19-1821
TAX TYPE: INCOME TAX
TAX YEAR: 2016
DATE SIGNED: 9/04/2020
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.	**INITIAL HEARING ORDER** Appeal No. 19-1821 Account No. #### Tax Type: Income Tax Tax Year: 2016 Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYERS, CPA
TAXPAYER-1
TAXPAYER-2
For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on May 5, 2020 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The matter before the Commission is Petitioners' ("Taxpayers'") appeal filed under Utah Code §59-1-501 of a Utah individual income tax audit deficiency for tax year 2016. On August 15, 2019, Respondent ("Division") had issued a Notice of Deficiency and Audit Change on the basis that the Taxpayers were Utah resident individuals for all of 2016. The Taxpayers claim to be part-year Utah residents, having moved into Utah in DATE of 2016. They had filed a Utah Individual Income Tax Return as part-year residents in 2016, as well as a STATE-1 Individual Income Tax Return as part-year residents for the months prior to their move to Utah in 2016. The amounts of additional tax and interest due as of the date the Notice of Deficiency was issued is as follows:

	Tax	Interest[1]	Penalties	Total as of Notice Date
2016	$$$$$	$$$$$	$0	$$$$$

APPLICABLE LAW

Utah imposes income tax on resident individuals of the state, in Utah Code Subsection 59-10-104(1) as follows:

> . . . . a tax is imposed on the state taxable income of a resident individual as provided in this section . . . .

"Resident individual" is defined in Utah Code Subsection 59-10-103(1)(q) as follows:

> (q)(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.

Beginning with the 2012 tax year, Utah Code §59-10-136 was adopted regarding what constitutes domicile in the State of Utah. This was a substantial change in which Utah enacted a statute that sets out a hierarchy of very specific factors that constitute Utah domicile. This legislation indicates a clear change from the pre-2012 factors for determining domicile in Utah. After the 2012 law had been in effect for a number of years, the Utah Legislature made some limited, specific revisions to the law effective beginning with tax year 2018, but the revisions were not made retrospective to the tax years at issue in this appeal. Utah Code §59-10-136 as in effect for tax year 2016 provides as follows:

> (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

1 Interest continues to accrue on the unpaid balance until paid in full.

(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.

Utah provides for property tax assessment for all tangible property located within Utah, but it also allows for a residential exemption on a property that is used as an individual's primary residence at Utah Code Sec. 59-2-103 as follows:

> (1) All tangible taxable property located within the state shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on DATE, unless otherwise provided by law.
> (2) Subject to Subsections (3) through (5) and Section 59-2-103.5, for a calendar year, the fair market value of residential property located with the state is allowed a residential exemption equal to a 45% reduction in the value of the property.
> . . .
> (5) (a) Except as provided in Subsection (5)(b)(ii), a residential exemption described in Subsection (2) is limited to one primary residence per household.
> . . . .

If a property owner no longer qualifies for the primary residential exemption on their residential property they are required to take the following steps pursuant to Utah Code Subsection 59-2-103.5(4) (2015) as follows:

> Except as provided in Subsection (6), if a property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that 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 that 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 that property owner's primary residence, that the property owner no longer qualifies to receive a residential exemption authorized under Section 59-2-103 for that property owner's primary residence.

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

> (1) The county clerk may not remove a voter's name from the official register because the voter has failed to vote in an election.
> (2) The county clerk shall remove a voter's name from the official register if:
> (a) the voter dies and the requirements of Subsection (3) are met;
> (b) the county clerk, after complying with the requirements of Section 20A-2-306, receives written confirmation from the voter that the voter no longer resides within the county clerk's county;
> (c) the county clerk has:
> (i) obtained evidence that the voter's residence has changed;
> (ii) mailed notice to the voter as required by Section 20A-2-306;
> (iii) (A) received no response from the voter; or
> (B) not received information that confirms the voter's residence; and

(iv) the voter has failed to vote or appear to vote in an election during the period beginning on the date of the notice described in Section 20A-2-306 and ending on the day after the date of the second regular general election occurring after the date of the notice;

(d) the voter requests, in writing, that the voter's name be removed from the official register;

(e) the county clerk receives notice that a voter has been convicted of any felony or a misdemeanor for an offense under this title and the voter's right to vote has not been restored as provided in Section 20A-2-101.3 or 20A-2-101.5; or

(f) the county clerk receives notice that a voter has registered to vote in another state after the day on which the voter registered to vote in this state.

(3) The county clerk shall remove a voter's name from the official register within five business days after the day on which the county clerk receives confirmation from the Department of Health's Bureau of Vital Records that the voter is deceased.

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

(1) A county clerk may not remove a voter's name from the official register on the grounds that the voter has changed residence unless the voter:

(a) confirms in writing that the voter has changed residence to a place outside the county; or

(b) (i) has not voted in an election during the period beginning on the date of the notice required by Subsection (3), and ending on the day after the date of the second regular general election occurring after the date of the notice; and

(ii) has failed to respond to the notice required by Subsection (3).

(2) (a) When a county clerk obtains information that a voter's address has changed and it appears that the voter still resides within the same county, the county clerk shall:

(i) change the official register to show the voter's new address; and

(ii) send to the voter, by forwardable mail, the notice required by Subsection (3) printed on a postage prepaid, preaddressed return form.

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

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

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

_____

Street City County State Zip

If you have not changed your residence or have moved but stayed within the same county, you must complete and return this form to the county clerk so

that it is received by the county clerk no later than 30 days before the date of the election. If you fail to return this form within that time:
- you may be required to show evidence of your address to the poll worker before being allowed to vote in either of the next two regular general elections; or
- if you fail to vote at least once from the date this notice was mailed until the passing of two regular general elections, you will no longer be registered to vote. If you have changed your residence and have moved to a different county in Utah, you may register to vote by contacting the county clerk in your county.

_____
"Signature of Voter"
"The portion of your voter registration form that lists your driver license or identification card number, social security number, email address, and the day of your month of birth is a private record. The portion of your voter registration form that lists your month and year of birth is a private record, the use of which is restricted to government officials, government employees, political parties, or certain other persons.
You may apply to the lieutenant governor or your county clerk to have your entire voter registration record classified as private."

(4) (a) Except as provided in Subsection (4)(b), the county clerk may not remove the names of any voters from the official register during the 90 days before a regular primary election and the 90 days before a regular general election.
(b) The county clerk may remove the names of voters from the official register during the 90 days before a regular primary election and the 90 days before a regular general election if:
(i) the voter requests, in writing, that the voter's name be removed; or
(ii) the voter has died.
(c) (i) After a county clerk mails a notice as required in this section, the county clerk may list that voter as inactive.
(ii) If a county clerk receives a returned voter identification card, determines that there was no clerical error causing the card to be returned, and has no further information to contact the voter, the county clerk may list that voter as inactive.
(iii) An inactive voter shall be allowed to vote, sign petitions, and have all other privileges of a registered voter.
(iv) A county is not required to send routine mailings to an inactive voter and is not required to count inactive voters when dividing precincts and preparing supplies.

Utah Code Ann. §59-1-1417 provides, "[i]n a proceeding before the commission, the burden of proof is on the petitioner…"

The Commission has been granted the discretion to waive penalties and interest. Utah Code Ann. §59-1-401(14) provides, "Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part."

The Commission has promulgated Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest. Interest waiver provisions are as follows in pertinent part:

> (2)Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.

DISCUSSION

The issue in this appeal is whether the Taxpayers were "resident individuals" in the State of Utah for the purposes of Utah Code Sec. 59-10-104, for tax year 2016. The Taxpayers were married during this tax year, they were not legally separated or divorced and had filed federal returns with the filing status of married filing joint, so they are considered to be spouses for purposes of Utah Code Subsection 59-10-136(5). The Taxpayers did not have children or dependents that they had claimed on their federal return for 2016. The Taxpayers themselves did not attend a Utah institution of higher education during 2016.

The Taxpayer, TAXPAYER-1, had been employed by the Department of the Interior and he and TAXPAYER-2 had been living and working in STATE-1 for many years. By 2014, he was thinking about retiring from his employment and the Taxpayers were thinking about moving back to CITY-1, Utah to be nearer to their parents who were elderly. They purchased a residence in CITY-1, Utah in 2014. The residence, however, was not in a livable condition at the time of purchase as the utilities had been turned off and the power company would not turn the electricity back on until the electrical system and power boxes were replaced to current building code standards. The Taxpayer said there were other upgrades needed but it was the issue with the electricity that he noted that specifically made the property uninhabitable. Although the house was uninhabitable, the County listed it on its records as a primary residence and so the property was continuing to receive the primary residential exemption. The property is located in COUNTY and that County does not require an application from a homeowner prior to allowing this property tax exemption on a residential property. The Taxpayers never informed the County that it was not their primary residence. However, the Taxpayers maintain that they were unaware that the property was receiving this exemption.

Although the plan had been for TAXPAYER-1 and TAXPAYER-2 to move to CITY-1, Utah once TAXPAYER-1 retired in 2016, TAXPAYER-2's mother became ill with cancer and in 2015 TAXPAYER-2 returned to Utah to assist her mother. Her thought was that she would stay with her mother until her mother was well enough to be on her own. Unfortunately, that never occurred in 2015 or 2016 and TAXPAYER-2 was residing in Utah for most of 2015 and 2016,

but with her mother at her mother's residence in Utah and not in the residence that the Taxpayers had purchased in CITY-1, Utah. Although it appears that TAXPAYER-2 was primarily residing with her mother in Utah for all of 2015 and 2016, the Taxpayers argued that she was only visiting with her mother for a special and temporary purpose and her primary residence was still in STATE-1 with TAXPAYER-1 until he moved to Utah on DATE, 2016.

TAXPAYER-1 retired from his employment in STATE-1, they sold their residence in STATE-1 and TAXPAYER-1 moved to Utah on DATE, 2016. He did not move into the residence that they had purchased in CITY-1, Utah because it was still not habitable. Instead, he moved into his grandmother's residence, which was across the street from the residence that they owned. After he moved to Utah, he started working on their CITY-1 residence replacing the electrical system and making other upgrades. The Taxpayers provided the building inspection reports for when they obtained a certificate of occupancy as well as a letter regarding when the water and sewer was turned on at their CITY-1 residence. This did not occur until DATE, 2017. TAXPAYER-1 was at the hearing and stated that he had been registered to vote in STATE-1 until after he moved to Utah, but he was unclear about TAXPAYER-2 registering to vote in Utah. In their written answers to the Domicile Survey, they did answer that both TAXPAYER-1 and TAXPAYER-2 were registered to vote in STATE-1 "from maybe 2012 till moving back to Utah in 2016." The Division did not provide a copy of any Utah voter registration records for the Taxpayers, nor did the Division argue that either TAXPAYER-1 or TAXPAYER-2 ever registered to vote in Utah prior to DATE, 2016.

TAXPAYER-2 had some Utah employment in 2015 and 2016. The Taxpayers had filed a Utah return claiming non-resident status in 2015 claiming TAXPAYER-2's income. In 2016, the Taxpayers had filed both STATE-1 and Utah part-year resident returns. The Taxpayers reported $$$$$ in individual income tax paid on their STATE-1 return and the Division has allowed them a credit for taxes imposed by another state in that amount in its audit. The Taxpayers did not check the box on either their 2015 or 2016 Utah returns to indicate that they were not entitled to the residential exemption on the Utah residence they owned. Their representative at the hearing stated that the Taxpayers had prepared the returns themselves and did not know or understand that on the return.

For the purposes of Utah individual income tax a "resident individual" is defined at Utah Code Subsection 59-10-103(1)(q)(i) to include, "(A) an individual who is domiciled in this state . . ." It was the Division's position that both Taxpayers were Utah "resident individuals" because they were domiciled in Utah during all of 2016. Utah Code Sec. 59-10-136 specifically addresses what constitutes having "domicile" in Utah. The Taxpayers were considered to be spouses

pursuant to Utah Code Subsection 59-10-136(5). The Taxpayers did not meet all of the requirements to not be considered to be domiciled in Utah during 2016 under the 761 day exception to domicile provided at Utah Code Subsection 59-10-136(4) for reasons including that their Utah property was receiving the residential property tax exemption and they were both in Utah more than 30 days in 2016.

The Division argues that the Taxpayers were domiciled in Utah for all of 2016 under Subsection 59-10-136(2)(a)[2] Subsection 59-10-136(2) provides, "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 . . . . " For this presumption to arise, two elements must exist. First, the taxpayer must have claimed the residential exemption on his or her Utah home. Second, the Utah home on which the taxpayer claimed the residential exemption must be considered the "primary residence" of the taxpayer in accordance with the guidance provided in Subsection 59-2-103.5(4).

As to the first element, the Taxpayers are considered to have claimed the residential exemption on their Utah home for the period at issue because they received the primary residential exemption for this period. 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 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, for the tax year at issue in this appeal simply owning a residential property in a Utah county, like COUNTY, that does not require an application generally asserts an enduring claim to the residential exemption, so the Taxpayers are considered to have claimed the exemption for their Utah residence.[3]

2 The Taxpayers were not domiciled in Utah during 2016 under Subsection 59-10-136(1) because they had no dependents enrolled in a Utah public school and they themselves did not attend a Utah institution of higher education during the tax years at issue.

3 Furthermore, in those Utah counties that require an application, receiving the residential exemption after filing the application also constitutes a claim to the exemption. 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.

For purposes of determining if the second element of whether the residence is the individual's primary residence is met, when Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a Utah property on which an individual claims the residential exemption is considered their "primary residence" unless one or both of the property owners take affirmative steps to: 1) file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence; *and* 2) declare on the property owner's Utah individual income tax return for the taxable year that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence. The Taxpayers did not take either of these steps.

This presumption of domicile under Utah Code Subsection 59-10-136(2)(a) is, however, a rebuttable presumption. The Legislature did not provide what circumstances are sufficient to rebut the presumption in Subsection (2)(a), leaving it to the Commission to determine which circumstances are sufficient to rebut the presumption. The Commission has considered what rebuts the Subsection 59-10-136(2)(a) presumption of domicile in numerous decisions. The Commission has previously concluded that remodeling a home that was receiving the residential exemption, even if the home was empty while the remodeling occurred did not rebut this presumption. *See Utah State Tax Commission Initial Hearing Orders, Appeal No. 18-2130,* pg. 27 (3/6/2020) & *Appeal No. 19-1515*, pg. 11 (5/28/2020). In addition, the Commission has held in prior cases that a taxpayer has failed to rebut the presumption of domicile because an individual was unaware that they were receiving the primary residential exemption.[4] Likewise, the Commission has previously found that retroactively removing the primary residential exemption and paying the difference in property tax is insufficient to rebut the presumption of domicile.[5] The Commission also found in Appeal No. 15-1332 that the presumption can be rebutted for that period that a home was listed for sale and the home was vacant. In Appeal No. 17-1589 the Commission found that the 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. Further, the presumption could be rebutted for that period that a home 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).

4 *See* Appeal nos. 14-30 and 15-720.
5 *See* Appeal nos. 15-1582 and 17-1787.

S*ee Utah State Tax Commission Initial Hearing Order, Appeal No. 17-758* (1/26/2018). In another case, the Commission found the presumption rebutted where an individual whose home was receiving the residential exemption disclosed on their Utah income tax return that the home no longer qualified for the exemption (even if the individual did not contact the county directly).[6] In a recent decision the Commission found the presumption rebutted where in a County that requires filing of an application, the property owner had written on the application above his signature that the property would only be his primary residence for a two year period, and the County did not remove the exemption after the two year period had expired. See *Utah State Tax Commission Initial Hearing Order, Appeal No. 19-1218* (7/10/2020). As prior decisions have noted, there may be other grounds in future cases for rebutting this presumption.

The Taxpayers have the burden of proof in this matter. In reviewing the facts presented the Taxpayers had purchased the Utah residence in 2014. They did receive the primary residential exemption on the residence. They were not trying to sell or lease the residence. The Taxpayers did not notify the County that the residence was not their primary residence and did not check the box on their Utah non or part-year resident tax returns filed in 2015 or 2016 indicating that the residence was not their primary residence. The Taxpayers argue that the home was vacant and uninhabitable and that they were unaware they were receiving the residential exemption on the property. After reviewing the facts presented at this hearing, the law and the precedent from the prior cases, the Taxpayers have not rebutted the Subsection (2)(a) presumption of domicile even though the home was not habitable, because the facts that the home was vacant and being repaired and remodeled or that the Taxpayers were unware of the exemption, as noted above, have both previously been found to not be grounds for rebuttal of the Subsection 59-10-136(2)(a) presumption.

Under Subsection 59-10-136(2), if a taxpayer meets the criteria of any one of Subsections 59-10-136(2)(a), (2)(b) or (2)(c)[7] the taxpayer is presumed domiciled in Utah. At the hearing, the Division only argued that the Taxpayers met the Subsection (2)(a) presumption because of the primary residential exemption on their Utah residence and under Subsection (2)(a) the Taxpayers are domiciled in Utah for all of tax year 2016. Therefore, because the Taxpayers have already

6 S*ee Utah State Tax Commission Initial Hearing Order, Appeal No. 17-812* (3/13/2018). These and other prior Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decision.

7 There was no assertion from the Division that indicated Subsection 59-10-136(2)(c) applied to the Taxpayers' situation in this appeal prior to DATE 2016 The Taxpayers had filed a Utah part-year individual income tax return for tax year 2016 on which they had claimed some Utah source income and stated that they were Utah residents for the period from DATE 2016 until DATE, 2016. The period from DATE, 2016 to DATE, 2016 is not in dispute.

been found to be domiciled in Utah under Subsection (2)(a) for the entire audit period, it is unnecessary to determine whether the taxpayers are domiciled in Utah under Subsection (2)(b) or (c); however, some observations about these subsections may be helpful. The Division did not claim at the Initial Hearing that the Taxpayers were domiciled in Utah under Subsection 59-10-136(2)(b) prior to DATE, 2016. During tax year 2016, a taxpayer is also presumed domiciled in Utah under Subsection 59-10-136(2)(b) for the period of time that the taxpayer or the taxpayer's spouse was registered to vote in Utah. The Taxpayers had stated in the domicile survey that neither were registered to vote in Utah until after they moved to Utah in 2016. The Division did not challenge this at the Initial Hearing. The evidence presented indicates the Taxpayers were not registered to vote in Utah until after DATE, 2016. Once either Taxpayer registered to vote in Utah this presumption would arise unless rebutted, but the Taxpayers did not dispute that they were domiciled in Utah after DATE, 2016.

Additionally, the Division did not argue for the period at issue that the Taxpayers were domiciled under Subsection 59-10-136(2)(c) under which a rebuttable presumption of domicile arises when an individual or an individual's spouse asserts residency in this state for purposes of filing an individual income tax return as a resident or part-year resident of this state. In this appeal the Taxpayers did claim to be Utah residents on their Utah part-year return beginning DATE, 2016. They claimed to be STATE-1 residents on their STATE-1 part-year return from DATE, 2016 to DATE, 2016. The Taxpayers would be presumed domiciled in Utah beginning DATE, 2016 under this subsection, but again the Taxpayers did not dispute Utah domicile from DATE, 2016 to the end of the year.

If an individual is not considered to be domiciled in Utah under Subsection 59-10-136(1), (2)(a), (2)(b), or (2)(c), the individual 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 applicable "if the requirements of Subsection (1) or (2) are not met[.]" Because the Taxpayers were domiciled in Utah under Subsection (2)(a) for the entire audit period and (2)(b) & (c) for a portion of the audit period after DATE, 2016, Subsection (3) is not applicable.

The Taxpayers' representative argues in this matter that the Taxpayers can only be domiciled in one state for tax purposes at a time. It was her position that the State of STATE-1 would have considered TAXPAYER-1 domiciled in that state in 2016, at least up to DATE, 2016 when he moved to Utah. The representative argues that the Taxpayers can then not also be domiciled in Utah from DATE, 2016 to DATE, 2016. However, under Utah Code Sec. 59-10-136 there are a number of scenarios under which a taxpayer could be considered domiciled in

Utah, regardless of whether they were domiciled in another state under the more traditional common law factors of domicile. The Taxpayers' argument that an individual can only be domiciled in one state at any one time may have been true under common law principles concerning "domicile" and for Utah income tax purposes prior to 2012 (when the more traditional application of "domicile" was in effect in Utah.) However, once the Utah Legislature amended Utah's income tax domicile laws by enacting Section 59-10-136 effective beginning with tax year 2012, an individual may be considered to be domiciled in Utah and in another state at the same time for state income tax purposes (with double taxation concerns mitigated by the credit provided under Section 59-10-1003).

The Taxpayers also argued at the hearing that the Utah domicile law was unfair because they had never requested a primary residential exemption for their Utah property and they did not know that they were receiving one. As previously noted the Tax Commission has considered the argument that a taxpayer was unaware that they were receiving this property tax exemption and found this did not rebut the presumption of domicile. Many individuals have argued ignorance of the law in regards to the Subsection 59-10-136(2) presumptions as a basis for rebutting the presumptions and the Tax Commission has concluded that ignorance of the law is not a sufficient basis to rebut the presumptions. See *Utah State Tax Commission Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 14-30* (9/2/2015); *Initial Hearing Orders, Appeal No. 15-1154* (2/1/16); *Appeal No. 16-117*(1/18/17); *Appeal No. 16-792* (8/16/2017); *Appeal No. 17-237* (9/18/17); *Appeal No. 17-609* (1/26/2018); and *Appeal No. 18-88* (3/22/2019). While the Commission is tasked with the duty of implementing laws enacted by the Utah Legislature, the Commission is not authorized to amend these laws to achieve what the Taxpayers may consider a more "fair" result.[8]

As the Taxpayers were domiciled in Utah for all of tax year 2016, they were Utah resident individuals. Under Utah Code Sec. 59-10-104, a "resident individual" in the State of Utah is subject to Utah individual income tax on all taxable income, subject to a credit for the individual income taxes imposed by another state. In this case, the Division has allowed a credit for the taxes that the Taxpayers had paid to STATE-1 for tax year 2016.

8 Utah Code Sec. 59-10-136 was adopted effective beginning with tax year 2012 and has been applied uniformly since that time and for the tax year at issue in this appeal. However, as the Division is already aware, an issue similar to that addressed in this appeal has been appealed to the Utah Supreme Court and a decision from the Court is pending in *[TAXPAYER] v. Tax Commission*, Utah Supreme Court Case No.#####. When the Court will issue its decision is unknown at this time. It may be in the Taxpayers' interest to keep this appeal open by requesting a Formal Hearing in the event the Supreme Court's decision has some effect in this matter.

No penalties were assessed with this audit. Interest was assessed pursuant to law. Utah Admin. Rule R861-1A-42(2), sets out what constitutes reasonable cause for waiver of interest and it is limited to instances where the taxpayer can prove "that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error." The Taxpayers have not asserted a basis for waiver of interest.

After review of the evidence submitted by the parties at the hearing and the applicable law, the Taxpayers were domiciled in Utah for all of tax year 2016 based on the statutory provisions in effect for that tax year and the audit assessment of additional tax and interest should be upheld.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission finds that the Taxpayers were domiciled in Utah for all of 2016 and sustains the Division's 2016 audit deficiency as to the tax and interest. 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 of 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 applied.