpayers are domiciled in Utah for all of 2015 and for the DATE to DATE, and DATE to DATE portions of 2016; and 2) concedes that the taxpayers are not domiciled in Utah for the DATE to DATE portion of the audit period.[21]

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21 The Division stated that for the DATE to DATE period that they do not consider the taxpayers to be domiciled in Utah under Subsection 59-10-136(1) or Subsection 59-10-136(2), the factors of Subsection 59-10-136(3) may be considered. However, for this DATE to DATE period (during which the taxpayers were living in STATE 1), the Division claims that the 12 factors of Subsection 59-10-136(3) point to a

30. The taxpayers, however, contend that their actions overwhelmingly show that they changed their domicile from Utah to STATE 1 for the DATE to DATE portion of the audit period, including moving to STATE 1 with their children for TAXPAYER 1'S job, enrolling their children in STATE 1 schools, and selling their Utah home. The taxpayers do not believe that relying on their Utah voter registrations to find that they remained domiciled in Utah for the period they lived in STATE 1 is reasonable, especially where neither of them have voted in Utah since DATE, where their Utah voter registrations were in an "inactive" status during the audit period, and where the Utah Legislature has amended Subsection 59-10-136(2)(b) to rely more on actual voting in Utah instead of being registered to vote in Utah to determine domicile.[22]

31. At the hearing, TAXPAYER 1 also contended that because the Utah Legislature has amended Subsection 59-10-136(2)(b), it is improper for the Commission to still apply the prior version of Subsection 59-10-136(2)(b) in making its decisions because other laws that have been determined to be mistakes are no longer applied.[23] For these reasons, the taxpayers ask the Commission to find that they

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domicile outside of Utah. For these reasons, the Division contends that the taxpayers are not considered to be domiciled in Utah under any provision of Section 59-10-136 for the DATE to DATE portion of the audit period.

22 Petitioner's Exhibit 1. The amendments to Section 59-10-136 to which the taxpayers refer were made in 2019 General Session Senate Bill 13 ("SB 13"). In Section 4 of SB 13 (concerning the retrospective operation of the bill), the Utah Legislature expressly provided that "[t]his bill has retrospective operation for a taxable year beginning on or after DATE."

23 As an example, TAXPAYER 1 appears to have referred to the United States Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Court struck down state laws banning interracial marriage in the United States as being unconstitutional under the 14th Amendment. The Commission is not aware of any court finding that any portion of the version of Section 59-10-136 that was in effect for the 2015 and 2016 tax years is unconstitutional.

Furthermore, TAXPAYER 1 did not specifically state that the taxpayers were challenging the constitutionality of the 2015 and 2016 version of Section 59-10-136. However, in case his arguments were an indirect attempt to challenge the constitutionality of the 2015 and 2016 version of Section 59-10-136, the Commission notes that it is not authorized to determine whether a Utah statute is unconstitutional (although constitutional arguments can be presented in a Commission proceeding in order to preserve these arguments for possible future court proceedings). *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, although the Commission will not discuss the taxpayers' possible constitutional arguments any further, it will discuss later in the decision the Utah Legislature's amendment of Section 59-

properly reported their Utah tax liability on their 2015 and 2016 Utah tax returns and to reverse the Division's 2015 and 2016 assessments in their entireties.

32. The Division, however, contends that the SB 13 amendments to Section 59-10-136 are not applicable to the 2015 and 2016 tax years at issue in this appeal because the SB 13 amendments only have retrospective application to the 2018 tax year. The Division further indicated that the Utah Legislature had the authority to apply the SB 13 amendments to years prior to 2018, but elected not to. As a result, the Division contends that the Commission should rely on the 2015 and 2016 version of Section 59-10-136 when determining the taxpayers' domicile for the 2015 and 2016 tax years. The Division reiterated its current position that pursuant to the 2015 and 2016 version of Section 59-10-136, the taxpayers are domiciled in Utah for all of 2015 and for the DATE to DATE, and DATE to DATE portions of 2016.

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

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2016)[24], "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:

10-136 in SB 13.

24 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.

(I) maintains a place of abode in this state; and
(II) spends in the aggregate 183 or more days of the taxable year in this state.

. . . .

3. Effective for tax year 2012 (and applicable to the 2015 and 2016 tax years at issue), UCA §59-10-136 provides for the determination of "domicile," as follows:[25]

(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:

25 As explained earlier, effective for tax year 2018, the Utah Legislature amended Section 59-10-136 in SB 13. However, it is the versions of Section 59-10-136 in effect during the 2015 and 2016 tax years that are applicable to this appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);
(C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;
(D) claim a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence; or
(E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.

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

(c) For purposes of Subsection (4)(a), an absence from the state:
(i) begins on the later of the date:
(A) the individual leaves this state; or
(B) the individual's spouse leaves this state; and
(ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.

(d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:
(i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and
(ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.

(e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.
(ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:
(A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and
(B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).

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

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

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

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

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

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

4. Utah Code Ann. §20A-2-305 provides for names to be removed or not be removed from the 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)[26] 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.

. . . .

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26 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.

5. 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).
>
> (2) (a) When a county clerk obtains information that a voter's address has changed and it appears that the voter still resides within the same county, the county clerk shall:
>
> (i) change the official register to show the voter's new address; and
>
> (ii) send to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.
>
> (b) When a county clerk obtains information that a voter's address has changed and it appears that the voter now resides in a different county, the county clerk shall verify the changed residence by sending to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.
>
> (3) Each county clerk shall use substantially the following form to notify voters whose addresses have changed: "VOTER REGISTRATION NOTICE
>
> We have been notified that your residence has changed. Please read, complete, and return this form so that we can update our voter registration records. What is your current street address?
>
> ____
>
> Street City County State Zip
>
> If you have not changed your residence or have moved but stayed within the same county, you must complete and return this form to the county clerk so that it is received by the county clerk no later than 30 days before the date of the election. If you fail to return this form within that time:
>
> - you may be required to show evidence of your address to the poll worker before being allowed to vote in either of the next two regular general elections; or
>
> - if you fail to vote at least once from the date this notice was mailed until the passing of two regular general elections, you will no longer be registered to vote. If you have changed your residence and have moved to a different county in Utah, you may register to vote by contacting the county clerk in your county.
>
> ____
>
> Signature of Voter"
>
> . . . .
>
> (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.

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

> (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
> (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
> (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
> (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

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 for the DATE to DATE, and DATE to DATE portions of 2016. The taxpayers, however, contend they were Utah resident individuals only for the DATE to DATE, and DATE to DATE portions of the audit period. For the 2015 and 2016 tax years, Subsection 59-10-103(1)(q)(i) provides that a person is a Utah

resident individual under either of two scenarios: 1) if the person is domiciled in Utah (the "domicile test"); or 2) if the person maintains a place of abode in Utah and spends 183 or more days of the taxable year in Utah (the "183 day test").

3. The Division does not assert that the taxpayers are Utah resident individuals for any portion of 2015 or 2016 under the 183 day test. Instead, the Division contends that the taxpayers are Utah resident individuals for all of 2015 and portions of 2016 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 for the DATE to DATE, and DATE to DATE portions of 2016 (as the Division contends); or whether the taxpayers are considered to be domiciled in Utah only for the DATE to DATE, and DATE to DATE portions of the audit period (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)).[27] To determine whether the taxpayers are domiciled in Utah during the 2015 and 2016 tax years, the taxpayers contend that the Commission should use the version of Section 59-10-136 that became effective after the enactment of SB 13, arguing that the Legislature made these amendments because the prior version of Section 59-10-136 contained "mistakes." The Legislature, however, elected for the SB 13 amendments to take effect beginning with tax year 2018, purposefully electing not to apply the amendments to tax years prior to 2018 (thus electing for the SB 13 amendments not to apply to the 2015

27 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.

and 2016 tax years at issue in this appeal). While the Commission is tasked with the implementation of Section 59-10-136 and the SB 13 changes to this statute, the Commission is not authorized to change the effective date of the bill and apply the SB 13 amendments to the tax years at issue in this appeal. Accordingly, the Commission will use the 2015 and 2016 versions of Section 59-10-136 to determine whether the taxpayers are considered to be domiciled in Utah during 2015 and 2016.

5. Subsection 59-10-136(5)(b). For a married individual, it is often necessary 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.

6. 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. Both taxpayers were absent from Utah from DATE to DATE, which is a period of less than 600 days. Because both taxpayers were not absent from Utah for at least 761 consecutive days that included a portion of 2015 and/or 2016, the Subsection 59-10-136(4)(a) exception from domicile had not been met for any portion of the audit period, regardless of whether all of the other listed conditions would have been met.

7. 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 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 Division contends that both taxpayers are considered to be domiciled in Utah for all of 2015 and most of 2016 under Subsection 59-10-136(2)(b), the Commission will begin the remainder of its analysis with this subsection.

8. 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 both taxpayers were registered to vote in Utah for all of DATE and for the DATE to DATE portion of DATE. As a result, under Subsection 59-10-136(2)(b), both taxpayers will be considered to be domiciled in Utah from DATE to DATE, unless they are able to rebut this presumption.[28]

9. 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.[29] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to

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28 Because the taxpayers admit that they were Utah resident individuals for the DATE to DATE, and DATE to DATE periods for which the Subsection 59-10-136(2)(b) presumption has arisen, it is unclear whether the taxpayers are attempting to rebut the Subsection 59-10-136(2)(b) presumption for the entire period for which the presumption has arisen; or whether they are attempting to rebut the Subsection 59-10-136(2)(b) presumption only for the DATE to DATE period they lived in STATE 1. To avoid any confusion and in order to show how the taxpayers may be considered to be domiciled in Utah under each of the relevant Section 59-10-136 provisions, the Commission will determine whether the taxpayers have rebutted the Subsection 59-10-136(2)(b) presumption for the entire DATE to DATE period for which this presumption has arisen.

29 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).

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.

10. The taxpayers contend that their actions demonstrate their intent to change their domicile from Utah to STATE 1 in 2015 and that these actions should be sufficient to rebut the Subsection 59-10-136(2)(b) presumption. This 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)).

11. 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 (i.e., the version of Section 59-10-136 that became effective for tax year 2012 and remained in effect for the 2015 and 2016 tax years at issue) little or no effect, which the Commission declines to do.[30]

12. 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

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

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).[31]

13. 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 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).

14. 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).[32] 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 Subsections 59-10-136(1) and (2) were given greater import than they had received in establishing income

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31 *See, e.g., 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.

32 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" (emphasis added).

tax domicile for years prior to 2012 (when each of these factors was merely one of the many factors with which domicile was determined).[33]

15. 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 exceptions, 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). 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.[34]

16. 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 "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

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33 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.

34 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.

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.

17. 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.[35] Neither of the taxpayers, however, ever registered to vote in STATE 1. 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.

18. 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.[36] No evidence was provided to show that the taxpayers asked for their names to be removed from the Utah voter registry prior to or during the 2015 and 2016 tax years. That the taxpayers did not ask for the names to be removed from the Utah voter registry prior to or during the 2015 and 2016 tax years is insufficient to rebut the Subsection 59-10-136(2)(b) presumption.[37]

19. 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

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35 *See, e.g., USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016).

36 *See, e.g., Appeal No. 18-793*.

37 Furthermore, the instructions for the 2015 and 2016 Forms TC-40 (i.e., the 2015 and 2016 Utah tax returns) included explanations about domicile under Section 59-10-136 and specifically indicated that a rebuttable presumption of Utah domicile would exist if an individual was registered to vote in Utah. Forms for prior tax years can be reviewed on the Commission's website at https://tax.utah.gov/forms-pubs/previousyears.

prior to voting and if the individual eventually votes in that state.[38] The taxpayers have not shown that STATE 1 allows an individual who moves there to vote in a STATE 1 election without having registered to vote in STATE 1. Furthermore, the taxpayers provided no information to suggest that either of them ever voted in STATE 1.

20. The taxpayers contend that they should be able to rebut the Subsection 59-10-136(2)(b) presumption because they have not voted in Utah since 2012, which would include the 2015 and 2016 tax years at issue. The Commission, however, 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(s) 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 the version of Subsection 59-10-136(2)(b) that applies to the 2015 and 2016 tax years at issue.[39] As a result, that neither taxpayer voted in Utah after the 2012 tax year or during the 2015 and 2016 tax years at issue is insufficient to rebut the Subsection 59-10-136(2)(b) presumption for any portion of the DATE to DATE period for which the presumption has arisen.

21. The taxpayers also contend that they should be able to rebut the Subsection 59-10-136(2)(b) presumption because their Utah voter registrations were on "inactive" status for all of the DATE to DATE period for which the presumption has arisen. As mentioned earlier, both taxpayers' Utah voter registrations were placed on "inactive" status on DATE, and they remained on "inactive" status until DATE, when a Utah county clerk removed their names from the official voter registry in accordance with Section 20A-2-305.

22. Subsection 20A-2-305(2)(c) provides that after a Utah voter is placed on "inactive" status in accordance with Subsection 20A-2-306 (after a Utah county clerk mails a notice concerning an address

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38 *See, e.g., USTC Appeal No. 17-1552* (Initial Hearing Order Feb. 7, 2019).

39 *See, e.g., Appeal No. 15-720.*

change), a COUNTY clerk *shall* remove the voter's name from the official voter registry if "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[.]" After the DATE on which the taxpayers were placed on "inactive" status, neither of the taxpayers voted in any Utah election held through and including the second regular general election, which occurred on DATE.[40] As a result, pursuant to Subsections 20A-2-305(2)(c) and 20A-2-306(1)(b), a Utah county clerk could not have removed the taxpayers' names from the official voter registry prior to DATE, but was required to remove their names on or after this date. A Utah county clerk subsequently removed the taxpayers' names from the official voter registry on DATE.

23. Pursuant to Subsection 20A-2-306(4)(c), a Utah voter on "inactive" status is "allowed to vote, sign petitions, and have all other privileges of a registered voter[,]" but might not receive "routine mailings." As a result, it appears that the taxpayers were still allowed to vote, sign petitions, and have all other privileges of a Utah registered voter for all of 2015 and the DATE to DATE portion of the 2016 tax year. For these reasons, the Commission finds that the taxpayers have not rebutted the Subsection 59-10-136(2)(b) presumption because of their Utah voter registrations being on "inactive" status, especially where Utah law precluded the removal of their names from the official registry for almost all of the time that they were on "inactive" status.

24. However, for the DATE to DATE portion of 2016 that the taxpayers' Utah voter registrations were on "inactive" status and during which a COUNTY clerk could have removed their names from the official voter registry, the Commission finds that the Subsection 59-10-136(2)(b) presumption has been rebutted. It is not unreasonable that it took a COUNTY clerk approximately a month to remove the

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40 For the 2015 and 2016 tax years, "regular general election" was defined in Utah Code Ann. §20A-1-102(69) to mean "the election held throughout the state on the first Tuesday after the first Monday in November of each even-numbered year for the purposes established in Section 20A-1-201." Subsequent to the 2015 and 2016 tax years, this definition has not been amended, but it has been renumbered.

taxpayers' names from the official voter registry once the second regular general election of DATE occurred without the taxpayers' having voted. Nevertheless, where a clerk was required to remove their names from the official voter registry on or after DATE, and where the clerk did not remove their names until DATE, the Commission finds that the Subsection 59-10-136(2)(b) presumption has been rebutted for the period occurring after the DATE election. Specifically, the Subsection 59-10-136(2)(b) presumption is rebutted for the DATE to DATE portion of the 2016 tax year that the taxpayers were registered to vote in Utah.

25. For reasons discussed in the preceding paragraphs, the taxpayers have not rebutted the Subsection 59-10-136(2)(b) presumption for the remaining period for which the presumption has arisen, specifically from DATE to DATE. 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 DATE to DATE period that remains at issue. Accordingly, under Subsection 59-10-136(2)(b), both taxpayers are considered to be domiciled in Utah for the DATE to DATE portion of the audit period.

26. Because both taxpayers have been found to be domiciled in Utah from DATE to DATE, there is no need to analyze the remaining subsections of Section 59-10-136 (i.e., Subsections (1)(a)(i), (1)(a)(ii), (2)(a), (2)(c), and (3)) to resolve this portion of the audit period. However, some observations about these remaining subsections and how they relate to this portion of the audit period may be useful. In addition, the Commission will need to discuss these remaining subsections, at least to some extent, to determine whether the taxpayers are considered to be domiciled in Utah for the DATE to DATE portion of the audit period that was not resolved under Subsection 59-10-136(2)(b).

27. <u>Subsection 59-10-136(1)(a)(i)</u>. 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). On the taxpayers' 2015 and 2016 federal returns, the taxpayers claimed their ##### children as dependents. For reasons previously discussed, the Commission has found that one of the taxpayers' dependent children was enrolled in a Utah public kindergarten, elementary, and/or secondary school from DATE to DATE. Accordingly, under Subsection 59-10-136(1)(a)(i), both taxpayers will be considered to be domiciled in Utah for the DATE to DATE portion of the audit period, unless the exception found in Subsection 59-10-136(1)(b) is met.

28. Subsection 59-10-136(1)(b) provides that an individual may not be considered to be domiciled in Utah under Subsection 59-10-136(1)(a)(i) if the individual is the noncustodial parent of a dependent whom the individual claimed as a personal exemption on their federal return and who is enrolled in a Utah public kindergarten, elementary, or secondary school; and if the individual is divorced from the custodial parent. For the 2016 tax year, neither taxpayer was the noncustodial parent of any of their dependents, and neither taxpayer was divorced from the custodial parent of any of their dependents. Accordingly, the Subsection 59-10-136(1)(b) exception is not applicable to the taxpayers' circumstances. Because the Subsection 59-10-136(1)(b) exception does not apply, both taxpayers are considered to be domiciled in Utah from DATE to DATE under Subsection 59-10-136(1)(a)(i).

29. As a result, the Commission has found that the taxpayers are considered to be domiciled in Utah for all portions of the audit period for which the Division now proposes that they are domiciled in Utah, specifically from DATE to DATE, and from DATE to DATE. Although the Division contends now that the taxpayers are not domiciled in Utah for the DATE to DATE portion of the audit period, the Commission will perform some analysis of the remaining subsections of Section 59-10-136 (i.e., Subsections (1)(a)(ii), (2)(a), (2)(c), and (3)) to determine whether the Commission agrees with this position.

30. Subsection 59-10-136(1)(a)(ii). Under this subsection, an individual is considered to be domiciled in Utah if the individual or the individual's spouse is a resident student enrolled in a Utah

institution of higher education. During 2015 and 2016, neither taxpayer was enrolled in an institution of higher education. Accordingly, neither taxpayer is considered to be domiciled in Utah for any portion of 2015 or 2016 under Subsection 59-10-136(1)(a)(ii).

31. 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. Neither party relied on Subsection 59-10-136(2)(a) to support their respective positions. Nevertheless, the taxpayers owned a home in Utah from DATE to sometime in DATE, and the Commission has previously found that the home received the residential exemption for the period that the taxpayers owned it. As a result, the taxpayers would be domiciled in Utah under Subsection 59-10-136(2)(a) for the period they owned the home, unless they were able to rebut the presumption.[41]

32. The Commission has found in prior appeals that while the Subsection 59-10-136(2)(a) presumption is generally not rebutted for a period in which a property owner was living in their home, the presumption can be rebutted for that period that a home is vacant and listed for sale (i.e., if no one was residing in the home even on an occasional basis while it was listed for sale).[42] At least one of the taxpayers and their children were living in the Utah home from DATE to DATE. As a result, the Subsection 59-10-136(2)(a) presumption would not be rebutted for the DATE to DATE portion of the period for which the presumption has arisen. However, the Utah home was vacant from DATE to sometime in DATE when it

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41 It is clear that the taxpayers would not be domiciled in Utah under Subsection 59-10-136(2)(a) for the DATE to DATE period that remains at issue and that the Commission has already found the taxpayers to be domiciled under Subsection 59-10-136(2)(b) for the entirety of the period in 2015 that they owned the Utah home. As a result, the Commission will forego some of the Subsection 59-10-136(2)(a) analysis that it would have otherwise made had this subsection been more critical to resolving the appeal.

42 *See, e.g., USTC Appeal No. 15-1332* (Initial Hearing Order Jun. 27, 2016).

sold. As a result, it appears that the Subsection 59-10-136(2)(a) presumption would be rebutted from DATE to whenever in DATE that the home sold.

33. Based on this limited analysis of Subsection 59-10-136(2)(a), the Commission finds that both taxpayers would be considered to be domiciled in Utah under this subsection from DATE to DATE. The taxpayers, however, have admitted that they were domiciled in Utah for this period. In addition, the Commission has previously found that the taxpayers are considered to be domiciled in Utah under Subsection 59-10-136(2)(b) for the entire portion of 2015 that the taxpayers owned the Utah home. As a result, the Commission will not discuss the Subsection 59-10-136(2)(a) presumption any further.

34. Subsection 59-10-136(2)(c). 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 to DATE. On their 2016 Utah return, the taxpayers asserted Utah residency from DATE to DATE. Accordingly, under Subsection 59-10-136(2)(c), both taxpayers would also be considered to be domiciled in Utah from DATE to DATE, and from DATE to DATE, unless they were able to rebut this presumption.

35. The Commission has already found the taxpayers to be domiciled in Utah for the DATE to DATE, and DATE to DATE portions of the audit period for which the Subsection 59-10-136(2)(c) presumption has arisen. However, the Commission will make some limited observations about Subsection 59-10-136(2)(c). The taxpayers admit that they were domiciled in Utah for the DATE to DATE portion of the audit period for which the Subsection 59-10-136(2)(c) presumption has arisen and, thus, do not attempt to rebut the Subsection 59-10-136(2)(c) presumption for the last month of 2016. As a result, the Commission finds that the taxpayers are also considered to be domiciled in Utah from DATE to DATE under Subsection 59-10-136(2)(c).

36. As to the DATE to DATE portion of the audit period for which the Subsection 59-10-

136(2)(c) presumption has arisen, TAXPAYER 1 explained that the taxpayers erroneously declared on their 2015 Utah return that they were Utah resident individuals for this portion of 2015. The taxpayers explained that they had meant to declare on the 2015 return that they were Utah resident individuals only from DATE to DATE, and that is why they allocated their 2015 income to Utah on the basis that they were Utah resident individuals only from DATE to DATE. Under such circumstances, the Commission finds that the Subsection 59-10-136(2)(c) presumption is rebutted for the DATE to DATE portion of the audit period for which the presumption has arisen. Regardless, the Commission has previously found that the taxpayers are considered to be domiciled for this portion of the audit period under Subsection 59-10-136(2)(b).

37. Subsection 59-10-136(3). Even if an individual is not considered to be domiciled in Utah under Subsection (1)(a)(i), (1)(a)(ii), (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 domiciled in Utah from DATE to DATE, and from DATE to DATE under Subsection 59-10-136(1) and/or (2), Subsection 59-10-136(3) has no applicability to these portions of the audit period.

38. Still at issue, however, is the DATE to DATE portion of the audit period, which is the only portion of the audit period that the Commission has not already found the taxpayers to be considered to be domiciled in Utah. Accordingly, Subsection 59-10-136(3) has applicability to the DATE to DATE portion of the audit period. At the hearing, the Division contends that the taxpayers are not considered to be domiciled in Utah for this DATE to DATE period under the 12 factors of Subsection 59-10-136(3), which appears to be consistent with the taxpayers' position that they were not domiciled in Utah for the period they lived in STATE 1 (which would include this DATE to DATE period). As a result, the Commission will review the 12 factors of Subsection 59-10-136(3) in regards to this DATE to DATE period and only

include a complete analysis of each factor if the Commission disagrees with the parties.

39. A review of the 12 factors of Subsection 59-10-136(3) for the DATE to DATE period suggests that: 1) one or more of the relevant factors point to a Utah domicile for this period (the factor described in Subsection 59-10-136(3)(b)(i) and perhaps the factors described in Subsections 59-10-136(3)(b)(viii) and (3)(b)(ix)); 2) four of the factors are not relevant for this period (the factors described in Subsections 59-10-136(3)(b)(ii), (3)(b)(x), (3)(b)(xi), and (3)(b)(xii)); and 3) five of the factors point to a domicile outside of Utah for this period (the factors described in Subsections 59-10-136(3)(b)(iii), (3)(b)(iv), (3)(b)(v), (3)(b)(vi), and (3)(b)(vii)). In prior decisions, the Commission has generally relied on a majority of the relevant factors to determine whether an individual is considered to be domiciled in Utah under Subsection 59-10-136(3).[43] Based on the foregoing, three or less of the relevant factors point to a domicile in Utah, while five of the relevant factors point to a domicile outside of Utah. Accordingly, the Commission finds that under Subsection 59-10-136(3), the taxpayers are also not considered to be domiciled in Utah for the DATE to DATE portion of the audit period.

40. Conclusion. Based on the foregoing, the taxpayers are found to be domiciled in Utah under various subsections of Section 59-10-136 for the DATE to DATE, and DATE to DATE portions of the audit period; and the taxpayers are found not to be domiciled in Utah under any subsection of Section 59-10-136 for the DATE to DATE portion of the audit period. Consequently, pursuant to Subsection 59-10-103(1)(q)(i)(A), the taxpayers are Utah resident individuals for the DATE to DATE, and DATE to DATE portions of the audit period. For these reasons, the Commission should sustain the Division's 2015 assessment in its entirety. In addition, the Commission should order the Division to revise its 2016 assessment to reflect the taxpayers' being Utah resident individuals only for the DATE to DATE, and DATE to DATE portions of the 2016 tax year.

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43 *See, e.g., USTC Appeal No. 18-300* (Initial Hearing Order Dec. 14, 2018).

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's 2015 assessment in its entirety. The Commission also orders the Division to revise its 2016 assessment to reflect the taxpayers' being Utah resident individuals only for the DATE to DATE, and DATE to DATE portions of the 2016 tax year. It is so ordered.

DATED this _________ day of ________________________, 2020.

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.