19-1221
TAX TYPE: INCOME TAX
TAX YEAR: 2014
DATE SIGNED: 11/14/2020
COMMISSIONERS: J. VALENTINE, R. ROCKWELL, M. CRAGUN, 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. 19-1221 Account No. ##### Tax Type: Income Tax Tax Year: 2014 Judge: Marshall

Presiding:
John L. Valentine, Commission Chair
Jan Marshall, Administrative Law Judge

Appearances:
For Petitioners: REPRESENTATIVE-1 FOR TAXPAYERS, REPRESENTATIVE-2 FOR TAXPAYERS
TAXPAYER-1
TAXPAYER-2
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Income Tax Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on June 9, 2020, in accordance with Utah Code Ann. §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The Respondent ("Division") issued a Notice of Deficiency and Audit Change to the Petitioners ("Taxpayers") on April 11, 2017 for the 2014 tax year. The audit assessed tax of $$$$$ and interest in the amount of $$$$$ through May 11, 2017. (Exhibit R-1).
2. Taxpayers did not timely file an appeal in response to the April 11, 2017 statutory notice. However, the Taxpayers subsequently paid the audit tax and filed an amended 2014 return

requesting a refund within two years of the payment date. The Division denied the claim for refund as the amended return was not accepted. (Pleadings).

3. Taxpayers filed a married filing joint federal return, and a Utah non-resident return for the 2014 tax year. The Division's audit changed the return type of the Utah individual income tax return from a non-resident to a full-year resident. The Division reduced the Utah adjusted gross income reported by the Taxpayers from $$$$$ to $0, and determined the Taxpayers' tax liability on their total adjusted gross income of $$$$$. (Exhibit R-1).
4. It is the Division's position that the Taxpayers were domiciled in Utah for the 2014 tax year. It is the Taxpayers' position that TAXPAYER-1 was a resident of STATE-1 and that his income should not be subject to Utah tax.
5. The Taxpayers both lived in Utah prior to the audit period in question. The Taxpayers maintain that TAXPAYER-1 changed his residency to STATE-1 in 2010.
6. TAXPAYER-1 worked FOR COMPANY-1. He started working for COMPANY-1 in 2001, and continued working for COMPANY-1 through the audit period.
7. Taxpayers asserted that TAXPAYER-1 was based out of CITY-1 for work during the audit period. However, TAXPAYER-1 testified at the hearing that in 2014, most of his flights originated in the State of Utah. He stated that most of those flights would leave Utah and that he traveled within the continental United States, with some flights to FOREIGN COUNTRY-1 and FOREIGN COUNTRY-2.
8. TAXPAYER-1 estimated that less than 25% of his flying was in Utah in any given year. It is not clear if the 25% is of TAXPAYER-1's total flight time or his scheduled flight time.
9. The Taxpayers included with the copy of their 2014 federal and Utah individual income tax returns a document that purports to list the "2014 overnights" for TAXPAYER-1. The list included the airport code, the city, and the number of nights in each city, with a total number of overnights being #####. The list includes ##### overnights in CITY-1, STATE-1 and a single overnight in CITY-2, Utah. (Exhibit P-1).
10. The Taxpayers provided documents showing that TAXPAYER-1's Medical Certificates indicating that he has met the medical standards prescribed the Federal Aviation Regulations, identify his address as the CITY-1 home from DATE, 2010 through DATE, 2017. (Exhibit P-1).
11. The Taxpayers purchased a home in CITY-1 in DATE, 2010. The home was ##### square feet, and had a three-car garage. The CITY-1 home received a property tax abatement from the State of STATE-1. Taxpayers assert this was TAXPAYER-1's primary residence during the audit period. (Exhibit R-1).

12. Taxpayers provided documents showing utility service, a letter from the homeowners association, and homeowners insurance related to the CITY-1 property. (Exhibit P-1).
13. TAXPAYER-1 was issued a STATE-1 driver license on DATE, 2010. (Exhibit P-1).
14. The Taxpayers assert that TAXPAYER-1 was registered to vote in STATE-1 in 2014, but provided no supporting documentation. The information provided by the Division shows that TAXPAYER-1 was not registered to vote in Utah in 2014. (Exhibit R-1).
15. The Taxpayers owned a home located in CITY-3, Utah from DATE 2003 through DATE, 2016. The home had ##### square feet, ##### bedrooms, ##### bathrooms, and a two-car garage. (Exhibit R-1).
16. The CITY-3 home received the primary residential exemption in 2014. (Exhibit R-1).
17. Both of the Taxpayers resided in the CITY-3 home prior to TAXPAYER-1's move to STATE-1. TAXPAYER-2 continued to reside in the CITY-3 home until 2016, when she moved to STATE-1. (Exhibit R-1).
18. TAXPAYER-2 worked as an office manager for COMPANY-2 in CITY-4 from DATE 2010 through DATE 2016. TAXPAYER-2 testified that she did not move to STATE-1 with TAXPAYER-1 in 2010 because she could not find a job that paid as well in STATE-1, and she was building up her 401(k). TAXPAYER-2 stated that she worked Monday through Thursday, and would travel to STATE-1 to be with TAXPAYER-1 nearly every weekend.
19. The Taxpayers have no children, and did not claim any dependents on their 2014 federal income tax return. (Exhibits P-1 and R-1).
20. Neither of the Taxpayers attended a Utah institution of higher education during in 2014. (Exhibits P-1 and R-1).
21. TAXPAYER-2 registered to vote in Utah on DATE, 2004, and remained registered to vote in Utah throughout the audit period. Her voting history shows that she voted in Utah in the 2008, 2010, 2012, and 2014 general elections. (Exhibit R-1).
22. The Taxpayers owned a VEHICLE-1 that was registered in Utah until 2016. It was used by TAXPAYER-2 during the audit period. The Taxpayers also owned a VEHICLE-2 that was registered in STATE-1 during the audit period. It was used by TAXPAYER-1, until he purchased a VEHICLE-3 in STATE-1. The VEHICLE-3 was then used by TAXPAYER-1 in STATE-1. (Exhibit R-1).
23. TAXPAYER-2's mail, and mail related to the CITY-3 home was sent to the CITY-3, Utah address during 2014. TAXPAYER-1's mail, and mail related to the STATE-1 property, was sent to the CITY-1 address. (Exhibit P-1).

24. TAXPAYER-2's 2014 W-2 was sent to the CITY-3, Utah address, and sources all of her wages to Utah. TAXPAYER-1's 2014 W-2 was sent to the CITY-1 address, and does not source wages to any state. (Exhibit P-1 and R-1).
25. The Taxpayers used the CITY-1 address on their federal and Utah individual income tax returns for the 2014 tax year. The Taxpayers also used the CITY-1 address on their 2012 and 2013 tax returns. (Exhibits P-1 and R-1).

LEGAL ARGUMENTS

The Taxpayers' representative stated that 49 U.S.C. §40116(f)(2)(A) dictates that TAXPAYER-1's wages can be taxed only in his state of residence. He argued that TAXPAYER-1 is considered a resident of STATE-1 under STATE-1 Revised Statute 10.155, which provides,

> Unless otherwise provided by specific statute, the legal residence of a person with reference to the person's right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, is that place where the person has been physically present within the State or county, as the case may be, during all of the period for which residence is claimed by the person. Should any person absent himself or herself from the jurisdiction of his or her residence with the intention in good faith to return without delay and continue his or her residence, the time of such absence is not considered in determining the fact of residence.

The Taxpayers' representative argued that TAXPAYER-1 only left STATE-1 for work or a limited number of other trips, but always returned to STATE-1. He stated that beginning in 2010 and throughout the 2014 tax year, TAXPAYER-1 demonstrated an intent to remain a STATE-1 resident. He argued that if STATE-1 is entitled to tax TAXPAYER-1's income under 49 U.S.C. §40116, that hinders Utah's ability to do so. The Taxpayers' representative argued that the preemption doctrine and the supremacy clause require the application of 49 U.S.C. §40116.

The Taxpayers' representative stated that TAXPAYER-1 is considered an employee under 49 U.S.C. §40116 (f)(2) because he had regularly assigned duties on an aircraft in at least two states. He argued that as a result, TAXPAYER-1 is subject to the income tax laws only of a state referenced in 2(a) or (b). The Taxpayers' representative noted that TAXPAYER-1's flight time was spread over several states, and there was not more than 50% of that time spent in any one state. Because TAXPAYER-1 did not earn more than 50% of his pay in one state, it is the Taxpayers' position that TAXPAYER-1 can only be taxed by his state of residence, which they contend is STATE-1. The Taxpayers' representative argued that Utah allowing a credit for taxes paid to another state is fundamentally unfair in this case. He noted that although STATE-1 does not have a state income tax, this does not mean that TAXPAYER-1 is not paying other taxes to the State of STATE-1.

The Taxpayers' representative argued that Subsection (2)(a) of Utah Code Ann. §59-10-136 is rebutted with regard to TAXPAYER-1. The Taxpayers acknowledged that both TAXPAYER-1 and

TAXPAYER-2 owned the CITY-3 home. However, the Taxpayers' representative argued that TAXPAYER-2 was entitled to the primary residential exemption as a resident of Utah. He argued that in order for both TAXPAYER-1 and TAXPAYER-2 to avoid being considered residents of Utah because of the primary residential exemption on the CITY-3 home, the Taxpayers only had three options. The first option proposed by the Taxpayers' representative was for the TAXPAYERS to get divorced and distribute the property so that only TAXPAYER-2 owned the CITY-3 home individually. The second option proposed was that TAXPAYER-1 could quit his job so that he had no income to be taxed by the State of Utah. The third option proposed by the Taxpayers' representative was that TAXPAYER-1 could transfer his ownership interest in the CITY-3 home to TAXPAYER-2. However, the Taxpayers' representative stated that could have adverse financial consequences for the Taxpayers. The Taxpayers' representative noted that in Appeal No. 18-1717, the Commission found that the Division could not rely upon Utah Code Ann. §59-10-136(5)(a) alone in determining whether someone is domiciled in Utah.

The Taxpayers' representative stated that a review of the factors in Subsection (3) of Utah Code Ann. §59-10-136 supports a finding that TAXPAYER-1 is not a resident of Utah. He noted that STATE-1 also uses many of the same factors, and they indicate that TAXPAYER-1 is a resident of STATE-1.

The Taxpayers' representative argued that as applied, Utah Code Ann. §59-10-136 is an unconstitutional burden to interstate commerce. He acknowledged the Commission is not able to rule on the constitutionality of the statute, but wanted to preserve the issue for any further appeals. The Taxpayers' representative cited to *North Carolina Department of Revenue v. Kimberley Rice Kaester 1992 Family Trust*, 139 S. Ct. 2213, 2219 (2019) and *Wisconsin v. JC Penney*, 311 U.S. 435, where the Supreme Court found that the "Due Process Clause limits States to imposing only taxes that bear fiscal relation to protection, opportunities and benefits given by the state." He argued that the commerce clause demands that there be some minimum connection between a state and the person or property that it seeks to tax. The Taxpayers' representative argued that as applied to the Taxpayer, the Division's application of Utah Code Ann. §59-10-136 runs afoul of that requirement. He argued that TAXPAYER-1 does not receive any benefits from the State of Utah. Further, the Taxpayers' representative argued that whatever protections the CITY-3 home received, TAXPAYER-2 was entitled to as a taxpaying resident of Utah.

The Division's representative argued that both of the Taxpayers are domiciled in Utah under Utah Code Ann. §59-10-136 under three subsections. First, TAXPAYER-1 was a co-owner of the CITY-3 home that received the primary residential exemption. Second, TAXPAYER-2 was registered to vote in Utah, and did in fact vote in Utah. Third, Utah Code Ann. §59-10-136(5)(a) provides that if an individual's spouse is domiciled in Utah, that individual is domiciled in Utah.[1] The Division's

[1] The Commission notes that Subsection (5)(a) of Utah Code Ann. §59-10-136 alone is not sufficient to establish an individual's domicile in Utah. *See* Appeal No. 18-1717.

representative stated that the Commission has ruled in prior decisions that in order to rebut a presumption of domicile, the circumstances have to be related to the specific presumption, not a totality of the circumstances, and does not believe the Taxpayers have rebutted the presumption of domicile in this case.[2]

The Division's representative argued 49 U.S.C. §40116 does not preempt the application of Utah Code Ann. §59-10-136. He stated that it is the Division's position that an air carrier employee could be subject to tax in more than one state, even under the federal law. The Division's representative stated that generally, a state has to give a credit for taxes paid to another state to not run afoul of the constitutional principles. He stated that Utah does allow for such a credit; however, because STATE-1 does not have a state income tax, there was no tax paid for which the Division could give a credit.

The Division's representative stated that the use of the term "residence" in 49 U.S.C. §40116 is a broad term. He argued that an individual could be a resident in more than one state, and that is the Division's contention in this case. The Division's representative stated that under 49 U.S.C. §40116 an air carrier employee can be taxed in either the employee's state of residence or the state where the individual earns 50% or more of their pay.

The parties believe the question of whether 49 U.S.C. §40116 preempts Utah Code Ann. §59-10-136 is one of first impression before the Commission. The Division's representative noted that there have been prior cases involving a question of domicile for an airline pilot. However, he could not recall this specific statute being raised.

APPLICABLE LAW

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

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

> (i) subject to Section 59-10-1404.5, for a resident individual, means the resident individual's adjusted gross income after making the:
> (A) additions and subtractions required by Section 59-10-114; and
> (B) adjustments required by Section 59-10-115…

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

> (i) "resident individual" means:
> (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
> (B) an individual who is not domiciled in this state but:

[2] The Division's representative cited to Appeal Nos. 16-316, 16-1243, 16-1257, 16-1791, and 14-30. Prior Commission decisions are available online at tax.utah.gov/commission-office/decisions.

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

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

(1) (a) An individual is considered to have domicile in this state if:
(i) except as provided in Subsection (1)(b), a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on the individual's or individual's spouse's federal individual income tax return is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; or
(ii) the individual or the individual's spouse is a resident student in accordance with Section 53B-8-102 who is enrolled in an institution of higher education described in Section 53B-2-101 in this state.
(b) The determination of whether an individual is considered to have domicile in this state may not be determined in accordance with Subsection (1)(a)(i) if the individual:
(i) is the noncustodial parent of a dependent:
(A) with respect to whom the individual claims a personal exemption on the individual's federal individual income tax return; and
(B) who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state; and
(ii) is divorced from the custodial parent of the dependent described in Subsection (1)(b)(i).
(2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
(a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence;
(b) the individual or the individual's spouse is registered to vote in this state in accordance with Title 20A, Chapter 2, Voter Registration; or
(c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.
(3) (a) Subject to Subsection (3)(b), if the requirements of Subsection (1) or (2) are not met for an individual to be considered to have domicile in this state, the individual is considered to have domicile in this state if:
(i) the individual or the individual's spouse has a permanent home in this state to which the individual or the individual's spouse intends to return after being absent; and
(ii) the individual or the individual's spouse has voluntarily fixed the individual's or the individual's spouse's habitation in this state, not for a special or temporary purpose, but with the intent of making a permanent home.
(b) The determination of whether an individual is considered to have domicile in this state under Subsection (3)(a) shall be based on the preponderance of the evidence, taking into consideration the totality of the following facts and circumstances:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) claim a personal exemption on the individual's or individual's spouse's federal individual income tax return with respect to a dependent who is enrolled in a public kindergarten, public elementary school, or public secondary school in this state, unless the individual is an individual described in Subsection (1)(b);

(C) are resident students in accordance with Section 53B-8-102 who are enrolled in an institution of higher education described in Section 53B-2-101 in this state;

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

(E) assert that this state is the individual's or the individual's spouse's tax home for federal individual income tax purposes.

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

(c) For purposes of Subsection (4)(a), an absence from the state:

(i) begins on the later of the date:

(A) the individual leaves this state; or

(B) the individual's spouse leaves this state; and

(ii) ends on the date the individual or the individual's spouse returns to this state if the individual or the individual's spouse remains in this state for more than 30 days in a calendar year.

(d) An individual shall file an individual income tax return or amended individual income tax return under this chapter and pay any applicable interest imposed under Section 59-1-402 if:

(i) the individual did not file an individual income tax return or amended individual income tax return under this chapter based on the individual's belief that the individual has met the qualifications of Subsection (4)(a) to not be considered to have domicile in this state; and

(ii) the individual or the individual's spouse fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state.

(e) (i) Except as provided in Subsection (4)(e)(ii), an individual that files an individual income tax return or amended individual income tax return under Subsection (4)(d) shall pay any applicable penalty imposed under Section 59-1-401.

(ii) The commission shall waive the penalties under Subsections 59-1-401(2), (3), and (5) if an individual who is required by Subsection (4)(d) to file an individual income tax return or amended individual income tax return under this chapter:

(A) files the individual income tax return or amended individual income tax return within 105 days after the individual fails to meet a qualification of Subsection (4)(a) to not be considered to have domicile in this state; and

(B) within the 105-day period described in Subsection (4)(e)(ii)(A), pays in full the tax due on the return, any interest imposed under Section 59-1-402, and any applicable penalty imposed under Section 59-1-401, except for a penalty under Subsection 59-1-401(2), (3), or (5).

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

in this state.

(b) For purposes of this section, an individual is not considered to have a spouse if:
  (i) the individual is legally separated or divorced from the spouse; or
  (ii) the individual and the individual's spouse claim married filing separately filing status for purposes of filing a federal individual income tax return for the taxable year.

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

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

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

(4) Except as provided in Subsection (5), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, the property owner shall:
  (a) file a written statement with the county board of equalization of the county in which the property is located:
    (i) on a form provided by the county board of equalization; and
    (ii) notifying the county board of equalization that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence; and
  (b) declare on the property owner's individual income tax return under Chapter 10, Individual Income Tax Act, for the taxable year for which the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for the property owner's primary residence.

(5) A property owner is not required to file a written statement or make the declaration described in Subsection (4) if the property owner:
  (a) changes primary residences;
  (b) qualified to receive a residential exemption authorized under Section 59-2-103 for the residence that was the property owner's former primary residence; and
  (c) qualifies to receive a residential exemption authorized under Section 59-2-103 for the residence that is the property owner's current primary residence.

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

(1) The county clerk may not remove a voter's name from the official register because the voter has failed to vote in an election.

(2) The county clerk shall remove a voter's name from the official register if:

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

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

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

[3] Effective May 9, 2017, Subsection 20A-2-305(2)(e) was deleted from the statute. However, it is in the 2014 version of this statute that is pertinent to this appeal.

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

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

_____

Street City County State Zip

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

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

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

_____

Signature of Voter"

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

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

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

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

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

(ii) the voter has died.

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

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

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

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

49 U.S. Code §40116(f) addresses state taxation on the pay of air carrier employees, as follows:

Pay of Air Carrier Employees.—

(1) In this subsection—
  (A) "pay" means money received by an employee for services.
  (B) "State" means a State of the United States, the District of Columbia, and a territory or possession of the United States.
  (C) an employee is deemed to have earned 50 percent of the employee's pay in a State or political subdivision of a State in which the scheduled flight time of the employee in the State or subdivision is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.
(2) The pay of an employee of an air carrier having regularly assigned duties on aircraft in at least 2 States is subject to the income tax laws of only the following:
  (A) the State or political subdivision of the State that is the residence of the employee.
  (B) the State or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier.
(3) Compensation paid by an air carrier to an employee described in subsection (a) in connection with such employee's authorized leave or other authorized absence from regular duties on the carrier's aircraft in order to perform services on behalf of the employee's airline union shall be subject to the income tax laws of only the following:
  (A) The State or political subdivision of the State that is the residence of the employee.
  (B) The State or political subdivision of the State in which the employee's scheduled flight time would have been more than 50 percent of the employee's total scheduled flight time for the calendar year had the employee been engaged full time in the performance of regularly assigned duties on the carrier's aircraft.

"Air carrier" is defined in 49 USC §40102(a)(2), as follows:

"air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

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

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

CONCLUSIONS OF LAW

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

B. In this matter, the Taxpayers have argued that Utah Code Ann. §59-10-136 is unconstitutional. As noted by the Utah Supreme Court in *Nebeker v. Utah State Tax Commission*, 2001 UT 74, ¶15 "'[I]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments.' (citing *State Tax Commission v. Wright*, 596 P.2d 34 (Utah 1979)". *See* also *Steiner v. Utah State Tax Comm'n*, 2019 UT 47, ¶11, which noted, "[t]he Commission lacked jurisdiction to hear the constitutional claims and thus declined to address them."

C. The Taxpayers have argued that 49 U.S.C. §40116 preempts the application of Utah Code Ann. §59-10-136. The United States Constitution provides that federal laws "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As a result, federal laws will preempt state law under some circumstances. Preemption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field `as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).[4] See *Cippollone*, 505, U.S. at 516. Further, a federal law and a state system of regulation should be read in tandem, particularly in cases where the state law or regulation at issue touches on traditional areas of state sovereignty to avoid a finding of preemption. See *California v. ARC Am. Corp.*, 490 U.S. 93 (1993) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).

In relevant part, 49 U.S.C. §40116(f)(2) provides that the pay of air carrier employees is subject to taxation by only two states, the state that is the residence of the employee or the state in which the employee earns more than 50 percent of the pay received by the employee. 49 USC §40102(a)(2) provides "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. TAXPAYER-1's employer, COMPANY-1, is presumed to be an "air carrier" for purposes of analysis in this case.

[4] Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230

The Taxpayers have argued that TAXPAYER-1 did not earn more than 50% of his pay in one state. 49 U.S. Code §40116(f)(1)(C) provides:

> an employee is deemed to have earned 50 percent of the employee's pay in a State or political subdivision of a State in which the scheduled flight time of the employee in the State or subdivision is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.

In support of their position, the Taxpayers provided a document that purports to list the "2014 overnights" for TAXPAYER-1. The list includes the airport code, the city, and the number of nights in each city, with a total of ##### overnights. However, the list provided by the Taxpayers does not show TAXPAYER-1's scheduled flight time. TAXPAYER-1 testified at the hearing that most of his flights originated in the State of Utah. While TAXPAYER-1 estimated that 25% of his flying occurred in Utah, it is not clear whether that is scheduled flight time, or total flight time. Additionally, it is only an estimate, there was no evidence presented that would allow the Commission to make a determination as to whether 50% of TAXPAYER-1's scheduled flight time occurred in a single state.

The Taxpayers have argued that TAXPAYER-1's "residence" is STATE-1, and thus, his income could only be taxed in STATE-1 in accordance with 49 U.S.C. §40116(f)(2). "Residence" is not defined in 49 U.S.C. §40116. Absent guidance in the federal law, the Commission looks to the Utah Code to determine "residence." For purposes of Utah individual income tax during the audit period, Utah Code Ann. §59-10-103(1)(q)(i) defined a "resident individual" to be "(A) an individual who 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." It was the Division's position that the Taxpayers were Utah "resident individuals" for the 2014 tax year under Subsection 59-10-103(1)(q)(i)(A), because they were domiciled in Utah during this period.

The Legislature enacted domicile legislation that became effective beginning with the 2012 tax year, and was in effect for the 2014 audit year at issue. Utah Code Ann. §59-10-136 addresses when an individual is considered to have domicile in Utah. It contains four subsections addressing when a taxpayer is considered to have domicile in Utah (Subsections (1), (2), (3), and (5)) and a fifth subsection addressing when a taxpayer is not considered to have domicile in Utah (Subsection (4)).

D. The Taxpayers are each other's spouse for the year at issue. Subsection (5)(b) provides that an individual is not considered to have a spouse if the individual is legally separated or divorced from the spouse, or the individual and individual's spouse claim married filing separate filing status for purposes of filing a federal individual income tax return for the year in question. The Taxpayers filed a 2014 federal return with a married filing joint status. The Taxpayers have not argued or presented any evidence to show that they were legally separated or divorced during the audit period. Thus, for

the 2014 tax year, each of them is considered to have a spouse for purposes of Utah Code Ann. §59-10-136. As noted previously, Subsection (5)(a) does not provide independent grounds for finding that an individual is domiciled in Utah.

E. Subsection (4) of Utah Code Ann. §59-10-136 provides that an individual is not considered to have domicile in the State of Utah if certain qualifications are met. 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, and if a number of other listed conditions are met. The Taxpayers do not meet the qualifications of Subsection (4) because TAXPAYER-2 was not absent from Utah for at least 761 days that included 2014.

F. The Taxpayers are not domiciled in Utah under the provisions of Utah Code Ann. §59-10-136(1). If a dependent claimed on the individual's or individual's spouse's federal income tax return is enrolled in a Utah public kindergarten, elementary, or secondary school, the individual is considered domiciled in Utah. The Taxpayers claimed no dependents on their 2014 federal income tax return. Additionally, if an individual or individual's spouse is a resident student enrolled in an institution of higher education in Utah, the individual is considered domiciled in Utah. The Taxpayers asserted neither of them was enrolled as a resident student in a Utah institution of higher education.

G. The Taxpayers are presumed domiciled in Utah because the CITY-3 home received the primary residential property tax exemption for the 2014 tax year. Utah Code Ann. §59-10-136(2)(a) provides as follows:

> (2) There is a rebuttable presumption that an individual is considered to have domicile in this state if:
> (a) the individual or the individual's spouse claims a residential exemption in accordance with Chapter 2, Property Tax Act, for that individual's or individual's spouse's primary residence…

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

does not require an application to receive the primary residential exemption.[5] The presumption of domicile under Utah Code Ann. §59-10-136(2)(a) arises for both Taxpayers as the CITY-3 home received the primary residential exemption for the 2014 tax year.

A Utah property on which an individual or an individual's spouse claims the residential exemption is considered their "primary residence" unless one or both of the property owners take certain affirmative steps. First, the property owner must file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence. Second, the property owner must declare on their Utah individual income tax return for the taxable year that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence. The Taxpayers did not do so on their Utah individual income tax return for the 2014 tax year. The Taxpayers are both presumed domiciled in Utah under Utah Code Ann. §59-10-136(2)(a) because neither of them had asked the county to remove this exemption from the CITY-3 home and the Taxpayers had not checked the proper box on Part 7 of their Utah individual income tax return to indicate they were no longer qualified to receive this property tax exemption.

The Legislature did not provide what circumstances are sufficient to rebut the presumption in Subsection (2)(a), leaving it to the Commission to determine which circumstances are sufficient or not sufficient to rebut the presumption. The Commission has held in prior cases that taxpayers failed to rebut the presumption of domicile even though they were unaware that they were receiving the primary residential exemption.[6] Likewise, the Commission has previously found that retroactively removing the primary residential exemption and paying the difference in property tax is insufficient to rebut the presumption of domicile.[7] The Commission has found that the Subsection (2)(a) presumption was rebutted where the taxpayers had notified the county on their application that they were only claiming the residential exemption for a period of two years, but the County failed to remove the exemption.[8] The Commission has also found that the Subsection (2)(a) presumption was rebutted where an individual whose home was receiving the residential exemption disclosed on their Utah income tax return that the home no longer qualified for the exemption (even if the individual did not contact the county directly).[9] In addition, the Commission has found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home is listed for sale, but only if the

[5] In a county that requires an application, receiving the primary residential exemption without filing an application does not constitute a claim to the exemption.
[6] *See* Appeal nos. 14-30 and 15-720.
[7] *See* Appeal nos. 15-1582 and 17-1787.
[8] *See* Appeal No. 19-1218.
[9] S*ee* Appeal No. 17-812.

home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for sale).[10][11] The Taxpayers' representative in this case argued that in order for both TAXPAYER-1 and TAXPAYER-2 to avoid being considered residents of Utah because of the primary residential exemption on the CITY-3 home, the Taxpayers only had three options. The first option proposed by the Taxpayers' representative was for the TAXPAYERS to get divorced and distribute the property so that only TAXPAYER-2 owned the CITY-3 home individually. The second option proposed was that TAXPAYER-1 could quit his job so that he had no income to be taxed by the State of Utah. The third option proposed by the Taxpayers' representative was that TAXPAYER-1 could transfer his ownership interest in the CITY-3 home to TAXPAYER-2. The Commission is not persuaded by this argument and notes that the Taxpayers could have avoided the situation by filing separate federal income tax returns, or not claiming the primary residential exemption on the CITY-3 home. The Taxpayers have not provided any information to rebut the presumption of domicile created under this Subsection, and thus are domiciled in Utah under Utah Code Ann. §59-10-136(2)(a) for the 2014 tax year.

H. The Taxpayers are presumed domiciled in Utah because TAXPAYER-2 was registered to vote in Utah in 2014. Utah Code Ann. §59-10-136(2)(b) provides as follows:

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

TAXPAYER-2 was registered to vote in Utah for all of 2014. Her voter registration in Utah creates a rebuttable presumption of domicile. The Tax Commission has considered what rebuts and what does not rebut the Subsection (2)(b) presumption of Utah domicile in many prior appeal decisions. The Commission has found that an individual cannot rebut the Subsection (2)(b) presumption by showing that they did not vote in Utah during the tax year at issue. Factors found to rebut the presumption include a showing that the individual registered to vote in the state to which they moved relatively soon after moving there. The Commission has also found that the Subsection (2)(b) presumption can be rebutted if the individual who is registered to vote in Utah requested for their name to be removed from the Utah voter registry and the local county clerk or other official who received the request did not remove the individual's name from the registry. In addition, the Commission found the presumption can be rebutted from the date that Utah voting laws provide for an individual's name to be removed from the Utah voter registry and a local county clerk does not immediately remove their

[10] S*ee* Appeal No. 15-1332.
[11] The Commission notes that it may recognize additional grounds for rebuttal in future cases.

name from the registry.[12] Because Utah Code Ann. §59-10-136(2)(b) provides that there is a presumption of domicile in Utah if the individual, or the individual's spouse is registered to vote in Utah, both TAXPAYER-1 and TAXPAYER-2 are presumed domiciled in Utah for all of 2014 because TAXPAYER-2 was registered to vote in Utah. The Taxpayers have not rebutted the presumption of domicile based on any of the above-mentioned circumstances.

I. The Taxpayers are not presumed to be domiciled in Utah under Utah Code Ann. §59-10-136(2)(c) because they filed a non-resident Utah individual income tax return for the 2014 tax year. Utah Code Ann. §59-10-136(2)(c) provides as follows:

> There is a rebuttable presumption that an individual is considered to have domicile in this state if:
> (c) the individual or the individual's spouse asserts residency in this state for purposes of filing an individual income tax return under this chapter, including asserting that the individual or the individual's spouse is a part-year resident of this state for the portion of the taxable year for which the individual or the individual's spouse is a resident of this state.

J. The factors found in Utah Code Ann. §59-10-136(3) are not applicable in this case. 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 factors listed in Utah Code Ann. §59-10-136(3)(b). However, the factors in Subsection (3)(b) are only applicable if the requirements of Utah Code Ann. §59-10-136(1) or (2) are not met. Because the Commission has already found that the Taxpayers are considered to be domiciled in Utah for all of 2014 under Utah Code Ann. §59-10-136(2)(a) and (2)(b), Subsection (3) has no applicability to this case.

The Commission notes that the Taxpayers have argued that TAXPAYER-1 is a resident of STATE-1, under both the STATE-1 statute and under a more traditional domicile test. The Utah Legislature abandoned the traditional notions of domicile when the Legislature adopted Utah Code Ann. §59-10-136 effective beginning in tax year 2012. Instead of the traditional domicile notions, the Legislature set out a very specific hierarchy of factors to consider, clearly giving more weight to certain factors. In Appeal No. 17-1624, Conclusions of Law No. 18, the Commission explained:

> 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 [R865-9I-2]and/or Rule 52[R884-24P-52]). 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

[12] The Commission notes that it may find additional grounds for rebuttal in future cases.

> 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).

To rely upon the limited and exhaustive list of factors in Subsection (3) to rebut a Subsection (2) presumption is both contrary to the express language of Utah Code Ann. §59-10-136(3)(a) and contrary to the plain meaning of Utah Code Ann. §59-10-136 as a whole. By allowing the factors in Subsection (3) to be used to rebut a presumption in Subsection (2) upends the hierarchical nature of Utah Code Ann. §59-10-136 as established by the legislature. Almost all of the factors to which the Legislature gave greater import in Subsections (1) and (2) are based on an individual, or an individual's spouse availing themselves of certain benefits of being a resident of Utah. These include having a dependent attend a Utah public school, being enrolled as a resident student at a Utah institution of higher education, receiving a property tax benefit in the form of a residential exemption, or being registered to vote in Utah. Contrary to the Taxpayers' representative's assertion, both TAXPAYER-1 and TAXPAYER-2 received the benefit of reduced property taxes as a result of the primary residential exemption on the CITY-3 home.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the Taxpayers were domiciled in Utah for the 2014 tax year and sustains the Division's audit in its entirety. It is so ordered.

DATED this _____day of _____, 2020.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

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