19-211
TAX TYPE: INCOME TAX
TAX YEAR: 2015
DATE SIGNED: 4/21/2020
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.	**INITIAL HEARING ORDER** Appeal No. 19-211 Account No. ##### Tax Type: Income Tax Year: 2015 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYERS, CPA (by telephone)
For Respondent: RESPONDENT, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on March 4, 2020.

TAXPAYER-1 & TAXPAYER-2 ("Petitioners" or "taxpayers") are appealing Auditing Division's (the "Division") assessment of Utah individual income taxes for the 2015 tax year. On January 3, 2019, the Division issued a Notice of Deficiency and Estimated Income Tax ("First Statutory Notice") to the taxpayers, in which it imposed taxes, a 10% penalty for failure to timely file, a 10% penalty for failure to timely pay, and interest (calculated as of February 2, 2019),[1] as follows:

1 Interest continues to accrue until any tax liability is paid.

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

The taxpayers are a married couple who lived in different states during 2015. For all of 2015, TAXPAYER-1 lived in Utah (where he had permanently moved in 2005), while TAXPAYER-2 lived in STATE-1 (where both taxpayers had lived for many years prior to TAXPAYER-1's 2005 move to Utah and where TAXPAYER-2 has continued to live since TAXPAYER-1 moved to Utah). For the 2015 tax year, the taxpayers filed a federal return with a status of married filing jointly, on which they reported their joint 2015 federal adjusted gross income ("FAGI") to be $$$$$. The taxpayers, however, filed separate state returns for the 2015 tax year. TAXPAYER-1 filed a 2015 Utah full-year resident return with a status of married filing separately, on which he reported his 2015 FAGI to be $$$$$. TAXPAYER-2 filed a 2015 STATE-1 full-year resident return with a status of married filing separately, on which she reported her STATE-1 taxable income to be $$$$$.[2] The taxpayers proffered that since TAXPAYER-1 moved to Utah in or around 2005, they have filed joint federal returns and separate state returns.

The Division, however, determined that both taxpayers were domiciled in Utah for all of 2015, based on TAXPAYER-1's circumstances satisfying a number of provisions of Utah Code Ann. §59-10-136 (2015) (Utah's income tax domicile law). As a result, the Division also determined that both taxpayers were 2015 Utah full-year resident individuals and imposed taxes on all income that both taxpayers received during 2015. Because the Division did not have a copy of TAXPAYER-2's 2015 STATE-1 return, it did not allow a credit for 2015 income taxes imposed by STATE-1 on its First Statutory Notice.[3] After receiving this return, the

2 STATE-1 taxable income has little relationship with FAGI. FAGI is not even reported on a STATE-1 tax return.

3 For a Utah resident individual, Utah Code Ann. §59-10-1003 (2015) provides a credit against a taxpayer's Utah income tax liability for income taxes imposed by another state.

Division issued a revised Notice of Deficiency and Estimated Income Tax ("Second Statutory Notice") on April 12, 2019, in which it imposed taxes and interest (calculated as of May 12, 2019),[4] as follows:

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

The taxpayers acknowledge that they are not divorced, but they ask the Commission to find that they are "legally separated" for purposes of Section 59-10-136. The taxpayers admit that they have not obtained a decree or order from a Utah court approving a petition for temporary separation or separate maintenance or a decree or order from a STATE-1 court approving a similar type of petition. The taxpayers, however, contend that there is no such thing as "legal separation" under STATE-1 law and that separation for legal purposes in STATE-1 occurs when married individuals enter into an agreement to become separated, which can include a verbal agreement.[5]

The taxpayers contend that they entered into a verbal separation agreement around 2005, when TAXPAYER-1 decided to move to Utah and when they separated their households and financial accounts. As a result, the taxpayers ask the Commission to find that they are considered "legally separated" for purposes of Section 59-10-136 and that, as a result, neither taxpayer has a spouse for purposes of Section 59-10-136. For these reasons and because TAXPAYER-2's circumstances alone (i.e., if she is not considered to have a spouse

4 Again, interest continues to accrue until any tax liability is paid. Whereas the Division imposed penalties in the First Statutory Notice, it did not impose any penalties in its Second Statutory Notice. As a result, the Commission finds that there are currently no penalties for which a waiver might be considered.

5 The taxpayers' assertion about STATE-1 law appears to be correct. An informational website about "legal separation" in STATE-1 indicates:

> . . . there is no such thing as a "legal separation" in STATE-1 laws. Separation for legal purposes means that one spouse conveys the intent to the other that he or she no longer desires to remain married. That intent may be conveyed in a number of ways including by filing a divorce complaint, by one spouse vacating the marital residence without an intent to return, or by informing the other spouse of the end of the marriage verbally, in writing, or by actions including cessation of marital relations and inhabiting a separate portion of the marital residence.

(WEBSITE REMOVED)

for purposes of Section 59-10-136) would not satisfy any of the Section 59-10-136 domicile provisions, the taxpayers ask the Commission to find that TAXPAYER-2 is not considered to be domiciled in Utah during 2015. On this basis, the taxpayers ask the Commission to reverse the Division's assessment, as reflected by the Second Statutory Notice, in its entirety.

The Division proffered that it does not believe that the verbal separation agreement into which the taxpayers entered around the time that TAXPAYER-1 moved to Utah should result in the taxpayers' being considered to be "legally separated" for purposes of Section 59-10-136. As a result, the Division contends that both taxpayers should be considered to have a spouse for purposes of Section 59-10-136 and that both taxpayers are considered to be domiciled in Utah during 2015. For these reasons, the Division asks the Commission to sustain its assessment, as reflected in the Second Statutory Notice, in its entirety.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2015)[6], "a tax is imposed on the state taxable income of a resident individual[.]"

2. For purposes of Utah income taxation, a "resident individual" is defined in UCA §59-10-103(1)(q)(i), as follows in pertinent part:

> (i) "Resident individual" means:
> (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
> (B) an individual who is not domiciled in this state but:
> (I) maintains a place of abode in this state; and
> (II) spends in the aggregate 183 or more days of the taxable year in this state.
> . . . .

3. Effective for tax year 2012 (and applicable to the 2015 tax year at issue), UCA §59-10-136 provides for the determination of "domicile," as follows:[7]

6 All substantive law citations are to the 2015 version of Utah law, unless otherwise noted.

7 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 tax year that is applicable

(1) (a) An individual is considered to have domicile in this state if:

(i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or

(ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.

(b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:

(i) is the noncustodial parent of a dependent:

(A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and

(B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and

(ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).

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

(a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;

(b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or

(c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

(3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:

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

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

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

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

(ii) whether a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is a resident student in accordance with Section

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to this appeal.

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."[8] 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:[9]

> (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 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;

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8 *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.

9 In SB 13 (2019), the Utah Legislature also amended Section 59-2-103.5. Again, however, the SB 13 amendments have no applicability to the 2015 tax year at issue in this appeal.

(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)[10] 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).
(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

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

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.

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

(1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

(a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;

(b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and

> (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

Pursuant to Subsection 59-1-1417(1), the taxpayers have the burden of proof in this matter. At issue is whether both taxpayers are 2015 Utah full-year resident individuals. While the parties agree that TAXPAYER-1 is a Utah resident individual for all of 2015, they disagree as to whether TAXPAYER-2 is a Utah resident individual during 2015. The Division contends that TAXPAYER-2 is also a Utah resident individual for all of 2015, while the taxpayers contend that TAXPAYER-2 is not a Utah resident individual for any portion of 2015. For the 2015 tax year, Subsection 59-10-103(1)(q)(i) provides that a person is a Utah resident individual under either of two scenarios: 1) if the person is domiciled in Utah (the "domicile test"); or 2) if the person maintains a place of abode in Utah and spends 183 or more days of the taxable year in Utah (the "183 day test").

The Division does not argue that the taxpayers are 2015 Utah resident individuals under the 183 day test. Instead, the Division contends that both taxpayers are 2015 Utah resident individuals under the domicile test. As a result, the Commission must apply the facts to the Utah domicile law in effect for the 2015 tax year to determine whether both taxpayers are considered to be domiciled in Utah for all of 2015 (as the Division contends); or whether TAXPAYER-1 is a Utah resident individual and TAXPAYER-2 is a Utah nonresident individual for all of 2015 (as the taxpayers contend).

I. Additional Facts.

The taxpayers, who are in their #####, married in YEAR and have not since been divorced. Both taxpayers lived and worked in STATE-1 for many years until TAXPAYER-1 retired in the mid-1990's and

started coming to Utah for part of each year to work as an INSTRUCTOR. In 2005, TAXPAYER-1 decided to move to Utah on a permanent basis, while TAXPAYER-2 decided that she would remain in STATE-1. As a result, since 2005 (including the 2015 tax year at issue), the taxpayers have lived separately, with TAXPAYER-1 living in Utah and TAXPAYER-2 living in STATE-1. While the taxpayers have not entered into a written separation agreement, they proffer that they have entered into a verbal agreement to live separately and maintain separate financial accounts. After TAXPAYER-1 moved to Utah in 2005, the taxpayers initially visited one another in STATE-1 and/or Utah on occasion. However, for approximately five years (including the 2015 tax year), each of the taxpayers' health has prevented them from visiting each other.

The taxpayers claimed no dependents on their 2015 federal return. In addition, neither of the taxpayers attended an institution of higher education during 2015. Since 1962, both taxpayers have owned a single-family residence in STATE-1 in which TAXPAYER-2 still lives (the "STATE-1 home"). The STATE-1 home has received a STATE-1 property tax "homestead exemption" every year that the taxpayers have owned the home (including the 2015 tax year). The STATE-1 home is #####-square feet in size and has a value of approximately $$$$$.

When TAXPAYER-1 moved to Utah in 2015, he purchased a condominium in COUNTY in which he still lives (the "Utah home"). REPRESENTATIVE FOR TAXPAYERS', the taxpayers' representative, proffered that TAXPAYER-1 purchased the Utah home in his name alone, but she did not know the size or value of the Utah home. In addition, REPRESENTATIVE FOR TAXPAYERS' did not know whether the Utah home received the Utah property tax residential exemption for the 2015 tax year.[11] The Division did not provide any information about the Utah home, including whether it received the residential exemption during

11 UCA §59-2-103(2) 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 UCA §59-2-102(35)(a) 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.

2015. However, the taxpayers, not the Division, 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 2015 tax year, the Commission finds that the Utah home received the residential exemption for all of 2015.

TAXPAYER-2 was registered to vote in STATE-1 for all of 2015. While REPRESENTATIVE FOR TAXPAYERS' did not know if TAXPAYER-1 was registered to vote anywhere in 2015, she assumed that he was registered to vote in Utah during 2015. The Division also did not provide any information as to whether TAXPAYER-1 was registered to vote in Utah during 2015. Nevertheless, the taxpayers, again, have the burden of proof and have not shown that TAXPAYER-1 was not registered to vote in Utah during 2015 or that he was registered to vote in a state other than Utah during 2015. Accordingly, the Commission finds that TAXPAYER-1 was registered to vote in Utah for all of 2015 and that he was not registered to vote in a state other than Utah during 2015.

During 2015, TAXPAYER-1 had a Utah driver's license, while TAXPAYER-2 had a STATE-1 driver's license. During 2015, TAXPAYER-2 owned a motor vehicle in STATE-1 that was registered in STATE-1. REPRESENTATIVE FOR TAXPAYERS' did not know whether TAXPAYER-1 owned a motor vehicle during 2015 and, if so, where it was registered. However, she assumed that TAXPAYER-1 owned a motor vehicle in Utah that was registered in Utah. The Division also did not provide any information as to whether TAXPAYER-1 owned a motor vehicle that was registered in Utah during 2015.[12]

Neither taxpayer was a member of a church or a club or other similar organization during 2015. During 2015, all of TAXPAYER-1's "earned income" was earned in Utah, while all of TAXPAYER-2's

12 For reasons to be explained later, it is not critical, at least for this Initial Hearing decision, to know whether TAXPAYER-1 owned a motor vehicle(s) that was registered in Utah for the 2015 tax year because the Commission is finding that both taxpayers are domiciled in Utah for all of 2015 on account of the Utah home's receiving the residential exemption for 2015 and TAXPAYER-1 being registered to vote in Utah during 2015. However, if, at a Formal Hearing, information was provided to show that the Utah home did not receive the residential exemption for 2015 and that TAXPAYER-1 was not registered to vote in Utah during 2015, information about the registration of a vehicle owned by TAXPAYER-1 could be a factor that the Commission may need to consider in reaching a Formal Hearing decision.

"earned income" was earned in STATE-1. During 2015, TAXPAYER-1 received his mail at a Utah address, while TAXPAYER-2 received her mail at a STATE-1 address. However, in 2016, the taxpayers used a STATE-1 address not only to file their joint 2015 federal return and TAXPAYER-2's separate 2015 STATE-1 return, but also TAXPAYER-1's separate 2015 Utah return.[13] TAXPAYER-2 also indicated that in 2015, the taxpayers would also have filed a joint 2014 federal return and separate 2014 state returns. However, she stated at the Initial Hearing that she could not immediately access the 2014 returns and, thus, could not tell what address she used for these returns.[14]

II. Domicile Test for the 2015 Tax Year.

UCA §59-10-103(1)(q)(i)(A) defines a "resident individual" as "an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state[.]" For 2015, a taxpayer's domicile for income tax purposes is determined under Section 59-10-136, which contains four subsections addressing when a taxpayer is considered to have domicile in Utah (Subsections (1), (2), (3), and (5)) and a fifth subsection addressing when a taxpayer is not considered to have domicile in Utah (Subsection (4)).[15]

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13 REPRESENTATIVE FOR TAXPAYERS' is a CPA in STATE-1, and she prepared the taxpayers' 2015 and 2016 federal and state returns. She stated that she does not recall why she used a STATE-1 address to prepare TAXPAYER-1 2015 Utah return.

14 Again, it is not critical, at least for this Initial Hearing decision, to know the address(es) the taxpayers used to file their 2014 returns because the Commission is finding that both taxpayers are domiciled in Utah for 2015 on account of the Utah home's receiving the residential exemption for 2015 and TAXPAYER-1 being registered to vote in Utah during 2015. However, if, at a Formal Hearing, information was provided to show that the Utah home did not receive the residential exemption for 2015 and that TAXPAYER-1 was not registered to vote in Utah during 2015, information about the address(es) used to file the taxpayers' 2014 returns could be a factor that the Commission may need to consider when reaching a Formal Hearing decision.

15 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.

A. Subsection 59-10-136(5)(b). For a married individual, it is often necessary, as in this case, to first determine whether that individual is considered to have a "spouse" for purposes of Section 59-10-136. Subsection 59-10-136(5)(b) provides that a married individual is *not* considered to have a spouse for purposes of Section 59-10-136 if: 1) the individual is legally separated or divorced from the individual's spouse; or 2) if the individual and the individual's spouse file federal income tax returns with a status of married filing separately. The taxpayers did not file 2015 federal income tax returns with a status of married filing separately. Instead, they filed a 2015 federal return with a status of married filing jointly. As a result, each taxpayer will be considered to have a spouse throughout 2015, unless the taxpayers are considered to be "legally separated or divorced" during this year, pursuant to Subsection 59-10-136(5)(b)(i).

The taxpayers admit that they were not divorced during 2015. Still at issue, however, is whether the taxpayers, who have lived apart since 2005, are considered to be "legally separated" during 2015 for purposes of Section 59-10-136. The term "legally separated" is not defined in Utah law. However, living separately does not constitute being "legally separated." To interpret the term "legally separated" in this manner would impermissibly give no effect or meaning to the word "legally."[16]

An informational website about divorce and legal separation in Utah indicates that "[p]arties are legally separated only when a court enters a decree of separate maintenance. To obtain a decree of separate maintenance in Utah, the parties go through an action like a divorce."[17] This information appears to be

16 In *Warne v. Warne*, 275 P.3d 238, 2012 UT 13 (Utah 2012), the Utah Supreme Court ruled that "[u]nder our rules of statutory construction, we must give effect to every provision of a statute and avoid an interpretation that will render portions of a statute inoperative" (*citing Hall v. Utah State Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958). In *Hall v. Utah State Dept. of Corrections*, 24 P.3d 958, 2001 UT 34 (Utah 2001), the Court also stated that "our primary goal when construing statutes is to evince 'the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.'" (*citing Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984)). The Court further stated that "[i]n doing so, we seek 'to render all parts thereof relevant and meaningful' . . . and we accordingly avoid interpretations that will render portions of a statute superfluous or inoperative (*citing Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980), *Platts v. Parents Helping Parent*s, 947 P.2d 658, 662 (Utah 1997); *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995)).

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

consistent with Utah law concerning "separate maintenance," which are found in Title 30, Chapter 4 of the Utah Code. Utah Code Ann. §30-4-1 provides that upon one party to a marriage filing a petition for separate maintenance, the court may enter a decree of separate maintenance. The taxpayers admit, however, that a Utah court did not enter a decree of separate maintenance at any time prior to or during 2015.

However, there may other ways to be considered "legally separated" for purposes of Section 59-10-136. Utah Code Ann. §30-3-4.5 provides that one party to a marriage "may file an action for a temporary separation order without filing a petition for divorce" and that "temporary orders are valid for one year from the date of the hearing, or until one of the following occurs: (a) a petition for divorce is filed and consolidated with the petition for temporary separation; or (b) the case is dismissed." In addition, Subsection 30-3-1(3)(j) provides that one of the grounds for divorce is "when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation." As a result, the Commission believes that a married couple should also be considered "legally separated" if they obtain a temporary separation order, as permitted under Section 30-3-4.5. The taxpayers, however, admit that they did not obtain one these Utah orders either.

Based on the foregoing, the Commission has found in prior decisions that in order to be "legally separated" for purposes of Subsection 59-10-136(5)(b)(i), a Utah court must have issued a decree or order approving a petition for temporary separation or separate maintenance; or a court of a different jurisdiction must have issued a decree or order approving a similar type of petition.[18] As a result, had a STATE-1 court approved a decree or order approving a petition for temporary separation or separate maintenance or a similar petition, the Commission may have considered the taxpayers to be "legally separated" for purposes of Section 59-10-136.

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18 *See, e.g., USTC Appeal No. 17-514* (Initial Hearing Order Jan. 8, 2018); and *USTC Appeal No. 17-832* (Initial Hearing Order Oct. 31, 2018). These and other selected decisions can be reviewed in a redacted format on the Commission's website at https://tax.utah.gov/commission-office/decisions.

However, STATE-1 is a state whose laws do not expressly address "legal separation" and where separation for legal purposes appears to occur where one spouse conveys the intent to the other that he or she no longer desires to remain married, which may be conveyed in a number of ways such as: filing a divorce complaint; vacating the marital residence without an intent to return; or informing the other spouse of the end of the marriage verbally, in writing, or by actions. Neither of the taxpayers has filed a divorce complaint in STATE-1, nor has either taxpayer informed the other of the end of their marriage in writing. Instead, the taxpayers claim that they have entered into a verbal agreement that serves as their separation for legal purposes in STATE-1. Where a state does not provide for a court to issue a decree or order approving a petition for temporary separation or separate maintenance or a similar petition, the Commission is not inclined to find that an individual's verbal statement of intent to end the marriage or a verbal separation agreement is sufficient to constitute being "legally separated" for purposes of Section 59-10-136. Had one or both of the taxpayers, prior to or during 2015, filed a divorce complaint or entered into a written separation agreement in STATE-1, the Commission may have considered them to be "legally separated" for purposes of Section 59-10-136 for all or a portion of 2015. However, where the taxpayers claim that they only entered into a verbal agreement to be separated for legal purposes in STATE-1, the Commission finds that the taxpayers are not "legally separated" for purposes of Section 59-10-136.

As a result, not only did the taxpayers file a joint 2015 federal return, but they are also not "legally separated or divorced" for any portion of 2015 for purposes of Section 59-10-136. Accordingly, for purposes of determining whether each taxpayer is considered to be domiciled in Utah during the 2015 tax year, each taxpayer is considered to have a spouse throughout this year.

Subsection 59-10-136(5)(a) provides that "[i]f an individual is considered to have domicile in this state in accordance with this section, the individual's spouse is considered to have domicile in this state." Because the taxpayers admit that TAXPAYER-1 is domiciled in Utah for the 2015 tax year, the Division contends that

TAXPAYER-2 is also considered to be domiciled in Utah pursuant to Subsection 59-10-136(5)(a). However, for Subsection 59-10-136(5)(a) to apply to TAXPAYER-2, TAXPAYER-1 must be considered to have domicile in Utah "in accordance with this section" (i.e., in accordance with Section 59-10-136). As a result, the Commission must analyze the other subsections of Section 59-10-136 to determine whether the taxpayers are considered to be domiciled in Utah for the 2015 tax year at issue.[19]

B. Subsection 59-10-136(4). The taxpayers do not argue that either of them is *not* considered to be domiciled in Utah for the 2015 tax year under Subsection 59-10-136(4). 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 listed conditions are all met. TAXPAYER-1 was not absent from Utah for a 761-day or more period that included any portion of 2015. Accordingly, TAXPAYER-1 is an individual who was not absent from Utah for a 761-day or more period that included any portion of 2015, while TAXPAYER-2 is an individual whose spouse (i.e., TAXPAYER-1) was not absent from Utah for a 761-day or more period that included any portion of 2015. Accordingly, the Subsection 59-10-136(4) exception is not applicable to either taxpayer for any portion of 2015, regardless of whether the taxpayers met the other listed conditions or not.

Accordingly, the Commission must analyze whether the taxpayers *are* considered to have domicile in Utah for the 2015 tax year 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.

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19 This is consistent with other decisions in which the Commission has found that an *admission* of domicile by one spouse does not automatically result in the other spouse being domiciled in Utah, without first applying the facts to the other subsection(s) of Section 59-10-136 to see how the spouse who admitted to be domiciled in Utah would be considered to be domiciled in Utah. *See, e.g., Appeal No. 16-1458* (Findings of Fact, Conclusions of Law, and Final Decision Feb. 8, 2019).

C. Subsection 59-10-136(1). This subsection provides that an individual is considered to be domiciled in Utah if: 1) a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on their federal return is enrolled in a Utah public kindergarten, elementary, or secondary school; or 2) the individual or the individual's spouse is enrolled in a Utah institution of higher education. Neither of these circumstances applies to the taxpayers for any portion of 2015. Accordingly, under Subsection 59-10-136(1), neither taxpayer would be considered to be domiciled in Utah for any portion of the 2015 tax year.

D. Subsection 59-10-136(2)(a). This subsection provides that an individual is presumed to be domiciled in Utah if the individual *or* the individual's spouse claims a property tax residential exemption for that individual's or individual's spouse's primary residence, unless the presumption is rebutted. For the presumption to arise, two elements must exist. First, one or both of the taxpayers must have claimed the residential exemption on the Utah home. Second, the Utah home on which one or both 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 for the 2015 tax year at issue, the Subsection 59-10-136(2)(a) presumption will have arisen for both taxpayers.[20]

As to the first element, the Commission has found that TAXPAYER-1 received the residential exemption on his Utah home for the 2015 tax year. Because TAXPAYER-1 received the residential exemption on his Utah home for 2015, he is considered to have claimed the exemption on the home for this tax year. Subsection 59-2-103(2) generally provides that a Utah residential property will receive a 45% residential exemption, while Subsection 59-2-103.5(1) provides that a county may, at its option, require a property owner

20 Subsection 59-10-136(6) provides that claiming a residential exemption may not be considered in determining domicile if the home for which the exemption is claimed is the primary residence of a tenant. As a result, had the Utah home been the primary residence of a tenant during the 2015 tax year, the Subsection 59-10-136(2)(a) presumption would not have even arisen. However, the taxpayers admit that TAXPAYER-1 lived in the Utah home during the 2015 tax year. Accordingly, the Subsection 59-10-136(6) exception is not applicable for the 2015 tax year.

to file an application before the property receives the exemption. As a result, when the residential exemption was created by the Utah Legislature, this enactment generally added a claim for the exemption to the bundle of rights acquired with the purchase of residential property, unless the relevant county adds the second step of requiring formal application in order to receive the benefit of the exemption. The claim persists until the property is relinquished through the sale of the property or until the residential exemption is removed from the property (either by action of the county or the property owner).

Therefore, simply owning a residential property in a Utah county that does not require an application (which includes most Utah counties) generally asserts an enduring claim to the residential exemption. Furthermore, in those Utah counties that require an application, receiving the residential exemption after filing the application also constitutes a claim to the exemption.[21] In the instant case, it appears that TAXPAYER-1 received the residential exemption for a home that is located in a county (COUNTY) that does not typically require an application to receive the exemption. No evidence was provided to suggest otherwise. Accordingly, the first element for the Subsection 59-10-136(2)(a) presumption to arise exists for the 2015 tax year at issue.

As to the second element, for purposes of Section 59-10-136, TAXPAYER-1's Utah home is considered to be his "primary residence" during the 2015 tax year. When Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a Utah property on which an individual or an individual's spouse claims the residential exemption is considered that individual's "primary residence" unless the property owner(s) 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

21 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(2)(a) presumption would not arise. In addition, the Subsection 59-10-136(2)(a) presumption would not arise 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).

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.

No evidence was proffered to show that TAXPAYER-1 ever filed a written statement to notify COUNTY that his Utah home did not qualify for the residential exemption for any portion of the 2015 tax year. In addition, no evidence was proffered to show that TAXPAYER-1 ever filed a Utah income tax return on which he declared (on Part 7 of the return) that he no longer qualified to receive the residential exemption for the Utah home for any portion of 2015. Accordingly, pursuant to Subsection 59-2-103.5(4), TAXPAYER-1's Utah home is considered to be his "primary residence" for all of 2015. As a result, the second element for the Subsection 59-10-136(2)(a) presumption to arise also exists for this period.

Because the two elements necessary for the Subsection 59-10-136(2)(a) presumption to arise exist for the 2015 tax year, both taxpayers will be considered to be domiciled in Utah for this period unless they are able to rebut the presumption for all or a portion of this period.[22] Because Subsection 59-10-136(2)(a) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual whose actions give rise to this presumption *is* considered to have domicile in Utah, but also for there to be circumstances where an individual whose actions give rise to this presumption *is not* considered to have domicile in Utah.[23] However, the Legislature has not provided in statute what circumstances will be or will not

22 The Commission recognizes that TAXPAYER-2 did not own or live in the Utah home during 2015. However, the Subsection 59-10-136(2)(a) presumption arises for an individual if the individual *or* the individual's spouse claims the exemption for that individual's *or* individual's spouse's primary residence. TAXPAYER-2 is an individual whose spouse , claimed the residential exemption for his primary residence. As a result, the Subsection 59-10-136(2)(a) presumption has arisen for both taxpayers. In addition, where the presumption has arisen for both taxpayers, the taxpayers cannot rebut the presumption for only one of the taxpayers. Either the presumption is rebutted for both taxpayers, or the presumption is not rebutted for both taxpayers. This conclusion is supported by Subsection 59-10-136(5)(a), which provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah under Section 59-10-136.

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

be sufficient to rebut the Subsection 59-10-136(2)(a) 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.

It appears that the taxpayers are attempting to rebut the Subsection 59-10-136(2)(a) presumption for TAXPAYER-2 alone because she lived in STATE-1 and had most of her contacts with STATE-1, not Utah. The taxpayers' argument appears to rely on intent and weighing 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).

As explained earlier, married individuals who are considered to have a spouse for purposes of Section 59-10-136 cannot rebut the Subsection 59-10-136(2)(a) presumption for only one of the married individuals. Furthermore, 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.[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).[25]

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

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 the 12 domicile factors listed in Subsection 59-10-136(3)(b) (or using domicile factors found in Rule 2 and/or Rule 52 or other sources) 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).

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 tax years prior to 2012 (as set forth in Rule 2 and/or Rule 52).[26] 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 tax domicile for years prior to 2012 (when each of these factors was merely one of the many factors with which domicile was determined).[27]

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26 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).

27 Almost all of the factors that were given greater import in Subsections 59-10-136(1) and (2) are 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.

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). 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 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.[28]

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 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.

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.[29] For example, where the Subsection 59-10-136(2)(a) presumption has arisen in regards to claiming the residential

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28 For example, 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 This conclusion is consistent with prior Commission decisions. *See, e.g., USTC Appeal No. 18-1841* (Initial Hearing Order Jan. 13, 2020).

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.[30] In the instant case, no evidence was proffered to suggest that TAXPAYER-1 has ever asked COUNTY to remove the residential exemption from the Utah home.

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 county directly).[31] No evidence, however, was provided to suggest that TAXPAYER-1 ever declared on a Utah return that he was a Utah residential property owner who no longer qualified to receive the residential exemption from property taxation for his primary residence.

The Commission has also 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).[32] No evidence was proffered to show that TAXPAYER-1 had his Utah home listed for sale at any time during the 2015 tax year. Furthermore, even if TAXPAYER-1 listed the Utah home for sale during 2015, he lived in the Utah home throughout 2015.

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 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).[33] Again, no evidence was proffered to show that TAXPAYER-1 had his Utah

30 *See, e.g., USTC Appeal No. 17-1589* (Initial Hearing Order Aug. 8, 2018).
31 *See, e.g., USTC Appeal No. 17-812* (Initial Hearing Order Mar. 13, 2018).
32 *See, e.g., USTC Appeal No. 15-1332* (Initial Hearing Order Jun. 27, 2016).
33 *See, e.g., USTC Appeal No. 17-758* (Initial Hearing Order Jan. 26, 2018).

home listed for rent during the 2015 tax year. Furthermore, even if TAXPAYER-1 listed the Utah home for rent during 2015, he lived in the Utah home throughout 2015.

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 certificate of occupancy, if the home would be used as a primary residence upon its completion.[34] These circumstances, however, do not apply to the Utah home during 2015.

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.[35] 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 both of them for any portion of the 2015 tax year. Accordingly, given the information provided at the Initial Hearing, both taxpayers are considered to be domiciled in Utah for all of 2015 under Subsection 59-10-136(2)(a).

Because the Commission has found that both taxpayers are considered to be domiciled in Utah for all of 2015 under Subsection 59-10-136(2)(a), the Commission need not analyze the remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(b), (2)(c), and (3)) to determine whether the taxpayers are considered to be domiciled in Utah for this tax year. However, it may prove useful to make some observations about these remaining subsections, especially Subsection 59-10-136(2)(b).

E. Subsection 59-10-136(2)(b). This subsection provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah. For reasons discussed earlier, the Commission has found that TAXPAYER-1 was registered to

34 *See, e.g., USTC Appeal No. 17-1589.*
35 *See, e.g., USTC Appeal No. 15-1582* (Initial Hearing Order Aug. 26, 2016).

vote in Utah for all of the 2015 tax year. Accordingly, under Subsection 59-10-136(2)(b), both taxpayers are also considered to be domiciled in Utah for all of 2015 under Subsection 59-10-136(2)(b), unless they are able to rebut this specific presumption.[36]

For reasons explained earlier in regards to the Subsection 59-10-136(2)(a) presumption, an individual also cannot rebut the Subsection 59-10-136(2)(b) 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 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). 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, 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 in the state to which they moved relatively soon after moving from Utah to that other state.[37] Because TAXPAYER-1 has continued to live in Utah since 2005, these circumstances do not apply to him for the 2015 tax year. Furthermore, no evidence was proffered to suggest that TAXPAYER-1 was registered to vote somewhere other than Utah during the 2015 tax year at issue.

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

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36 The Commission recognizes that TAXPAYER-2 was registered to vote in STATE-1, not Utah, during 2015. However, for reasons explained earlier, the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers because each taxpayer is considered to have a spouse for purposes of Section 59-10-136 and because TAXPAYER-1 was registered to vote in Utah during 2015. In addition, where the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers, it cannot be rebutted for only one of the taxpayers. Under these circumstances, the Subsection 59-10-136(2)(b) presumption will either be rebutted for both taxpayers or for neither taxpayer.

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

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.[38] No evidence was provided to show that TAXPAYER-1 asked for his name to be removed from the Utah voter registry prior to or during the 2015 tax year.

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.[39] The taxpayers, however, have not shown that Utah voting laws provided for TAXPAYER-1's name to be removed from the Utah voter registry at any time prior to or during the 2015 tax year.

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.[40] These circumstances, however, do not apply because, again, TAXPAYER-1 has continued to live in Utah since 2005.

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 period 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).[41] As a result, even if the taxpayers were to show that TAXPAYER-1 did not vote in Utah during the 2015 tax year, this would be insufficient to rebut the Subsection 59-10-136(2)(b) presumption for the 2015 tax year for which the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers.

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

38 *See, e.g., USTC Appeal No. 18-793* (Initial Hearing Order Feb. 22, 2019).
39 *See, e.g., USTC Appeal No. 18-539* (Initial Hearing Order Apr. 30, 2019).
40 *See, e.g., USTC Appeal No. 17-1552* (Initial Hearing Order Feb. 7, 2019).

proffered sufficient arguments to rebut the Subsection 59-10-136(2)(b) presumption for any portion of 2015. As a result, given the information proffered at the Initial Hearing, both taxpayers are also considered to be domiciled in Utah for all of the 2015 tax year under Subsection 59-10-136(2)(b). Because both taxpayers are considered to be domiciled in Utah for all of 2015 under both Subsection 59-10-136(2)(a) and Subsection 59-10-136(2)(b), the Commission will make only cursory observations about the two remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(c) and (3)).

F. 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 return, unless the presumption is rebutted. On his 2015 Utah return, TAXPAYER-1 asserted a Utah residency for all of the 2015 tax year (he did not include a Form TC-40B asserting to be a Utah part-year resident or nonresident). As a result, under Subsection 59-10-136(2)(c), both taxpayers are presumed to be domiciled in Utah for the entirety of 2015, unless they are able to rebut the presumption.[42]

G. Subsection 59-10-136(3). 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 domiciled in Utah for all of 2015 under Subsection 59-10-136(2)(a) and Subsection 59-10-136(2)(b), Subsection 59-10-136(3) has no applicability to this case.

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

42 Although TAXPAYER-2 did not assert 2015 tax year residency on a Utah return, her spouse did. Accordingly, for reasons already discussed, the Subsection 59-10-136(2)(c) presumption would arise for both taxpayers for all of the 2015 tax year.

III. Conclusion.

For reasons discussed above, both taxpayers are considered to be domiciled in Utah for all of the 2015 tax year. Accordingly, pursuant to Subsection 59-10-103(1)(q)(i)(A), both taxpayers are Utah resident individuals for all of the 2015 tax year. As a result, the Commission should sustain the Division's revised assessment, as reflected in the Second Statutory Notice, in its entirety.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's revised assessment, as reflected in the Second Statutory Notice, in its entirety. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

or emailed to:

taxappeals@utah.gov

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

DATED this _____ day of _____, 2020.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.