IN THE UTAH SUPREME COURT

JOHNATHAN BUCK AND BROOKE BUCK, Appellants, v. UTAH STATE TAX COMMISSION, Appellee.	Case No. 20200531-SC

BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF TAX COUNSEL IN SUPPORT OF APPELLANTS JOHNATHAN BUCK AND BROOKE BUCK

On Appeal from the Utah State Tax Commission
Case No. 18-888

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INTEREST OF THE *AMICUS CURIAE*

The American College of Tax Counsel ("ACTC") is a nonprofit professional association of approximately 700 tax lawyers in private practice, law school teaching positions, and government. ACTC Fellows are recognized for their excellence in tax practice and their substantial contributions and commitment to the profession. As a national organization operating across the United States, ACTC regularly files *amicus curiae* briefs in cases of exceptional importance to the practice and development of tax law.

This case involves domicile for Utah individual income tax purposes. The issue here is whether Utah can treat the Petitioners as domiciled in Utah during 2012 when the Petitioners' actions and behavior demonstrated they were Florida residents. As described in more detail in Petitioners' brief, the Petitioners left Utah to pursue professional opportunities in Florida during 2011. They worked in Florida, leased a home with an option to buy in Florida, held Florida driver's licenses, registered to vote in Florida, educated their children in Florida schools, established banking and financial relationships in Florida, and became deeply involved in several charitable and public service activities based in Florida. Their lone connections with Utah were occasional short-term visits to family and continued ownership of a home in Bluffdale that they were trying to sell. The Utah State Tax Commission ("Tax Commission") nonetheless contends that Petitioners were domiciled in Utah because their ownership of that home, which had been provided with a residential property tax exemption without the knowledge or action of the

Petitioners, created a functionally irrebuttable presumption that Petitioners were domiciled in Utah.

Under the Tax Commission's interpretation of the law in the instant case, individuals and their spouses are provided no means to use domicile-related facts to rebut presumptive Utah domicile. The Tax Commission claims that individuals are domiciled in Utah for tax purposes if they: (1) like the Bucks, have moved from Utah and have established their domicile in another state for all legal purposes (other than the Tax Commission's current application of the Utah presumptive domicile statute); or (2) like taxpayers in other cases, such as one described further below, have neither lived nor worked in Utah, but are connected to Utah only through marrying someone who is (or was formerly) domiciled in Utah. In both scenarios, Utah is claiming domicile over those who have zero Utah source income. In addition to undermining the plain language of the statute, this Tax Commission interpretation raises several federal constitutional issues. The instant case has significant national implications because these issues may arise in other states applying their domicile laws or in other states that adopt laws like the Utah statute at issue. ACTC is well positioned to address these constitutional issues through this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

ACTC urges this Court to apply the plain language of Utah Code subsection 59-10-136 to permit individuals to present domicile-related facts to be considered to rebut presumptive domicile pursuant to Utah Code subsection 59-10-136(2). The Tax

Commission's disallowance of individuals' rights to present these facts and have them considered raises serious questions of federal constitutional law.

The decision below must be judged against restrictions imposed by several provisions of the Constitution of the United States:

- The decision violates the Due Process Clause because Utah is imposing individual income tax on 100% of the income of individuals who have neither resided nor worked in Utah, and thus do not have the required minimum contacts with Utah and/or are connected to Utah only through personal domestic relationships.
- The decision violates the Commerce Clause because if every state applied Utah's presumptive domicile statute in the same manner as the Tax Commission does, taxpayers would be subjected to tax on 100% of their income in more than one state, thus discriminating against individuals engaged in interstate commerce.
- The decision violates the Privileges and Immunities Clause because under the Tax Commission's interpretation, Utah requires nonresidents to pay tax on 100% of their income in states where they do not reside and does not require the same of residents.
- The decision violates the Equal Protection Clause because Utah is (1) interfering with individuals' rights to move from Utah and be treated like residents of other states (who are not taxed on 100% of their income in

states where they do not reside) and/or (2) trying to select its citizens rather than allowing the citizens to select Utah.

This Court's application of the plain language of Utah Code subsection 59-10-136(2) to permit individuals to present domicile-related facts for consideration to rebut presumptive Utah domicile would avoid these constitutional infirmities in the Tax Commission's decision.

ARGUMENT

Under the plain language of Utah Code subsection 59-10-136(2), taxpayers must have a reasonable means to rebut presumptive Utah domicile by presenting appropriate facts relating to domicile. If the Tax Commission decision is upheld and the taxpayers are provided no reasonable means to rebut presumptive Utah domicile under the statute at issue using domicile-related facts, then several provisions of the U.S. Constitution are implicated, as outlined below. As this Court has held, "we are constrained to construe statutory terms to avoid an unconstitutional application of the statute." *Utah State Rd. Comm'n v. Friberg*, 687 P.2d 821, 831 (Utah 1984); *see also Nat'l Fed. of Indep. Business v. Sibelius*, 567 U.S. 519, 563, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)) (internal quotation marks omitted) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); and *id.* at 574 ("[W]e have a duty to construe a statute to save it, if fairly possible."). The plain language of Utah Code subsection 59-10-136 can, and properly should, be read to allow domicile-related facts to be considered to rebut Utah presumptive domicile in order to avoid an unconstitutional application of the statute.

I. The Tax Commission's Interpretation Violates the Due Process Clause.

The Tax Commission's interpretation violates the Due Process rights of affected taxpayers. The Fourteenth Amendment of the U.S. Constitution prevents a State from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under this Due Process Clause, a state has jurisdiction to impose a tax on a person or entity only if the person or entity has "some definite link, some minimum connection" to the state "such that the tax does not offend 'traditional notions of fair play and substantial justice.'" *North Carolina v. Kaestner*, 139 S. Ct. 2213, 2220 (2019) (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The individuals in question must also "purposefully avail[]" themselves of the benefits of the forum state before the state can exercise jurisdiction over that person. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Only "those who derive 'benefits and protection' from associating with a State should have obligations to the State in question." *Kaestner*, 139 S. Ct. at 2229 (*quoting International Shoe*, 326 U.S. at 319).

Domicile is not merely a creature of statutory law. Because there are obviously territorial limitations on each state's taxing and other powers, a state's attaching the labels of state citizenship, residency, or domicile to a person necessarily has a constitutional dimension. "If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be . . . a nullity . . . ." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342, 74 S. Ct. 535, 98 L. Ed. 744 (1954) (internal quotation marks and citation

omitted). Imposing a tax without jurisdiction is "simple confiscation." *Id.*, *quoted in Kaestner*, 139 S. Ct. at 2220.[1]

As applied by the Tax Commission in this case, Utah Code subsection 59-10-136(2) does not allow presumptions to be rebutted using domicile-related facts, thus taxing 100% of the income of citizens of other states who are not domiciled in Utah and do not have "minimum contacts" with Utah.

An example of the constitutional infirmities engendered by that interpretation can be found in the Tax Commission's recent decision No. 18-978 (August 14, 2020), attached hereto in the Addendum ("Dec. No. 18-978").[2] In this decision, the Tax Commission ruled that an executive who had neither resided nor worked in Utah was nevertheless domiciled in Utah for individual income tax purposes (and thus taxed on 100% of her worldwide income) based solely on the presumption that her spouse was domiciled in the state. In that Dec. No. 18-978, the executive's spouse moved from Utah to the executive's state to marry her several years earlier. The husband still owned a

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[1] *See also Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 95, 50 S. Ct. 59 (1929) (Stone, J., concurring) (Property tax "levied [by Virginia] against a trustee *domiciled* in Maryland upon securities held by it in trust in its exclusive possession and control there . . . is forbidden as an attempt to tax property *without the jurisdiction.*") (emphasis added) (citing *Brooke v. Norfolk*, 277 U. S. 27, 48 S. Ct. 422 (1928)); *Kaestner*, 139 S. Ct. at 2221 (relying on *Safe Deposit* and *Brooke*); *id.* at 2227 (Alito, J., concurring) (same). In *Kaestner*, the Court rejected the "categorical rule" proposed by North Carolina, that a trust beneficiary's state of residence is always also the residence of the trust. *Id.* at 2225. The Tax Commission's interpretation violates Due Process for the same reason: it "fails to grapple with the wide variation in" individual circumstances. *Id.*

[2] Utah Tax Comm. Dec. No. 18-978 is presently on appeal in the Utah Third Judicial District Court as Case no. 200905859. That case, referenced here, will be directly impacted by the decision in the instant case.

home in Utah, but the executive had no ownership interest in the home. As in the instant *Buck* case, the Tax Commission allowed neither her nor her spouse to present any domicile-related facts to rebut presumptive Utah domicile.

In Dec. No. 18-978, the executive did not have the requisite minimum contacts with Utah and had not purposefully availed herself of the benefits and protections of Utah such that Utah could impose an individual income tax on her income as if she were domiciled in the state. There was no definite link between the executive's earning income in another state that ties such income to Utah. The executive had neither earned income in Utah, nor resided in Utah, nor owned any property in Utah. Her only connection to Utah was the application of the Tax Commission's [irrebuttable] presumption that her spouse was a Utah resident despite the statute's clear provision that such a presumption could be rebutted. The Tax Commission's unconstitutional application of the statute could be avoided if this Court interprets Utah's statute to permit the executive and her spouse to present domicile-related facts to rebut Utah's presumptive domicile.

The Tax Commission's interpretation also violates Due Process by imposing domicile on individuals based solely on whom they marry, as evidenced again by the executive in Dec. No. 18-978. The executive was presumed to have a Utah domicile based solely on the fact that she was married to a person with presumptive Utah domicile. The United States Supreme Court has "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1976) (citations omitted); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Pierce v. Society of Sisters*, 268 U.S.

510, 534-535 (1925). Further, the Court has held there is "a private realm of family life which the state cannot enter." *Moore*, 431 U.S. at 499 (*quoting Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

In *Moore*, the City of Cleveland, Ohio ("City"), limited occupancy of dwelling units to members of a single family; however, the City's housing ordinance contained language limiting the definition of "family" to only a few categories of related individuals. *Moore*, 431 U.S. at 494. Ms. Moore was convicted of a criminal offense because her family living with her then included two grandsons who were first cousins and, therefore, not deemed a "family" under the City's housing ordinance. *Id.* at 496. Although the *Moore* Court acknowledged that the City had legitimate goals which the ordinance was designed to achieve, it ruled that the ordinance violated the Due Process Clause through standardizing children and adults "by forcing all to live in certain narrowly defined family patterns." *Id.* at 506.

As interpreted by the Tax Commission, Utah Code subsection 59-10-136(2) would disregard a taxpayer's "personal choice in matters of marriage and family life"—namely, the choice and intent to marry and remain domiciled in another state. *Id.* at 499. Under the Tax Commission's application of the statute, Utah domicile is imputed to individuals (like the executive) even though their only connection with Utah is from their personal domestic relationships. Such an intrusion violates the Due Process Clause by forcing residency and domicile on a nonresident individual merely because his or her spouse has presumptive Utah domicile.

The U.S. Supreme Court has held that personal domestic relationships, by themselves, are not sufficient to warrant a state's assertion of personal jurisdiction over a nonresident individual. In *Kulko v. Superior Court*, 436 U.S. 84 (1978), the Court addressed whether a state could assert personal jurisdiction over a nonresident, nondomiciliary parent of a minor child domiciled in the state. The Court ruled that California's assertion of personal jurisdiction over a New York domiciliary who sent his minor daughter to California to live with her mother was in error. That act was not a commercial act and inferred no intent of the father to receive a corresponding benefit from California that would make California's assertion of personal jurisdiction over him fair or reasonable. *Id.* at 101. The Court reasoned that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State .... [I]t is essential in each case that there be some act by which the defendant personally avails [him]self of the privilege of conducting activities within the forum State ...." *Id.* at 93-94 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

In *Kramer v. Kramer*, 226 Ill. App. 3d 815 (Ill. App. 4 Dist. 1992), the court ruled that the mere presence of a daughter and an ex-spouse in South Dakota was not enough to establish minimum contacts between a nonresident father and the state. Despite his personal relationships with several individuals domiciled in South Dakota, the defendant father and ex-spouse had neither visited South Dakota during the last 18 years nor purposely availed himself of the benefits and protection of South Dakota. *Id.* at 819-820.

For a state to assert jurisdiction over a taxpayer, the taxpayer must have minimum contacts with the forum state, such that such jurisdiction would not offend "traditional notions of fair play and substantial justice." *See Kulko*, 436 U.S. at 91 (quoting *International Shoe*, 326 U.S. at 316). In Dec. No. 18-978, the only connection between Utah and the executive is through the executive's marriage to a *former* Utah resident. Like the defendants in *Kulko* and *Kramer*, this link is too attenuated either to deem the executive to be a Utah domiciliary or to claim she has minimum contacts with Utah sufficient to be taxed as a Utah resident. Although her spouse formerly resided in Utah, the executive's residence and place of domicile are clearly outside of Utah and always have been. Her only connection with Utah was through her husband's *former* Utah domicile, a tie which, without more, is too attenuated to establish minimum contacts with a state.

As narrowly interpreted by the Tax Commission, Utah Code subsection 59-10-136(2) thus interferes with fundamental constitutional protections under the Due Process Clause. To avoid this untenable outcome, this Court should properly require the Tax Commission to interpret the statute to allow individuals to offer domicile-related facts to be considered to rebut presumptive Utah domicile under Utah Code subsection 59-10-136(2).

II. The Tax Commission's Interpretation Violates the Commerce Clause.

The Tax Commission's interpretation of Utah law violates the Commerce Clause of the U.S. Constitution by discriminating against out-of-state individuals and imposing a greater burden on non-Utah citizens than on residents of Utah. Article I, section 8 of the

U.S. Constitution gives Congress the power to "regulate commerce . . . among the several states." Pursuant to the Commerce Clause, the U.S. Supreme Court has held that states are prohibited from "discriminat[ing] between transactions on the basis of some interstate element." *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation omitted). Moreover, states may not "subject[] interstate commerce to the burden of 'multiple taxation.'" *Id.* (citation omitted).

In *Wynne*, the U.S. Supreme Court "struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State." *Id.* at 1795. The Court has described this as the "internal consistency" test, which "'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Id.* at 1803 (*quoting Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185, 115 S. Ct. 1131 (1994)).

Here, the taxing scheme imposed under Utah Code subsection 59-10-136(2), as presently applied by the Tax Commission, would result in unconstitutional multiple taxation of income if applied in the same manner by every state. There is a "well-established principle of interstate . . . taxation . . . that a [state] may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463, 115 S. Ct. 2214 (1995) (emphasis in original). The domiciliary state has taxing power that is much broader than that of other states. Taxpayers like the Bucks have moved outside Utah and are domiciled outside Utah for all tax and nontax legal purposes (other than the Tax Commission's current application of

the presumptive domicile Utah statute for Utah income tax purposes). The Tax Commission has now taxed 100% of the Bucks' income (and the income of other taxpayers like them) by not allowing the Bucks to offer evidence to rebut the Utah Code subsection 59-10-136(2) presumptions using domicile-related facts. If every state had such a hard-and-fast presumption (or conclusion, as interpreted by the Tax Commission) based on a property tax exemption or based on the lag before voter registration started in the new state (see Dec. No. 18-978 and Utah Code section 59-10-136(2)), more than one state would be able to tax 100% of the income of both spouses, resulting in clear multiple taxation in violation of the Commerce Clause as most recently outlined by the U.S. Supreme Court in *Wynne*.

Utah does provide a credit for taxes paid by a resident individual "on income . . . derived from sources within [another] state." Utah Code section 59-10-1003. However, Utah does *not* provide a credit for taxes paid because of a taxpayer's *domicile* in another state, which captures any income that is not derived from sources within another state. If every state had domicile and credit statutes like Utah's and also provided to taxpayers no reasonable means to rebut the presumption of domicile based on domicile-related facts, then taxpayers moving from state to state would be subjected to two or more states asserting domicile, and thus two or more states claiming the right to tax 100% of the taxpayer's income. Such taxpayers are disadvantaged compared to those who do not

move. Thus, the Tax Commission's application of Utah Code subsection 59-10-136(2) violates the Commerce Clause.[3]

III. The Tax Commission's Interpretation Violates the Privileges and Immunities Clause.

The Tax Commission's interpretation of the statute also violates the Privileges and Immunities Clause of the U.S. Constitution, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV § 2. Although the Constitution refers to "citizens," the Supreme Court has specified that this clause prohibits state discrimination against citizens, residents, and nonresidents equally. *Baldwin v. Fish and Game Comm. of Montana*, 436 U.S. 371, 383 (1978).

[3] The fact that other states like Florida do not impose an individual income tax does not change this Commerce Clause analysis. The internal consistency test requires an analysis of whether the statute's application by "*every* state in the Union would place interstate commerce at a disadvantage" [not just one state]. *Wynne*, 135 S.Ct. at 1803 (emphasis added). That is, it raises a hypothetical question. Additionally, it also does not matter if a taxpayer can do something to avoid this outcome (like earn all income with a source in a particular state or register to vote the day they move to a new state). If every state has the Utah statute as applied by the Tax Commission, and if under a given fact situation these state statutes create multiple taxation, then internal consistency is violated and the statute is unconstitutional. In *Wynne*, the Court struck down the state tax scheme because it "*might* have resulted in the double taxation of income earned out of the state." *Wynne*, 135 S. Ct. at 1795 (emphasis added). If a factual scenario exists where that double taxation could happen (and in the case of voter registration, it is not rare, but applies to every taxpayer who moves from Utah until they register to vote in the new state), then the statute as applied is unconstitutional. Thus, if the Tax Commission's interpretation applies, then the violation of the internal consistency prong is met, thereby rendering Utah Code subsection 59-10-136(2) unconstitutional under the Commerce Clause as applied unless a reasonable means is allowed by the Tax Commission for taxpayers to rebut presumptive Utah domicile.

For tax purposes, the Privileges and Immunities Clause generally prohibits a state from imposing a more substantial tax burden on nonresidents than it imposes on its own residents. For example, in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 80-81 (1920), the *Travis* Court struck down a provision of the New York income tax statute that prohibited nonresident taxpayers from utilizing a personal exemption that was granted to resident taxpayers. The court reasoned that "[t]his is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring states, and favoring all residents including those who are citizens of the taxing state." *Id.*

In *Austin v. New Hampshire*, 420 U.S. 656, 666 (1975), the Court held that a New Hampshire Commuters Income Tax violated the established rule under the Privileges and Immunities Clause of "substantial equality of treatment for citizens of the taxing state and nonresident taxpayer." The tax was deemed to violate the Privileges and Immunities Clause because it fell exclusively on nonresidents. *Id.* Further, the court was unpersuaded by the state's argument that the tax was no more onerous in effect on nonresidents because a nonresident's total state tax liability was unchanged once the taxpayer received the tax credit from his or her state of residence. *Id.* The court reasoned that "[t]he constitutionality of one State's statutes affecting nonresidents cannot depend upon the present configuration of another State's statutes." *Austin*, 420 U.S., at 666.

In *Lunding v. New York Tax App. Trib.*, 522 U.S. 287 (1998), the *Lunding* Court held that a New York statute denying nonresidents an alimony deduction while affording

the deduction to its residents violated the Privileges and Immunities Clause because the discriminatory treatment of nonresidents was not adequately justified.

In the instant case, Utah Code subsection 59-10-136(2), as applied by the Tax Commission, violates the Privileges and Immunities Clause because Utah does not force Utah residents to pay tax on 100% of their income in states where they do not reside, but the Tax Commission is imposing that requirement on nonresidents. Utah residents pay individual income tax to states in which they do not reside only if they earn income from sources from within those states. Under the Commission interpretation, however, nonresidents of Utah, like the Bucks or the executive in Dec. No. 18-978, are not just taxed in Utah on income from Utah sources—they are taxed on their worldwide income. The Tax Commission's interpretation thus discriminates against nonresidents because nonresidents are forced to pay tax on income in states where they do not reside, whereas Utah residents are not required to do this. The Tax Commission's interpretation thus violates the Privileges and Immunities Clause. This unconstitutional outcome can be avoided if this Court instructs the Tax Commission to follow the plain language of Utah Code subsection 59-10-136(2) and allow taxpayers the opportunity to rebut presumptive domicile using domicile-related facts.

IV. The Tax Commission's Interpretation Violates the Equal Protection Clause.

The Tax Commission's interpretation of Utah Code subsection 59-10-136(2) also violates the Equal Protection Clause and its constituent "right to travel." The U.S. Supreme Court has held that the "'constitutional right to travel from one State to another is firmly embedded in our jurisprudence'" and is "a virtually unconditional right,

guaranteed by the Constitution to us all." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (holding that a California statute violated the constitutional right to travel by requiring individuals to live in California for one year before being eligible for certain welfare benefits) (*quoting United States v. Guest*, 383 U.S. 745, 757 (1966)). The Court has described this "right to travel" as including three separate and distinct rights: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"; and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Id.* at 500 (emphasis added).

Stated further, "'a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State.'" *Id.* at 503 (*quoting Slaughter-House Cases*, 83 U.S. 36, 80 (1873)). The Court also added that:

> A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.

Id. at 503-504 (*quoting Slaughter-House Cases*, 83 U.S. 36, 112-113 (1873) (Bradley, J., dissenting)). Lastly:

> Citizens of the United States, whether rich or poor, have the right to choose to be citizens 'of the State wherein they reside.' U.S. Const., Amdt. 14, § 1. The States, however, do not have any right to select their citizens.

Saenz, 526 U.S. at 510-511.

In *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), the U.S. Supreme Court held that "any classification which serves to penalize the exercise of [the right to travel]" violates the Equal Protection Clause "unless shown to be necessary to promote a compelling governmental interest." The Court in *Saenz* clarified that a "State's legitimate interest in saving money provides no justification" to discriminate against fundamental rights. *Saenz*, 526 U.S. at 507. The Court in *Saenz* also held that any review of a fundamental right demands a standard of review that is "[n]either mere rationality nor some intermediate standard of review." *Id*. at 504. That is, a heightened standard of review is required.

As applied by the Tax Commission, Utah Code subsection 59-10-136(2) raises constitutional implications by impinging an individual's "right to travel." The Bucks have a constitutional right to leave the state of Utah and to be treated just like all other residents of Utah and residents of the state to which they move (which residents are not taxed on 100% of their income in states in which they do not reside).

Additionally, individuals like the executive in Dec. No. 18-978 who have never lived in Utah are beyond Utah's reach. The executive can select Utah to be her state of residence, but Utah cannot make that selection for her because "[s]tates do not have any right to select their citizens." *Saenz*, 526 U.S. at 510-511. For these reasons, the Tax Commission's interpretation of Utah Code subsection 59-10-136(2) unduly infringes on an individual's right to travel. This result can be avoided by requiring the Tax Commission to consider domicile-related facts to rebut presumptive Utah domicile under

Utah Code subsection 59-10-136(2), as was allowed by the Utah Legislature when it passed the plain language of the statute.

CONCLUSION

The Tax Commission's interpretation of Utah Code subsection 59-10-136(2) raises fundamental concerns regarding violations of the Due Process, Commerce, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. These infirmities may be avoided by this Court instructing the Tax Commission to apply the plain language of the statute to permit consideration of appropriate domicile-related facts to rebut the statutory presumption of domicile. Accordingly, ACTC respectfully submits that the Court should reverse the decision of the Tax Commission and follow the plain language of the statute by allowing taxpayers to rebut presumptive domicile under Utah Code subsection 59-10-136(2) using domicile-related facts.

Respectfully submitted this 10th day of December 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 5,008 words.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman.

Dated this 10th day of December 2020.

/s/ Steven P. Young
Steven P. Young

ADDENDUM

Utah Tax Commission Decision-18-978
(Redacted)

BEFORE THE UTAH STATE TAX COMMISSION

Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 18-978 Account No. Tax Type: Individual Income Tax Tax Years: 2014, 2015, & 2016 Judge: Chapman

Presiding:

John L. Valentine, Commission Chair
Michael J. Cragun, Commissioner
Rebecca L. Rockwell, Commissioner
Lawrence C. Walters, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner:

For Respondent:

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on May 5, 2020. Based upon the evidence and testimony, the Tax Commission hereby makes its:

FINDINGS OF FACT

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

2. The tax years at issue are 2014, 2015, and 2016 (which may be referred to as the "audit period").

3. ("Petitioners" or "taxpayers") have appealed Auditing Division's (the "Division") assessments of Utah individual income taxes for the 2014, 2015, and 2016 tax years.

4. On April 24, 2018, the Division issued Notices of Deficiency and Estimated Income Tax ("Statutory Notices") to the taxpayers, in which it imposed taxes, 10% penalties for failure to timely file and failure to timely pay, and interest (calculated as of May 24, 2018),[1] as follows:

Year	Tax	Penalties	Interest	Total
2014				
2015				
2016				

5. On May 24, 2019, the Commission denied the taxpayers' Amended Motion for Partial Summary Judgment and the Division's Cross-Motion for Summary Judgment. For this reason and because the parties agreed to waive an Initial Hearing, this matter proceeded to a Formal Hearing.

6. The taxpayers married in Texas on October 27, 2014, and they have not since been legally separated or divorced. For each of the 2014, 2015, and 2016 tax years, the taxpayers filed a United States federal income tax return ("federal return") with a status of married filing jointly using a Texas address. The taxpayers did not claim any dependents on their 2014, 2015, or 2016 federal return.[2]

7. Mr. was born in Arkansas, where he lived for approximately 40 years before moving to Florida in 1996. Mr. continued to live in Florida until 2008, when he moved to Utah for work. In October 2013, Mr. retired. Mr. continued to live in Utah through July 25, 2014, after which he moved to Ms. home in Texas on July 26, 2014. As of the hearing date, Mr. continues to live in Texas.[3]

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1 Formal Exhibit 1. Interest continues to accrue until any tax liability is paid. In the event that the Commission sustains all or portions of the Division's assessments, the taxpayers ask for penalties the Division imposed to be waived. At the hearing, the Division indicated that it would have no objection to the Commission's waiving the penalties it imposed in its assessments.

2 Formal Exhibits 4 (AUD 0047) (Declaration and Registration of Informal Marriage) and 9 (AUD 0194, AUD 0280, and AUD 0366) (federal returns); Testimony of Mr. All three of these federal returns were prepared by which Mr. described as the Texas accounting firm that Ms. had used prior to their marriage and which they continued to use after their marriage.

3 Testimony of Mr.

8. Ms. was born in New Jersey. Ms. has moved to several states for work, including Florida, Illinois, and Texas. Ms. moved to Texas in 2008. As of the hearing date, Ms. continues to live in Texas, where she is the Chief Financial Officer ("CFO") of Ms. has never lived or worked in Utah.[4]

9. For the 2014 tax year, Mr. originally filed a Utah return with a status of married filing separately, on which he reported his income only (Mr. reported his 2014 federal adjusted gross income ("FAGI") to be). This return was also prepared by and it was filed using a Texas address. It appears that Mr. filed his 2014 Utah return as a Utah full-year resident individual because his return did not include a Form TC-40B on which he would have declared himself to be a Utah nonresident or part-year resident individual. On Part 7 (Property Owner's Residential Exemption Termination Declaration) of this 2014 Utah return, Mr. did not declare he was a Utah residential property owner who no longer qualified to receive a residential exemption for a Utah residential property.[5]

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4 Formal Exhibit 20; Testimony of Mr.

5 Formal Exhibit 5 (AUD 0061 – AUD 0066); Testimony of Mr. This exhibit also includes information about Mr. 2012 and 2013 Utah full-year resident returns, which he filed with a status of single using a Utah address (AUD 0048 - AUD 0059). At the hearing, Mr. stated that when he filed his original 2014 Utah return, he was not aware of any filing instructions and that he relied on to file his 2014 Utah return. Mr. now claims that this accounting company made a mistake by not filing his 2014 Utah return as a part-year return. Mr. stated that he did not know why did not include a Form TC-40B with his return, unless it is because he did not receive much 2014 income after he moved from Utah to Texas. On Formal Exhibit 23, the taxpayers show that Mr. received less than 10% of his 2014 income after he moved to Texas.

The instructions for the 2014 Form TC-40 (i.e., the Utah income tax return) provide instructions for "Military Personnel," including:

> If one spouse is a full-year Utah resident and the other spouse is a full-year nonresident, they may file their federal return as married filing jointly and file their Utah returns as married filing separately. See Pub 57, *Military Personnel Instructions*. If either spouse is a part-time resident, they cannot file using these special instructions but must file their Utah return using the same filing status as on their federal return" (italics in original).

Formal Exhibit 6 (AUD 0148). The 2014 instructions do not provide that non-military personnel who file a federal return as married filing jointly can file a Utah return as married filing separately, nor were either of the taxpayers a military serviceperson during 2014. As a result, it is unclear why decided to file a 2014 Utah return with a status of married filing separately for Mr. Perhaps did not originally file a 2014 Utah part-year resident return for Mr. because the military

10. Ms. did not originally file a 2014 Utah return. On or around December 19, 2019, however, the taxpayers filed an amended 2014 Utah return with a status of married filing jointly that was also prepared by On the Form TC-40B accompanying the amended 2014 Utah return, the taxpayers reported a Utah part-year residency from January 1, 2014 to July 25, 2014, and they allocated to Utah of their 2014 FAGI of The taxpayers used a Texas address to file this return. The return also included a statement indicating that the return was filed to show that: 1) Mr. was a Utah resident individual from January 1, 2014 to July 25, 2014, and was a Utah nonresident individual from July 26, 2014 to December 31, 2014; and 2) Ms. was a Utah nonresident individual for all of 2014. On the amended 2014 Utah return, the taxpayers did not indicate that either of them was a Utah residential property owner who was no longer qualified to receive a residential exemption for a Utah residential property.[6]

11. No evidence was provided to suggest that either taxpayer filed a 2015 or 2016 Utah return.[7] In addition, no evidence was provided to suggest that either taxpayer ever declared on Part 7 of a Utah return that either of them was a Utah residential property owner who was no longer qualified to receive a residential exemption for a Utah residential property.

12. The Division, however, has determined that Mr. was a Utah resident individual for all of 2014, 2015, and 2016; and that Ms. was a Utah resident individual for that portion of the audit period that she was married to Mr. specifically the October 27, 2014 to December 31, 2014 portion of 2014, and all of 2015 and 2016. The Division also determined that Ms. was a Utah nonresident individual for the January 1, 2014 to October 26, 2014 portion of 2014 (before she and Mr. were

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personnel instructions provided that if a military serviceperson or the military serviceperson's spouse is a Utah part-year resident individual, they "must file their Utah return using the same filing status as on their federal return." However, the reasons for the accounting firm to prepare the 2014 Utah full-year resident return for Mr. to file are not known.

6 Formal Exhibit 10; Testimony of Mr.

7 Mr. stated that the taxpayers' 2015 and 2016 returns were also prepared by The AYCO Company, which decided that the taxpayers did not need to file Utah returns for these years.

married). For reasons to be discussed in more detail later in the decision, the Division based these determinations on Utah Code Ann. §§59-10-136 and 59-10-103(1)(q)(i)(A) (2014-2016).[8]

13. The taxpayers appealed the Division's assessments and, also for reasons to be discussed in more detail later in the decision, contend that: 1) Mr. was a Utah resident individual only for the January 1, 2014 to July 25, 2014 portion of the audit period (before he moved to Texas) and was not a Utah resident individual for the remainder of the audit period; and 2) Ms. was not a Utah resident individual for any portion of the audit period.

14. Furthermore, if the Commission accepts the Division's position that Mr. is a 2014 Utah full-year resident individual and that Ms. is a Utah part-year resident individual for the October 27, 2014 to December 31, 2014 portion of 2014, the taxpayers contend that the Division's 2014 assessment would still need to be revised because the Division has allocated too much of Ms. 2014 income to Utah. On its 2014 assessment, the Division allocated to Utah $908,217 of the taxpayers total FAGI of $2,681,522.[9]

15. The Division allocated Ms. 2014 income to Utah on a pro-rata basis. The taxpayers contend that because Ms. received a disproportionate amount of her 2014 income prior to October 27,

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8 For the portions of the audit period that the taxpayers are Utah resident individuals, they would be entitled to a credit against their Utah tax liability for income taxes imposed by another state (pursuant to UCA §59-10-1003 (2014-2016)). In its assessments, the Division did not apply a credit for taxes imposed by another state for the 2014 tax year, but applied credits for the 2015 tax year and the 2016 tax year (Formal Exhibit 1). Because Texas does not impose a state income tax, it appears that the credits the Division allowed for 2015 and 2016 were associated with income taxes imposed by a state(s) other than Utah or Texas. In the event that the Commission accepts the Division's position concerning the periods that the taxpayers are Utah resident individuals, the taxpayers did not show that the amounts of Section 59-10-1003 credits that the Division applied were incorrect.

9 Formal Exhibit 1 (AUD 0001). The 2014 assessment does not show how much of the of 2014 income that the Division allocated to Utah was attributable to Mr. and how much was attributable to Ms. However, if Mr. of 2014 FAGI (as reported on his original 2014 Utah return that he filed with a status of married filing separately) is subtracted from the difference is As a result, it appears that the Division may have allocated around of Ms. 2014 income to Utah.

2014, this allocation methodology overstates the income Ms. received for the October 27, 2014 to December 31, 2014 portion of 2014.[10] The taxpayers assert that the amount of Ms. 2014 income that she received from October 27, 2014 to December 31, 2014 is only The Division agreed that an adjustment to the amount of Ms. 2014 income that it allocated to Utah is necessary and that the amount of Ms. income that she received from October 27, 2014 to December 31, 2014 is Accordingly, if the Commission finds that Mr. is a 2014 Utah full-year resident individual and that Ms. is a Utah part-year resident individual from October 27, 2014 to December 31, 2014, the Commission will order the Division to revise its 2014 assessment to reflect that the portion of Ms. 2014 income that should be allocated to Utah is

16. In 2008, Mr. purchased a home in Utah (the "Utah home"), which Mr. continued to own through at least 2018.[11] Ms. has never had any ownership interest in the Utah home. The Utah home is a single-family residence that is approximately square feet in size and which was worth approximately on or around March 9, 2018, when the taxpayers answered a Domicile Survey regarding the audit period ("Domicile Survey").[12]

17. When Mr. moved to Texas on July 26, 2014, he moved into a home that Ms. owned in Texas (the "Texas home"), which Ms. still owns and in which the taxpayers still live. The Texas home is a single-family residence that is approximately square feet in size and which was worth approximately on or around the March 9, 2018 date that the taxpayers answered the Domicile Survey.[13]

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10 Formal Exhibit 24.
11 Testimony of Mr.
12 Formal Exhibit 4 (AUD 0035 and AUD 0040).
13 Formal Exhibit 4 (AUD 0041). At the hearing, Mr. confirmed that throughout the audit period, Ms. Texas home was worth many times more than his Utah home.

18. Mr. had two sons from a prior marriage who were named and and who, in 2014 (the first year of the audit period), were and years of age, respectively. While Ms. also had a prior marriage, she had no children from her prior marriage. Mr. testified that moved into the Utah home in July 2011 and that continued to live in the Utah home until he passed away on March 17, 2016.[14] Mr. also testified that was in the but would visit the Utah home occasionally until 2015, when he moved to Florida permanently. Since passed away on March 17, 2016, neither of the taxpayers have had any family members living in Utah.

19. Mr. testified that when he moved to Texas, he initially kept the Utah home for to have a place to live in and for the taxpayers to use as a vacation home. However, in 2015, Mr. decided to sell the Utah home. On July 23, 2015, Mr. entered into a one-year agreement with to list the Utah home for sale (the agreement provided that the listing would expire on or about July 23, 2016).[15] The Utah home had not sold prior to the March 17, 2016 date on which passed away.[16] Mr. explained that after passed away, he decided to put a "pause" on selling the Utah home and that he and his wife continued to use the Utah home as a vacation home (primarily to use when skiing and attending golf events in Utah). Mr. further explained that he decided to remodel or update the Utah home before listing it for sale again. No evidence was provided to suggest that the Utah home was again listed for sale between July 23, 2016 (when the listing expired) and December 31, 2016 (the end of the audit period). It appears that Mr. did not complete the remodeling and list the Utah home for sale again until after the audit period.

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14 Formal Exhibit 22. Included in this exhibit are Utah driver's license, Certificate of Death, and other evidence to show that lived at the Utah home for that portion of the audit period until his death.

15 Formal Exhibit 16. The agreement also provided that would not place any "for sale" signs on the property. Mr. explained that not placing "for sale" signs on the property was to help ensure that only qualified buyers visited the Utah home.

16 Mr. explained that had the Utah home sold before death, would have had to move elsewhere.

20. When answering the Domicile Survey, the taxpayers indicated that after Mr. moved to Texas, they visited Utah the following number of days: 1) for the July 26, 2014 to December 31, 2014 portion of 2014, Mr. visited Utah 35 days and Ms. visited Utah 3 days; 2) for all of 2015, Mr. visited Utah 17 days and Ms. visited Utah 8 days; and 3) for all of 2016, Mr. visited Utah 32 days and Ms. visited Utah 17 days.[17]

21. At the hearing, however, the taxpayers suggested that they may have overstated the number of days in Utah that they reported on their Domicile Survey, arguing that the "standard" is to count a particular day as being in Utah only if one is present in Utah more time than anywhere else on that day. Whether or not the taxpayers have correctly stated this standard, the taxpayers have not provided evidence to show how much time they were in Utah in comparison to somewhere else for the days they showed they were in Utah (particularly for the first day and last day of the various trips to Utah). For example, on the Domicile Survey, the first trip to Utah that the taxpayers reported for Mr. after he moved to Texas shows that he arrived in Utah on August 5, 2014, that he departed from Utah on August 10, 2014, and that he was in Utah for five days on this trip. When determining that Mr. was in Utah for five days on this trip, it appears that the taxpayers may have counted August 5th as a half day, August 6th as a full day, August 7th as a full day, August 8th as a full day, August 9th as a full day, and August 10th as a half day (the sum of which would be five days).[18] The taxpayers, however, have not shown how much time Mr. spent in Utah on August 5th or August 10th as opposed to how much time he spent somewhere else on these days. Accordingly, the taxpayers have not shown that Mr. was in Utah for less than five days on this trip.

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17 Formal Exhibit 4 (AUD 0041, AUD 0043 – AUD 0044). This exhibit also shows that during the 2017 tax year (i.e., the tax year subsequent to the audit period), Mr. visited Utah 49 days and Ms. visited Utah 18 days. To support the number of days in Utah that they reported on this exhibit for Mr. the taxpayers submitted Mr. American Express statements for the July 26, 2014 to December 31, 2016 portion of the audit period to show where his purchases took place (Formal Exhibit 19).

18 Formal Exhibit 4 (AUD 0043).

22. Furthermore, under the taxpayers' proposed "standard," if Mr. was in Utah for more time than somewhere else on both August 5th and August 10th, it is possible that Mr. was present in Utah for more than five days on this trip. Moreover, on Mr. American Express statement for the period ending August 13, 2014, someone has handwritten that Mr. "flew to 8/11/14."[19] If Mr. flew to from Utah on August 11, 2014, the number of days in Utah for this particular trip may also have been understated. However, no information was provided as to whether Mr. flew to from Utah or from somewhere else on August 11, 2014. For these reasons, the Commission finds that the taxpayers (who have the burden of proof in this matter) have not shown that either of them was present in Utah for fewer days than they reported on their Domicile Survey for the July 26, 2014 to December 31, 2016 portion of the audit period or for the 2017 tax year.

23. Mr. stated that when he moved to Texas on July 26, 2014, he took most of his personal belongings with him, but did not move any furniture from the Utah home to Texas.[20] In addition, while living in Texas, Mr. kept at least one motor vehicle and some clothing and toiletries at the Utah home to use whenever he would stay at the home during the remainder of the audit period. Mr. further stated that after he moved to Texas, he and Ms. stayed in the Utah home whenever they visited Utah during the audit period (with the exception of staying at a friend's home in March 2016, when they came to Utah for funeral).[21]

24. Between July 26, 2014 (when Mr. moved to Texas) but prior to March 2016 (the month passed away), Mr. and/or Ms. made nine trips to Utah and stayed in the Utah home during most, if not all, of these trips. Three of the trips during which Mr. and/or Ms. stayed at the Utah home occurred after July 23, 2015 (when the home was listed for sale) but before March

19 Formal Exhibit 19 (MAN-0043).
20 Mr. stated that once he decided to sell the Utah home, his plan was to sell most of the furniture along with the home.
21 Testimony of Mr.

2016 (the month passed away). Between April 1, 2016 (the month after passed away) and December 31, 2016 (the end of the audit period), Mr. and/or Ms. made five trips to Utah and stayed in the Utah home. Among these five trips was a four-day trip to Utah in June 2016 during which Mr. stayed in the Utah home (which occurred after passed away on March 17, 2016 but prior to the expiration of the listing agreement on July 23, 2016).[22]

25. No evidence was provided to suggest that Mr. and ever entered into a written agreement to allow to live in the Utah home. Mr. testified that both before and after he moved to Texas on July 26, 2014, never paid any rent or utilities to live in the Utah home. Mr. further explained that both before and after he moved to Texas, would watch over and perform minor maintenance at the Utah home and would see that vendors hired to perform certain jobs at the home completed their jobs. Mr. also explained that he did not need to receive permission from to stay at the Utah home before passed away (i.e., Mr. retained the right to enter and use the Utah home after he moved to Texas).

26. For the 2008 through 2017 tax years (including the 2014, 2015, and 2016 tax years at issue), Mr. Utah home received the Utah residential exemption from property taxation.[23] Mr. testified that he took no action in 2008 (when he purchased the Utah home) to receive the residential exemption on the home. He also testified that he was not aware that the exemption existed or that he was

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22 Formal Exhibit 4 (AUD 0043); Testimony of Mr. After death and continuing for the rest of the audit period, the Utah home was unoccupied except when the taxpayers would visit Utah and stay in it (with personal effects remaining in the home). Mr. explained that a housekeeper would come and clean the Utah home about once every six weeks.

23 Formal Exhibit 2. Utah Code Ann. §59-2-103(2) (2016) provides that ". . . the fair market value of residential property located within the state is allowed a residential exemption equal to a 45% reduction in the value of the property[,]" while Utah Code Ann. §59-2-102(36)(a) (2016) defines "residential property" to mean, in part, "any property used for residential purposes as a primary residence." As a result, for property tax purposes, a home that is used as a person's primary residence *for property tax purposes* is only taxed on 55% of its fair market value, while a home that is not a person's primary residence *for property tax purposes* (such as a vacation home) is taxed on 100% of its fair market value. Subsections 59-2-103(2) and 59-2-102(36)(a) were amended and/or renumbered during the 2015 and 2016 tax years at issue. However, any amendment to

receiving it on the Utah home until the Division began its audit in 2018, after which he contacted County, Utah (the county in which the Utah home is located) to find out about the exemption and to see if he needed to take any action in regards to the exemption. No evidence was provided to suggest that Mr. ever asked County to remove the residential exemption from the Utah home prior to 2018.

27. On May 3, 2018, Mr. sent an email to County in which he indicated that he left Utah on July 26, 2014, and in which he indicated that had he known about the exemption, he would have contacted the County to have the exemption removed from the home when he moved to Texas. He also asked the County to "invoice" him for the additional taxes he would owe for "a partial year 2014, and for years 2015, 2016, and 2017."[24] Later in May 2018, however, the County informed the taxpayers' counsel, that it would not invoice any additional property taxes on the Utah home for the 2014 through 2017 tax years.[25]

28. For each of the 2014, 2015, and 2016 tax years, Ms. Texas home received the Texas homestead exemption from property taxation.[26]

29. Ms. has never had a Utah driver's license. Mr. last renewed his Utah driver's license on July 31, 2013, which was in effect until he obtained a Texas driver's license on June 10, 2015. As of the hearing date, Mr. Texas driver's license is still in effect. As a result, Mr. had a Utah driver's license for the January 1, 2014 to June 9, 2015 portion of the audit period and a Texas driver's license for the June 10, 2015 to December 31, 2016 portion of the audit period.[27]

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the language cited in this paragraph was nonsubstantive.

24 Formal Exhibit 17. At the hearing, however, the taxpayers now contend that the Utah home qualified for the residential exemption for all of the 2014, 2015, and 2016 tax years at issue. Mr. explained that he now believes that the Utah home was his primary residence until he moved to Texas on July 26, 2014, and that the home was primary residence until his death on March 17, 2016.

25 Formal Exhibit 18. While the County indicated that it would take no action for a tax year prior to the 2018 inquiry, it appears that the County may have removed the exemption for the 2018 tax year.

26 Formal Exhibit 21. Mr. explained that he believes that Ms. was able to receive the Texas homestead exemption on the Texas home throughout the audit period because her home was her primary residence both before and after their marriage.

27 Formal Exhibits 7 and 11.

30. Mr. explained that he did not obtain a Texas driver's license immediately upon moving to Texas because his Utah driver's license was still in effect and because the Utah registration of a 2014 that he had purchased in Utah and which he had shipped to Texas had not expired. Mr. stated that once the 2014 Utah registration was nearing expiration and he needed to register the vehicle in Texas, he decided to obtain a Texas driver's license.[28] Utah motor vehicle registration records show that the 2014 was registered in Utah on July 28, 2014.[29] The taxpayers also indicated on their Domicile Survey that Mr. registered the 2014 in Texas in June 2015 when he applied for his Texas driver's license (presumably around the June 10, 2015 date that he received his Texas driver's license).[30] For this reasons, the Commission finds that Mr. 2014 was registered in Utah for the July 28, 2014 to June 9, 2015 portion of the audit period and that it was registered in Texas for the June 10, 2015 to December 31, 2016 portion of the audit period.

31. For all of 2014, 2015, and 2016, Mr. had a 2011 that was registered in Utah and which he kept at the Utah home. Mr. explained that he kept this vehicle at the Utah home to drive whenever he visited Utah.[31]

32. Mr. also had another vehicle, a 2012 that he kept at the Utah home and which was registered in Utah for a portion of the audit period. This vehicle was registered in Utah prior to the audit period and was still registered in Utah in June 2015, when Mr. sold the vehicle to his son, (then took the vehicle to Florida when he moved there in July 2015).[32] No information was provided as to when in June 2015 that Mr. sold the vehicle to For this reason and because the taxpayers have

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28 Mr. explained that on or around July 12, 2014, he purchased the from a Utah dealership. Formal Exhibit 13 (various portions of the purchase documents). Mr. explained that he did take receipt of the 2014 in Utah, but had the Utah dealership ship the vehicle directly to Texas so that he would have a vehicle to drive immediately upon arriving in Texas in late July 2014.

29 Formal Exhibit 8 (AUD 0180).

30 Formal Exhibit 4 (AUD 0041).

31 Formal Exhibit 8 (AUD 0176); Testimony of Mr.

32 Formal Exhibits 4 (AUD 0041) and 8 (AUD 0182); Testimony of Mr.

the burden of proof, the Commission finds that Mr. sold the 2012 to on June 30, 2015. Accordingly, the Commission finds that for the January 1, 2014 to June 29, 2015 portion of the audit period, Mr. owned the 2012 and that it was registered in Utah.

33. Mr. testified that before and after he moved to Texas in July 2015, Ms. had one motor vehicle that was registered in Texas. He also testified that after he moved to Texas, Ms. acquired a second vehicle that she also registered in Texas. On the Domicile Survey, the taxpayers indicated that Ms. leased this second vehicle, a 2015 in February 2015.[33] No information was provided as to when in February 2015 that Ms. leased the 2015 For this reason and because the taxpayers have the burden of proof, the Commission finds that Ms. acquired the 2015 on February 28, 2015. As a result, the Commission finds that: 1) for the January 1, 2014 to February 27, 2015 portion of the audit period, Ms. had one vehicle that was registered in Texas; and 2) for the February 28, 2015 to December 31, 2016 portion of the audit period, Ms. had two vehicles that were registered in Texas.

34. Based on the foregoing, for the January 1, 2014 to October 26, 2014 portion of the audit period prior to the taxpayers' October 27, 2014 marriage, the Commission finds that: 1) from January 1, 2014 to July 27, 2014 (the date before the 2014 was registered in Utah), Mr. had two vehicles that were both registered in Utah; 2) from July 28, 2014 to October 26, 2014, Mr. had three vehicles that were all registered in Utah; and 3) from January 1, 2014 to October 26, 2014, Ms. had one motor vehicle that was registered in Texas.

35. In addition, for the October 27, 2014 to December 31, 2016 portion of the audit period that the taxpayers were married, the Commission finds that: 1) from October 27, 2014 to February 27, 2015 (the date before Ms. acquired her second vehicle), the taxpayers, together, had three vehicles registered in Utah

33 Formal Exhibit 4 (AUD 0041 and AUD 0042).

and one vehicle registered in Texas; 2) from February 28, 2015 to June 9, 2015 (the day before Mr. registered his 2014 in Texas), the taxpayers, together, had three vehicles registered in Utah and two vehicles registered in Texas; 3) from June 10, 2015 to June 29, 2015 (the day before Mr. sold the 2012 to), the taxpayers, together, had two vehicles registered in Utah and three vehicles registered in Texas; and 4) from June 30, 2015 to December 31, 2016, the taxpayers, together, had one vehicle registered in Utah and three vehicles registered in Texas.

36. Ms. has never been registered to vote in Utah. In addition, on the Domicile Survey, the taxpayers indicated that Ms. was registered to vote in Texas for all of 2014, 2015, and 2016.[34] Mr. did not register to vote Texas until June 10, 2015.[35] Mr. stated that he registered to vote in Texas at the same time he obtained his Texas driver's license and that he remained registered in Texas for the remainder of the audit period.

37. As to Mr. Utah voter registration, Utah voting information shows that he first registered to vote in Utah in 2008 and that he voted in Utah in 2008 and 2012. This information also shows actions taken by a Utah county clerk's office ("clerk's office") in regards to Mr. Utah voting status after he last voted in Utah in 2012, including: 1) on June 14, 2016, the clerk's office took an action described as "status was active changed to inactive;" and 2) on December 11, 2018, the clerk's office took an action described as "made removable and placed in state holding area due to inactivity."[36] As a result, when Mr. registered to vote in Texas on June 10, 2015, his Utah voter registration was still in an "active" status.

38. As to what these actions of the clerk's office mean, the Division has provided information in prior appeals showing: 1) that when a Utah registered voter has little voting activity or when a Utah clerk receives information that a Utah registered voter may have moved, the Utah clerk generally mails the voter a

34 Formal Exhibit 4 (AUD 0040).
35 Formal Exhibit 12.
36 Formal Exhibit 3.

confirmation card on which the clerk informs the voter that records indicate that the voter may have moved and on which the clerk asks for a new address; 2) that if the voter does not respond to the confirmation card, the voter is classified as an "inactive voter;" 3) that an "inactive voter" is still considered to be registered to vote in Utah and can vote if the voter goes to the polls (an "inactive voter," however, will not receive mailings such as voter identification cards and mail-in ballots); and 4) that if an "inactive voter" does not vote within the next four years, the clerk removes the voter from the Utah voter registration rolls (which is the action described as "made removable and placed in state holding area due to inactivity").[37] As a result, it appears that Mr. was registered to vote in Utah for all of 2014, 2015, and 2016 (for the January 1, 2014 to June 13, 2016 period he was in an "active" status and the June 14, 2016 to December 31, 2016 period he was in an "inactive" status).

39. Based on the foregoing, the Commission finds that Mr. was registered to vote in Utah for the entire audit period and that he was registered to vote in Texas for the June 10, 2015 to December 31, 2016 portion of the audit period.[38] In addition, for the entire audit period, the Commission finds that Ms. was registered to vote in Texas and was not registered to vote in Utah.

40. Throughout the audit period, Ms. received her mail at a Texas address. For the January 1, 2014 to July 26, 2014 period that Mr. lived in Utah, he received his mail at a Utah address. For the July 26, 2014 to December 31, 2016 period that Mr. lived in Texas, he received most of his

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

38 As will be discussed later in the decision, the taxpayers claim that Mr. was not registered to vote in Utah once he registered to vote in Texas on June 10, 2015. Clearly, Utah voting records show that Mr. continued to remain registered to vote in Utah after he registered to vote in Texas. In addition, the taxpayers have not provided any Utah law that provides that an individual is no longer considered to be registered in Utah solely by registering to vote in another state. For these reasons, the Commission finds that Mr. is registered to vote in Utah for the entire audit period. Regardless, for reasons to be explained in more detail later in the decision, the Commission's finding that Mr. is considered to be registered to vote in Utah during the period that he was also registered to vote in Texas has no impact on the Commission's final decision.

mail at a Texas address. For example, soon after moving to Texas, Mr. had the electricity and natural gas bills for his Utah home sent to a Texas address.[39] However, some of Mr. mail continued to be received at a Utah address after he moved to Texas. For example, in 2015, Mr. received several of his tax documents for the 2014 tax year at a Utah address.[40]

41. Ms. was a member of a Texas club and attended church in Texas throughout the audit period. Once Mr. moved to Texas on July 26, 2014, he was added to Ms. Texas country club membership as a spouse. At the beginning of the audit period, Mr. was a member of a Utah club, and he remained a member of this club after he moved to Texas. Mr. stated that he "got rid" of his Utah club membership at some point after he moved to Texas, and on the Domicile Survey, the taxpayers indicated that Mr. "dropped" this membership at the end of 2016.[41] However, no specific date was provided as to when Mr. terminated his Utah club membership. For this reason and because the taxpayers have the burden of proof, the Commission finds that Mr. was a member of a Utah club throughout the audit period.

42. Mr. indicated that it was his intent to change his domicile from Utah to Texas when he moved to Texas on July 26, 2014, and that it was his intent to remain domiciled in Texas for the remainder of the audit period. In addition, Mr. stated that since he moved to Texas, he has never had an intent to move back to Utah. He further explained that once Ms. retires, the taxpayers plan to move to South Carolina and that, in anticipation of this future move, the taxpayers purchased a home in South Carolina in December 2018.

43. The Division claims that Mr. is considered to be domiciled in Utah for all of 2014, 2015, and 2016 under the Subsection 59-10-136(2)(a) presumption concerning the Utah residential exemption

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39 Formal Exhibits 14 and 15.
40 Formal Exhibit 9 (AUD 0250 – AUD 0253).
41 Formal Exhibit 4 (AUD 0042); Testimony of Mr.

because this presumption has arisen for the entire audit period and because it has not been rebutted for any portion of the audit period. In addition, even if Mr. is not considered to be domiciled in Utah under Subsection 59-10-136(2)(a) either before or after he moved to Texas, the Division claims that Mr. would still be considered to be domiciled in Utah for some portions of the audit period under the Subsection 59-10-136(2)(b) presumption concerning Utah voter registration and/or the Subsection 59-10-136(2)(c) presumption concerning the assertion of Utah residency on a Utah income tax return.

44. The Division claims that under Subsection 59-10-136(5), the taxpayers are considered to be spouses for purposes of Section 59-10-136 for the October 27, 2014 to December 31, 2016 portion of the audit period that they were married. In addition, for the October 27, 2014 to December 31, 2016 portion of the audit period, the Division contends that Ms. is also considered to be domiciled in Utah under the Subsection 59-10-136(2)(a) presumption. Furthermore, the Division contends that Ms. like Mr. would also be considered to be domiciled in Utah under the Subsection 59-10-136(2)(b) presumption and/or the Subsection 59-10-136(2)(c) presumption for some portions of the October 27, 2014 to December 31, 2016 period that the taxpayers were married.

45. the taxpayers' attorney, acknowledges that the Utah Legislature has not set forth in statute the circumstances under which one or all of the Subsection 59-10-136(2) presumptions can be rebutted. As a result, he contends that the Commission's long-standing practice of finding through the appeals process that some circumstances are sufficient and others are insufficient to rebut a Subsection 59-10-136(2) presumption provides no certainty as to whether a particular taxpayer's circumstances will or will not be sufficient to rebut a presumption. proposes that the Legislature's decision not to provide certainty as to what circumstances will or will not rebut a Subsection 59-10-136(2) presumption should be rectified, specifically by allowing a taxpayer to rebut a Subsection 59-10-136(2) presumption that has arisen by showing

that they had the requisite intent to be domiciled somewhere other than Utah either under the 12 factors of Subsection 59-10-136(3) or under the factors of Utah Admin. Rule R884-24P-52 ("Rule 52") (2014-2016).[42]

46. Furthermore, acknowledges that Subsection 59-10-136(3) provides that an individual's domicile is to be determined by a "preponderance of the evidence" associated with 12 factors listed in Subsection 59-10-136(3)(b) "if the requirements of Subsection (1) or (2) are not met[.]" As a result, it appears that may realize that the clear language of Subsection 59-10-136(3) precludes a Subsection 59-10-136(2) presumption from being rebutted by the 12 factors of Subsection 59-10-136(3) if a "preponderance of the evidence" standard is applied when analyzing those factors. To bypass the plain language of Subsection 59-10-136(3), proposes, instead, that the Commission apply a "clear and convincing evidence" standard to the 12 factors of Subsection 59-10-136(3) to rebut a Subsection 59-10-136(2) presumption. For reasons to be explained in more detail later in the decision, the Commission finds that it would be inconsistent with the structure and language of Section 59-10-136 to find that a Subsection 59-10-136(2) presumption can be rebutted with the 12 factors of Subsection 59-10-136(3) or with the factors of Rule 52, regardless of which standard of proof is used to analyze an individual's intent with these factors.

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42 Prior to tax year 2012, an individual's income tax domicile was determined under Utah Admin. Rule R865-9I-2 (2011) ("Rule 2"), which provided, in part, criteria to be used when determining an individual's income tax domicile and which referred to a non-exhaustive list of domicile factors in Rule 52, which is a property tax rule. After the Legislature enacted new criteria in Section 59-10-136 to determine income tax domicile for the 2012 tax year, Rule 2 was amended to remove any reference to domicile and to the Rule 52 factors. Rule 52, however, is still in effect and continues to have applicability for property tax purposes. The Commission, however, finds argument that certainty would exist if the 12 factors of Subsection 59-10-136(3) or the factors of Rule 52 were used to rebut a Subsection 59-10-136(2) presumption to be specious. For many individuals, it is difficult to determine their intent by using the 12 factors of Subsection 59-10-136(3) or the factors of Rule 52 (which may explain why the Utah Legislature changed the prior Utah domicile law that relied solely on intent by enacting Section 59-10-136, which does not rely solely on intent). further contends that rebutting a Subsection 59-10-136(2) presumption by analyzing the 12 factors of Subsection 59-10-136(3) or the factors of Rule 52 would be consistent with construing tax imposition statutes strictly in favor of a taxpayer (pursuant to Utah Code Ann. §59-1-1417(2) (2014-2016)). For reasons to be discussed in more detail later in the decision, however, the Commission finds that Section 59-10-136 clearly provides that a Subsection 59-10-136(2) presumption should not be rebutted by the 12 factors of Subsection 59-10-136(3) or the factors of Rule 52.

47. However, the Commission would also consider it improper to apply a "clear and convincing" standard to any provision of Section 59-10-136 and particularly to the 12 factors of Subsection 59-10-136(3) where the Utah Legislature has expressly provided for a "preponderance of the evidence" standard in that subsection. In addition, in *Egbert v. Nissan North America, Inc.*, 2007 UT 64, the Utah Supreme stated that "proof beyond a reasonable doubt is the standard appropriate for criminal defendants who stand to lose liberty or life upon conviction, while a preponderance of the evidence is the level of proof required in the typical civil case where only money damages are at stake." The Court further explained that "[t]he intermediate standard of proof—clear and convincing evidence—is appropriate when the interests at stake in a civil case are 'particularly important' and 'more substantial than the mere loss of money'" (specifically describing civil cases involving civil commitment, deportation, and denaturalization). The instant matter is a civil case where money damages are at stake and which is not similar to the "more important" civil cases specifically described by the Court as warranting a "clear and convincing" standard of proof. Accordingly, in addition to finding that an analysis of the 12 factors of Subsection 59-10-136(3) should not be used to rebut a Subsection 59-10-136(2)(a) presumption, the Commission also finds that the "preponderance of the evidence" standard is appropriate when resolving all issues concerning Section 59-10-136, including whether a Subsection 59-10-136(2) presumption has or has not been rebutted.

48. also contends that unless the Commission allows a taxpayer to rebut a Subsection 59-10-136(2) presumption by demonstrating that they had the requisite "intent" to be domiciled somewhere other than Utah (either through an analysis of the Subsection 59-10-136(3) or Rule 52 factors), the Commission will have interpreted the Subsection 59-10-136(2) presumptions as being "mandatory" indicia of Utah domicile, much like someone meeting the Subsection 59-10-136(1) education criteria is automatically considered to be domiciled in Utah.[43] The Commission is perplexed by this argument where

43 The Legislature, however, did not provide that an action giving rise to a Subsection 59 10-136(2) presumption is an "absolute" indication of domicile (as it did in Subsection 59-10-136(1) for an individual who

appears to be aware that the Commission has found numerous circumstances under which each of the Subsection 59-10-136(2) presumptions can be rebutted and where even argues that at least one of these circumstances is applicable to the taxpayers and the instant case.[44]

49. also makes a number of other arguments as to why the Subsection 59-10-136(2) presumptions would not arise or, if they do arise, why they would be rebutted. One of these arguments concerns the Subsection 59-10-136(2)(a) presumption regarding the Utah residential exemption from property taxes. appears to contend that the presumption may not arise and/or is rebutted for the entire audit period because the taxpayers can show that the Utah home qualified to receive the residential exemption for *property tax purposes* for all of 2014, 2015, and 2016. The purpose of the instant appeal, however, is not to determine whether the Utah home was entitled to receive the residential exemption from property taxation for the 2014, 2015, and 2016 tax years. At issue in this appeal is where the Utah home did receive the residential exemption *for property tax purposes* for these years, whether receiving the exemption results in the taxpayers being considered to be domiciled in Utah for *income tax purposes* for these years. Accordingly, for this income tax appeal, the Commission will not be issuing a decision on the separate and distinct matter of whether the Utah home was entitled under Utah law to receive the residential exemption from property taxation for the 2014, 2015, and 2016 tax years.[45]

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is enrolled as a resident student in a Utah institution of higher education or, with certain exceptions, has a dependent enrolled in a Utah public kindergarten, elementary, or secondary school). Instead, an action giving rise to a Subsection 59-10-136(2) presumption may or may not be rebutted, depending on the particular circumstances that exist.

44 As will be discussed in more detail later in the decision, argues that the taxpayers have rebutted the Subsection 59-10-136(2)(a) presumption from March 17, 2016 (the date passed away) to June 23, 2016 (the date that the Utah home's listing expired) because the Utah home was listed for sale and because the home was "vacant" during this period. This argument appears to be referencing numerous prior Commission decisions that provide that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was listed for sale, but only if the home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for sale). *See, e.g., USTC Appeal No. 15-1332* (Initial Hearing Order Jun. 27, 2016); and *USTC Appeal No. 18-2130* (Initial Hearing Order Mar. 6, 2020).

45 If properly receiving the residential exemption on a Utah residential property for *property tax purposes* were, by itself, enough to keep the Subsection 59-10-136(2)(a) presumption from arising or to rebut the

50. further claims that the Subsection 59-10-136(2)(a) presumption does not even arise because Mr. never took any affirmative action to claim the residential exemption on his Utah home and/or because Ms. Texas home was her primary residence for the entire audit period and Mr. primary residence once he moved to Texas on July 26, 2014.[46] In addition, Mr. claims that the Subsection 59-10-136(2)(a) presumption does not arise for that portion of the audit period that lived in the Utah home because of the Subsection 59-10-136(6) exception that provides that claiming the residential exemption cannot be considered in determining domicile if a residential property is the primary residence of a tenant.[47] Lastly, even if the Subsection 59-10-136(2)(a) presumption does arise, appears to argue, for various reasons, that the presumption should be rebutted for at least the July 26, 2014 to December 31, 2016 period that Mr. lived in Texas.[48]

51. As to the Subsection 59-10-136(2)(b) presumption regarding Utah voter registration, makes the same "intent" arguments that have been previously discussed. also claims that

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presumption, it is arguable that an individual who lived in their Utah residential property and properly received the residential exemption would never be considered to be domiciled in Utah for income tax purposes under Subsection 59-10-136(2)(a). Such a result, however, is contrary to the provisions of Section 59-10-136 when considered in concert as whole.

46 It is not entirely clear whether Mr. is arguing that the Subsection 59-10-136(2)(a) presumption does not arise for all of 2014, 2015, and 2016 (including the January 1, 2014 to July 25, 2014 portion of 2014 that Mr. lived in the Utah home) or only for the July 26, 2014 to December 31, 2016 portion of the audit period that he lived in Texas. To avoid any confusion and in order to show how the taxpayers may be considered to be domiciled in Utah under each of the relevant Section 59-10-136 provisions, the Commission will determine later in the decision whether all Subsection 59-10-136(2) presumptions have arisen and/or been rebutted for the entirety of the 2014 through 2016 audit period.

47 Again, it is not entirely clear whether Mr. is arguing that Subsection 59-10-136(6) precludes the Subsection 59-10-136(2)(a) presumption from arising for the entire January 1, 2014 to March 17, 2016 period that lived in the Utah home (including the January 1, 2014 to July 25, 2014 period that Mr. also lived in the home) or only for the July 26, 2014 to March 17, 2016 portion of this period that lived in the Utah home while Mr. was living in Texas. Again, the Commission will determine later in the decision whether all of the Subsection 59-10-136(2) presumptions have arisen and/or been rebutted for the entirety of the 2014 through 2016 audit period. That being said, however, finding that Subsection 59-10-136(6) applies and the Subsection 59-10-136(2)(a) presumption would not arise where a property owner and a second individual who is not an owner are both living in a Utah residential property would be a bizarre outcome when the various provisions of Section 59-10-136 are considered in concert as a whole.

the Subsection 59-10-136(2)(b) presumption does not even arise for the June 10, 2015 to December 31, 2016 portion of audit period that Mr. was registered to vote in Texas. In addition, while appears to concede that the Subsection 59-10-136(2)(b) presumption arises for the January 1, 2014 to June 9, 2015 portion of the audit period, he contends that the presumption should be rebutted for the July 26, 2014 to June 9, 2015 period that Mr. was living in Texas but was not yet registered to vote in Texas, arguing that an individual should be given a reasonable amount of time to register in a new state after moving away from an old state.

52. As to the Subsection 59-10-136(2)(c) presumption regarding an assertion of Utah residency on a Utah income tax return, it appears that agrees with the Division that this presumption has arisen for the 2014 tax year because of Mr. original 2014 Utah return being filed as a full-year resident return. In regards to rebutting Subsection 59-10-136(2)(c), makes the same "intent" arguments previously discussed. In addition, indicates that the Subsection 59-10-136(2)(c) presumption should be rebutted for at least the July 27, 2014 to December 31, 2014 portion of 2014 that Mr. was living in Texas because the taxpayers relied on to file their 2014 tax returns and because this firm mistakenly filed a Utah full-year resident return for Mr. instead of a Utah part-year resident return.

53. Based on the foregoing, the taxpayers ask the Commission to accept their amended 2014 Utah return and to reverse the Division's 2014, 2015, and 2016 assessments in their entireties.[49]

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48 Some of the reasons as to why believes that the Subsection 59-10-136(2)(a) presumption have already been discussed. Any other reasons will be discussed later in the decision.

49 also suggests that Section 59-10-136 raises constitutional issues. It appears that recognizes that the Commission is not authorized to determine whether a Utah statute is unconstitutional, but may have raised this concern in order to preserve a constitutional argument for possible future court proceedings. *See, e.g., Nebeker v. Utah State Tax Comm'n*, 34 P.3d 180, 2001 UT 74 (Utah 2001), in which the Utah Supreme Court stated that "'[i]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments'" (citations omitted). As a result, the Commission will not discuss the taxpayers' constitutional concerns any further.

54. The Division contends that regardless of which level of proof is applied, it is inappropriate to rebut a Subsection 59-10-136(2) presumption by applying the 12 factors of Subsection 59-10 136(3) or the factors of Rule 52. In addition, where Mr. lived in the Utah home for a portion of the audit period and where one or both taxpayers used the home as a vacation home for the remainder of the entire audit period, the Division contends that the Subsection 59-10-136(6) exception does not apply, even though lived in the home until he passed away. The Division also contends that the Subsection 59-10-136(2)(a) presumption has arisen for all of 2014, 2015, and 2016 because Mr. has claimed the residential exemption on the Utah home and because it is considered, under Utah law, to be his primary residence for Utah income tax purposes for the entire audit period. Furthermore, the Division does not believe that the Subsection 59-10-136(2)(a) presumption is rebutted for any portion of the July 23, 2015 to July 23, 2016 period for which it was listed for sale (where the one or both taxpayers continued to use the Utah home as a vacation home while it was listed for sale). For these reasons, the Division asks the Commission to sustain its assessments (with the exceptions of revising the 2014 assessment because of the allocation issue previously discussed and possibly waiving penalties).

55. As will be explained in more detail later in the decision, Mr. is considered to be domiciled in Utah for the entirety of the January 1, 2014 to December 31, 2016 audit period, while Ms. is considered to be domiciled in Utah for the October 27, 2014 to December 31, 2016 portion of the audit period. Accordingly, under Subsection 59-10-103(1)(q)(i)(A), Mr. is considered to be a Utah resident individual for the entirety of the January 1, 2014 to December 31, 2016 audit period, and Ms. is considered to be a Utah resident individual for the October 27, 2014 to December 31, 2016 portion of the audit period.

APPLICABLE LAW

1. Under Utah Code Ann. §59-10-104(1) (2016)[50], "a tax is imposed on the state taxable income of a resident individual[.]"

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

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

3. Effective for tax year 2012 (and applicable to the 2014, 2015, and 2016 tax years at issue), UCA §59 10-136 provides for the determination of "domicile," as follows:[51]

> (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

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50 All substantive law citations are to the 2016 version of Utah law. Unless otherwise noted, the substantive law remained the same during the 2014, 2015, and 2016 tax years.

51 Effective for tax year 2018, the Utah Legislature amended Section 59-10-136 in 2019 General Session Senate Bill 13 ("SB 13"). However, in SB 13, the Legislature expressly provided that these amendments would have retrospective operation for a tax year beginning January 1, 2018 (expressly providing that the amendments would not apply to a tax year prior to 2018). As a result, it is the versions of Section 59-10-136 in effect during the 2014, 2015, and 2016 tax years that are applicable to this appeal.

(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.

4. In Section 59-10-136, two subsections require the Commission to determine whether the property for which an individual or an individual's spouse claims a residential exemption is that individual's or individual spouse's "primary residence."[52] To assist in determining whether a property is considered the "primary residence" of the individual or individual's spouse who claimed the exemption, the Legislature enacted new property tax provisions at the same time it enacted the new domicile law in Section 59-10-136. Specifically, to assist in the determination of Utah income tax domicile of a property owner, Utah Code Ann

52 *See* Subsections 59-10-136(2)(a) and (4)(a)(ii)(D). It is noted that the term "primary residence" is also found in Subsection 59-10-136(6). However, Subsection 59-10-136(6) concerns a tenant who uses a home as the tenant's "primary residence," not the "primary residence" of the individual or individual's spouse who owns the property for which the residential exemption was claimed. Accordingly, the guidance provided in Subsection 59-2-103.5(4) does not apply when determining whether a home is used by a tenant as the tenant's "primary residence."

§59-2-103.5(4) provides, as follows:[53]

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

5. Utah Code Ann. §20A-2-305 provides for names to be removed or not be removed from the official voter register, as follows in pertinent part:

> (1) The county clerk may not remove a voter's name from the official register because the voter has failed to vote in an election.
>
> (2) The county clerk shall remove a voter's name from the official register if:
>
> (a) the voter dies and the requirements of Subsection (3) are met;
>
> (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;

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53 Effective for the 2015 tax year, Subsection 59-2-103.5(4) was renumbered and amended. The amendments to Subsection 59-2-103.5(4) that were effective for tax year 2015 were nonsubstantive. In SB 13, the Utah Legislature also amended Section 59-2-103.5. Again, however, the SB 13 amendments have no applicability to the 2014, 2015, and 2016 tax years at issue in this appeal.

(e)[54] the county clerk receives a returned voter identification card, determines that there was no clerical error causing the card to be returned, and has no further information to contact the voter;
(f) the county clerk receives notice that a voter has been convicted of any felony or a misdemeanor for an offense under this title and the voter's right to vote has not been restored as provided in Section 20A-2-101.3 or 20A-2-101.5; or
(g) the county clerk receives notice that a voter has registered to vote in another state after the day on which the voter registered to vote in this state.

. . . .

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

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

54 Effective May 9, 2017, Subsection 20A-2-305(2)(e) was deleted from the statute. However, it is the 2014, 2015, and 2016 versions of this statute that are pertinent to this appeal.

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

_____

Signature of Voter"

. . . .

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

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

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

(ii) the voter has died.

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

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

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

7. UCA §59-1-401(14) (2020) provides that "[u]pon 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."

8. Utah Admin. Rule R861-1A-42 ("Rule 42") (2020) provides guidance concerning the waiver of penalties and interest that is authorized under Section 59-1-401(14), 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.

(3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:

(a) Timely Mailing...

(b) Wrong Filing Place...

(c) Death or Serious Illness...

(d) Unavoidable Absence...

(e) Disaster Relief...

(f) Reliance on Erroneous Tax Commission Information...

(g) Tax Commission Office Visit...

(h) Unobtainable Records...

(i) Reliance on Competent Tax Advisor...
(j) First Time Filer...
(k) Bank Error...
(l) Compliance History. . . .
(m) Employee Embezzlement...
(n) Recent Tax Law Change...

(4) Other Considerations for Determining Reasonable Cause.

(a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:

(i) whether the commission had to take legal means to collect the taxes;
(ii) if the error is caught and corrected by the taxpayer;
(iii) the length of time between the event cited and the filing date;
(iv) typographical or other written errors; and
(v) other factors the commission deems appropriate.

(b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.

(c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.

(d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

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

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

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

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

(c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:

(i) required to be reported; and
(ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

(2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:

(a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and

(b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

CONCLUSIONS OF LAW

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

2. The Division contends that Mr. is a Utah resident individual for all of 2014, 2015, and 2016 and that Ms. is a Utah resident individual from October 27, 2014 (the date the taxpayers married) to December 31, 2016. The taxpayers, however, contend that Mr. is a Utah resident individual only for the January 1, 2014 to July 25, 2014 portion of the audit period and that Ms. is not a Utah resident individual for any portion of the audit period. For the 2014, 2015, and 2016 tax years, Subsection 59-10-103(1)(q)(i) provides that a person is a Utah resident individual under either of two scenarios: 1) if the person is domiciled in Utah (the "domicile test"); or 2) if the person maintains a place of abode in Utah and spends 183 or more days of the taxable year in Utah (the "183 day test").

3. The Division does not assert that the taxpayers are Utah resident individuals for any portion of 2014, 2015, or 2016 under the 183 day test. Instead, the Division contends that the taxpayers are Utah resident individuals for all or portions of the audit period under the domicile test. Accordingly, the Commission must apply the facts to the Utah income tax domicile law that is applicable for the 2014, 2015, and 2016 tax years to determine whether Mr. is a Utah resident individual for the entirety of the audit period and Ms. is a Utah resident individual from October 27, 2014 to December 31, 2016 (as the Division contends); or whether Mr. is a Utah resident individual only for the January 1, 2014 to July 25, 2014 portion of the audit period and Ms. is not a Utah resident individual for any portion of the audit period (as the taxpayers contend).

4. For the 2014, 2015, and 2016 tax years, Section 59-10-136 contains four subsections addressing when a taxpayer is considered to have income tax domicile in Utah (Subsections (1), (2), (3), and

(5)) and a fifth subsection addressing when a taxpayer is not considered to have income tax domicile in Utah (Subsection (4)). The Commission will begin its analysis with a discussion of Subsection 59-10-136(5)(b).

5. Subsection 59-10-136(5)(b). For a married individual, it is often necessary (as in this case) to first determine whether that individual is considered to have a "spouse" for purposes of Section 59-10-136. Subsection 59-10-136(5)(b) provides that a married individual is *not* considered to have a spouse for purposes of Section 59-10-136 if: 1) the individual is legally separated or divorced from the individual's spouse; or 2) if the individual and the individual's spouse file federal income tax returns with a status of married filing separately. The taxpayers filed their 2014, 2015, and 2016 federal income tax returns with a status of married filing jointly, not separately. While the taxpayers did not marry until October 27, 2014, they were not legally separated or divorced during the remaining portion of the audit period. Accordingly, for purposes of Section 59-10-136, each taxpayer is considered to have a spouse for the October 27, 2014 to December 31, 2016 portion of the audit period.

6. Subsection 59-10-136(4). The taxpayers do not meet all of the conditions of Subsection 59-10-136(4)(a) in order *not* to be considered to be domiciled in Utah for any portion of 2014, 2015, or 2016. This subsection applies to an individual if the individual and the individual's spouse are both "absent from the state" for at least 761 consecutive days, if a number of other listed conditions are also met. Subsection 59-10-136(4) would have no application to the January 1, 2014 to July 25, 2014 portion of the audit period that Mr. lived in Utah (which is prior to the date that his "absence from the state" began in accordance with Subsection 59-10-136(4)(c)). Mr. has been absent from Utah for more than 761 consecutive days since moving to Texas on July 26, 2014, while Ms. has never lived in Utah. However, the Subsection 59-10-136(4) exception from domicile is not applicable for any portion of the July 26, 2014 to December 31, 2016 period that Mr. lived in Texas because all of the conditions to qualify for the exception have not been met.

7. First, for a 761-day or more period of absence, Subsection 59-10-136(4)(a)(ii)(A) requires that neither an individual nor the individual's spouse return to Utah for more than 30 days in a calendar year. Once Mr. moved to Texas on July 26, 2014, he returned to Utah for 35 days through the remainder of the 2014 tax year and for 32 days of the 2016 tax year. As a result, it is clear that Mr. is not an individual who did not return to Utah for more than 30 days in a calendar year for a 761-day period that included any portion of the audit period. Furthermore, Ms. is the spouse of an individual who returned to Utah for more than 30 days in a calendar year after his absence from Utah began and after they married. For these reasons, the taxpayers do not satisfy the Subsection 59-10-136(4)(a)(ii)(A) condition for any portion of the audit period.[55]

8. Second, the Subsection 59-10-136(4)(a)(ii)(D) condition would also not be met for a 761-day period that includes any portion of the July 26, 2014 to December 31, 2016 period that Mr. lived in Texas. This condition requires that neither the individual nor the individual's spouse claim a Utah residential exemption for that individual's or individual's spouse's primary residence. For the Subsection 59-10-136(4)(a)(ii)(D) condition *not* to be met in regards to the Utah home, two elements must exist. First, one or both of the taxpayers must have claimed the residential exemption on the Utah home. Second, the Utah home on which one or both of the taxpayers claimed the residential exemption must be considered the "primary residence" of one or both of the taxpayers in accordance with the guidance provided in Subsection 59-2-103.5(4). If both of these elements exist, the Subsection 59-10-136(4)(a)(ii)(D) condition will not have been met.

9. Before determining if these two elements exist, however, the Commission must first consider what effect that living in the Utah home for the January 1, 2014 to March 17, 2016 portion of the audit

55 Even if the analysis were limited to a 761-day period beginning on the October 27, 2014 date that the taxpayers married, the taxpayers would not satisfy the Subsection 59-10-136(4)(a)(ii)(A) condition because Mr. returned to Utah for 32 days in 2016.

period has on its analysis of Subsection 59-10-136(4)(a)(ii)(D). Subsection 59-10-136(6) provides that claiming a residential exemption may not be considered in determining income tax domicile if the home for which the exemption is claimed is the primary residence of a tenant. It is clear that lived in the Utah home for the January 1, 2014 to March 17, 2016 portion of the audit period. At issue, however, is whether would be considered a tenant for purposes of Subsection 59-10-136(6) for any portion of this period.

10. It is clear that Subsection 59-10-136(6) does not apply to the March 18, 2016 to December 31, 2016 period after passed away and when no one was living in the Utah home (other than the taxpayers when they would occasionally visit Utah and stay in the home). It is also clear that Subsection 59-10-136(6) does not apply to the January 1, 2014 to July 25, 2014 portion of the audit period that Mr. who owns the Utah home, and were both living in the home. Where a property owner is living in their home, Subsection 59-10-136(6) does not apply, even if the property owner were to lease a portion of the home to an unrelated individual.[56]

11. Remaining at issue is whether Subsection 59-10-136(6) applies for the July 26, 2014 to March 17, 2016 period that lived in the Utah home after Mr. moved to Texas. Although was living in the Utah home for this period, Mr. retained the right to use the Utah home and did use it whenever he and/or Ms. visited Utah. did not have an exclusive use of the Utah home and did not need to give his permission for Mr. and/or Ms. to stay in the Utah home. Under these circumstances, is not a tenant for purposes of the Utah home's qualifying for the Subsection 59-10-136(6) exception.[57] Accordingly, the Commission will proceed with its analysis of whether the two elements described earlier exist.

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56 This conclusion is consistent with the Commission's prior decision that Subsection 59-10-136(6) did not apply where a Utah residential property owner eventually decided to live in his home's basement and to rent out the home's main floor to an unrelated family. *See USTC Appeal No. 17-758* (Initial Hearing Order Jan. 26, 2018).

57 This conclusion is consistent with the Commission's prior decisions that Subsection 59-10-136(6) did not apply where a Utah residential property owner who maintained homes in two states would periodically stay

12. As to the first element, because Mr. received the residential exemption on the Utah home for the entirety of 2014, 2015, and 2016, he is considered to have claimed the residential exemption on the home for the entire audit 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).

13. Therefore, simply owning a residential property in a Utah county that does not require an application (which includes most Utah counties) generally asserts an enduring claim to the residential exemption. Furthermore, in those Utah counties that require an application, receiving the residential exemption after filing the application also constitutes a claim to the exemption.[58] No evidence was proffered to suggest that County required an application before it applied the residential exemption to a residential property or, if it did, that the County applied the residential exemption to the Utah home without Mr.

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in their Utah residence but who also allowed an adult family member to reside in the Utah residence. Like the instant case, the property owners in those cases reserved the right to stay in their Utah residences without needing to receive the permission of the adult family member who lived in the home. *See, e.g., USTC Appeal No. 16-117* (Initial Hearing Order Jan. 18, 2017). To find otherwise would allow an owner of a Utah vacation home who retained the right to use that home to avoid the potential income tax consequences of Section 59-10-136 by allowing a caretaker or someone else to live in the home. Such a result would be contrary to the provisions of Section 59-10-136 when considered in concert as a whole.

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

having filed an application to receive the exemption. As a result, because Mr. received the residential exemption on his Utah home for all of 2014, 2015, and 2016, the Commission finds that Mr. claimed the residential exemption on the home for the entire audit period. Accordingly, the first element for the Subsection 59-10-136(4)(a)(ii)(D) condition not to be met exists for this period.

14. As to the second element, for purposes of Section 59-10-136, the Utah home is considered to be Mr. "primary residence" for all of 2014, 2015, and 2016, regardless of whether he lived in Texas for much of the audit period. When Section 59-10-136 and Subsection 59-2-103.5(4) are read in concert, a Utah property on which an individual or an individual's spouse claims the residential exemption is considered their "primary residence" unless one or both of the property owners take affirmative steps to: 1) file a written statement to notify the county in which the property is located that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence; *and* 2) declare on the property owner's Utah individual income tax return for the taxable year for which the property owner no longer qualifies to receive the residential exemption, that the property owner no longer qualifies to receive the residential exemption allowed for a primary residence.

15. Prior to or during the 2014, 2015, and 2016 tax years, Mr. never took a step to have the residential exemption removed from his Utah home. He never filed a written statement to notify County that his Utah home did not qualify for the residential exemption for these years. In addition, he never declared on page 3 of a Utah return that he no longer qualified to receive the residential exemption for his Utah home. Accordingly, pursuant to Subsection 59-2-103.5(4), Mr. Utah home is considered to be his "primary residence" throughout the 2014, 2015, and 2016 tax years at issue.[59]

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59 To find otherwise could allow an individual who lived in another state but claimed the residential exemption on their Utah vacation home not to be considered to be domiciled in Utah for income tax purposes under Subsection 59-10-136(2)(a). Such a result would also be contrary to the provisions of Section 59-10-136 when considered in concert as a whole.

Again, even if the Utah home qualified for the residential exemption for property tax purposes because of living in the home, Utah income tax law is based on the property owner's receiving the exemption,

16. Because Mr. meets both of these elements for all of the 2014, 2015, and 2016 tax years, he has not met the Subsection 59-10-136(4)(a)(ii)(D) condition for any portion of the audit period. In addition, because Ms. is the spouse of an individual who has met both of these elements for the October 27, 2014 to December 31, 2016 portion of the audit period that the taxpayers were married, she has not met the Subsection 59-10-136(4)(a)(ii)(D) condition for this portion of the audit period.[60]

17. In summary, because the taxpayers do not meet all of the Subsection 59-10-136(4)(a) conditions for any portion of 2014, 2015, or 2016, the Subsection 59-10-136(4)(a) domicile exception would not apply to either taxpayer for any portion of these years. As a result, the Commission must analyze whether the taxpayers *are* considered to have domicile in Utah for 2014, 2015, and 2016 under one or more of the remaining subsections of Section 59-10-136 (i.e., under Subsections 59-10-136(1), (2)(a), (2)(b), (2)(c), and (3)). If an individual meets the criteria found in *any one* of these subsections, that individual is considered to be domiciled in Utah, even if the individual does not meet the criteria found in any of the other subsections.

18. Subsection 59-10-136(1). This subsection provides that an individual is considered to be domiciled in Utah if: 1) a dependent with respect to whom the individual or the individual's spouse claims a personal exemption on their federal return is enrolled in a Utah public kindergarten, elementary, or secondary school; or 2) the individual or the individual's spouse is enrolled in a Utah institution of higher education. Neither of these circumstances applies to the taxpayers for any portion of the 2014, 2015, and 2016 years at issue. Accordingly, under Subsection 59-10-136(1), the taxpayers would not be considered to be domiciled in Utah for any portion of the audit period.

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not on the property qualifying for the exemption.

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

19. Subsection 59-10-136(2)(a). This subsection provides that an individual is presumed to be domiciled in Utah if the individual *or* the individual's spouse claims a property tax residential exemption for that individual's or individual's spouse's primary residence, unless the presumption is rebutted. For reasons already discussed in regards to Subsection 59-10-136(4), Subsection 59-10-136(6) is not applicable to any portion of the audit period. In addition, the two elements necessary for this presumption to arise exist for Mr. for all of 2014, 2015, and 2016, and for Ms. for the October 27, 2014 to December 31, 2016 portion of the audit period that the taxpayers were married. Accordingly, under Subsection 59-10-136(2)(a): 1) Mr. will be considered to be domiciled in Utah from January 1, 2014 to October 26, 2014, unless he is able to rebut the presumption for all or a portion of this period; and 2) both taxpayers will be considered to be domiciled in Utah from October 27, 2014 to December 31, 2016, unless they are able to rebut the presumption for all or a portion of this period.[61]

20. Because Subsection 59-10-136(2)(a) involves a rebuttable presumption, the Legislature clearly intended not only for there to be circumstances where an individual whose actions give rise to this presumption *is* considered to have domicile in Utah, but also for there to be circumstances where an individual whose actions give rise to this presumption *is not* considered to have domicile in Utah.[62] However, the Legislature has not provided in statute what circumstances will be or will not be sufficient to rebut the Subsection 59-10-

61 The Commission recognizes that Ms. does not own the Utah home and has never lived in Utah. However, Ms. is the spouse of an individual (i.e., Mr.) who claimed the residential exemption on his Utah home for that portion of the audit period that they were married. Accordingly, for the October 27, 2014 to December 31, 2016 portion of the audit period that the Subsection 59-10-136(2)(a) presumption has arisen for both taxpayers, the taxpayers cannot rebut the presumption for only one of the taxpayers. Either the presumption is rebutted for both taxpayers, or the presumption is not rebutted for both taxpayers. This conclusion is supported by Subsection 59-10-136(5)(a), which provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah under Section 59-10-136.

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

136(2)(a) presumption. As a result, it is left to the Commission, consistent with the structure and language of Section 59-10-136, to delineate between those circumstances that are sufficient and not sufficient to rebut the presumption.

21. The taxpayers contend that they have rebutted the Subsection 59-10-136(2)(a) presumption by showing that Mr. had the requisite intent to make Texas his permanent home once he moved there on July 26, 2014; and that Ms. had the requisite intent to make Texas her permanent home throughout the audit period. The taxpayers' arguments rely on intent and weighing an individual's contacts with various states when determining whether they are considered to be domiciled in Utah, as was done under Rule 52 (prior to Section 59-10-136 becoming effective for tax year 2012) and is done under Subsection 59-10-136(3)(b) if an individual is not considered to be domiciled in Utah under Subsection 59-10-136(1) or (2).

22. The Commission has previously found that an individual has not rebutted a Subsection 59-10-136(2) presumption because he or she would not be considered to be domiciled in Utah under Rule 52, the property tax rule used to determine income tax domicile for tax years prior to 2012. It is arguable that using the "old" income tax domicile criteria found in the pre-2012 version of Rule 2 and/or in Rule 52 to determine an individual's income tax domicile for years when Section 59-10-136 is in effect would be giving the Legislature's "new" law little or no effect, which the Commission declines to do.[63]

23. Similarly, the Commission has found that an individual cannot rebut a Subsection 59-10-136(2) presumption by showing that he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). If the Commission were to do so, one could argue that the Commission was giving no meaning to the Subsection 59-10-136(2) presumptions (i.e., that it was determining domicile as though the Subsection 59-10-136(2) presumptions did not exist).[64]

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

24. To allow an individual to rebut a Subsection 59-10-136(2) presumption by showing that they could be considered to be domiciled outside of Utah using the 12 domicile factors listed in Subsection 59-10-136(3)(b) (or using domicile factors found in Rule 2 and/or Rule 52 or other sources) would clearly frustrate the plain meaning of Section 59-10-136. The Subsection 59-10-136(2) presumptions involve three specific factors: 1) claiming the residential exemption on a Utah residential property (the Subsection 59-10-136(2)(a) presumption); 2) being registered to vote in Utah (the Subsection 59-10-136(2)(b) presumption); and 3) asserting Utah residency on a Utah income tax return (the Subsection 59-10-136(2)(c) presumption).

25. Prior to Section 59-10-136 becoming effective for tax year 2012, the three factors that the Utah Legislature described and set forth as rebuttable presumptions in Subsection 59-10-136(2) (as well as the two education factors described in Subsection 59-10-136(1)) had been among the numerous and non-exhaustive list of factors that the Commission had used to determine income tax domicile for tax years prior to 2012 (as set forth in Rule 2 and/or Rule 52).[65] In Section 59-10-136, however, the Utah Legislature established a hierarchy of specific factors described in Subsections 59-10-136(1) and (2) to establish income tax domicile, with the education factors creating an absolute indication of domicile and the three Subsection 59-10-136(2) factors creating rebuttable presumptions of domicile. Thus, each of the factors described in Subsections 59-10-136(1) and (2) were given greater import than they had received in establishing income tax domicile for years prior to 2012 (when each of these factors was merely one of the many factors with which domicile was determined).[66]

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

66 Almost all of the factors that were given greater import in Subsections 59-10-136(1) and (2) are based on an individual or individual's spouse availing themselves of certain benefits of being a resident of Utah, such as having their dependent attend a Utah public school, being enrolled as a resident student at a Utah institution of higher education, receiving a property tax benefit in the form of a residential exemption, or being registered to vote in Utah.

26. As a result, it is clear that the Legislature intended that an individual meeting one of the factors described in Subsection 59-10-136(1) would, with limited exceptions, be considered to be domiciled in Utah; and that an individual meeting one of the factors described and set forth as a rebuttable presumption in Subsection 59-10-136(2) might be considered to be domiciled in Utah, regardless of whether that individual would otherwise be deemed to be domiciled somewhere other than Utah under a more traditional domicile test (such as the one found in Rule 2 and/or Rule 52). To find that a Subsection 59-10-136(2) presumption can be rebutted by showing that the individual would not be considered to be domiciled under some more traditional type of domicile test does not consider the Subsection 59-10-136(2) presumptions in concert with the structure and language of Section 59-10-136 as a whole and would frustrate the plain meaning of Section 59-10-136.[67]

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

28. As a result, when a Subsection 59-10-136(2) presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not.[68] For example, where the Subsection 59-10-136(2)(a) presumption has arisen in regards to claiming the

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

68 This conclusion is consistent with prior Commission decisions. *See, e.g., USTC Appeal No. 18-1841* (Initial Hearing Order Jan. 13, 2020). suggested that an individual should be able to rebut a

residential exemption, the Commission has found that this presumption can be rebutted by showing that the property owner asked the county to remove the exemption, and the county failed to do so.[69] In the instant case, Mr. did not ask County to remove the residential exemption from the Utah home prior to or during the audit period. While Mr. asked County to remove the residential exemption from the Utah home in 2018 (after the Division's audit had begun), this is insufficient to rebut the Subsection 59-10-136(2)(a) presumption.[70]

29. The Commission has also found that the Subsection 59-10-136(2)(a) presumption was rebutted where an individual whose home was receiving the residential exemption disclosed on their Utah income tax return that the home no longer qualified for the exemption (even if the individual did not contact the county directly).[71] Neither taxpayer, however, ever declared on a Utah return that they were a Utah

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Subsection 59-10-136(2) presumption if they were "close" to meeting all of the conditions necessary for the Subsection 59-10-136(4) exception from domicile to apply. suggested that the taxpayers were close to meeting the Subsection 59-10-136(4) exception, arguing that once Mr. moved to Texas, he almost met the no more than 30 days in Utah during a calendar year condition. contention that the taxpayers were close to meeting the Subsection 59-10-136(4) exemption from domicile is erroneous. For reasons explained earlier, the taxpayers not only did not meet the no more than 30 days in Utah in a calendar year condition of Subsection 59-10-136(4)(a)(ii)(A), but they also did not meet the residential exemption condition of Subsection 59-10-136(4)(a)(ii)(D). Regardless, even if the taxpayers had met all but one of the Subsection 59-10-136(4) conditions, this would not have been sufficient to rebut a Subsection 59-10-136(2) presumption.

69 *See, e.g., USTC Appeal No. 17-1589* (Initial Hearing Order Aug. 8, 2018).

70 Even if, in 2018, Mr. had asked for the residential exemption he received on the Utah home for the 2014, 2015, and 2016 tax years to be removed and had paid the additional property taxes associated with the exemption for these years, this, too, would have been insufficient to rebut the Subsection 59-10-136(2)(a) presumption. The Commission has found in prior decisions that an individual's retroactive or corrective actions do not negate the actions taken during the tax year(s) at issue (especially where those retroactive or corrective actions did not occur until the Division began its audit of the tax year(s) at issue). *See, e.g., USTC 15-1582* (Initial Hearing Order Aug. 26, 2016); *USTC Appeal No. 17-812* (Initial Hearing Order Mar. 13, 2018); and *USTC Appeal No. 17-1768* (Findings of Fact, Conclusions of Law, and Final Decision Jul. 3, 2019). To find otherwise would allow an individual who claimed the residential exemption on a second home (such as a vacation home) and who was found to be domiciled in Utah (once these actions were uncovered) to avoid the income tax consequences of their actions.

71 *See, e.g., USTC Appeal No. 17-812.*

residential property owner who no longer qualified to receive the residential exemption from property taxation for their primary residence.[72]

30. The Commission has also found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was listed for sale, but only if the home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for sale).[73] Mr. listed his Utah home for sale on July 23, 2015, and it remained listed for sale through July 23, 2016. However, the home was not vacant for any portion of the period for which it was listed for sale. For the July 23, 2016 to March 17, 2016 period that the Utah home was listed for sale but before passed away, was living in the home, and both taxpayers would occasionally use the Utah home as a vacation home. In addition, for the March 18, 2016 to July 23, 2016 period that the Utah home was listed for sale after passed away, Mr. used the Utah home as a vacation home. Mr. also kept personal items at the Utah home throughout the period that the Utah home was listed for sale to accommodate his use of the Utah home as a vacation home during this period. Under these circumstances, the Subsection 59-10-136(2)(a) presumption is not rebutted for any portion of the July 23, 2015 to July 23, 2016 period it was listed for sale.

31. In addition, the Commission has found that the Subsection 59-10-136(2)(a) presumption can be rebutted for that period that a home that was listed for rent, but only if the home was vacant (i.e., if no one was residing in the home even on an occasional basis while it was listed for rent) and if the home would continue to qualify for the residential exemption by being rented to tenants who would use the home as the

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72 As explained earlier, contends that the Utah home qualified for the residential exemption throughout the audit period because of living in the home and that, as a result, there was no reason why Mr. would ask for the exemption to be removed. However, even if an individual could properly receive the residential exemption for property tax purposes, they could decide that receiving the exemption was not worth the risk of exposing them to Utah income tax liability and that it would be in their best interest to have the exemption removed (especially if questions exist as to whether someone living in the home would be considered a tenant for purposes of Subsection 59-10-136(6)). Again, however, the Commission is not determining whether Mr. Utah home qualified to receive the residential exemption for property tax purposes for each of the 2014, 2015, and 2016 tax years.

73 *See, e.g., USTC Appeal No. 15-1332*; and *USTC Appeal No. 18-2130.*

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).[74] Mr. however, did not list the Utah home for rent during the 2014, 2015 or 2016 tax year.

32. The Commission has also found that the Subsection 59-10-136(2)(a) presumption would be rebutted for that period that a home was under its initial construction (not a remodel) and until it received a certificate of occupancy, if the home would be used as a primary residence upon its completion.[75] The Utah home, however, was not under its initial construction during any portion of the audit period.

33. The Commission has previously found that the Subsection 59-10-136(2)(a) presumption is not rebutted because an individual had never heard of the residential exemption or did not know that they were receiving the residential exemption.[76] The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(a) presumption. The taxpayers, however, have not proffered sufficient arguments or evidence to rebut the Subsection 59-10-136(2)(a) presumption for any portion of the audit period. Accordingly, under Subsection 59-10-136(2)(a), Mr. is considered to be domiciled in Utah for all of the 2014, 2015, and 2016 tax years. In addition, under Subsection 59-10-136(2)(a), while Ms. is not considered to be domiciled in Utah for the January 1, 2014 to October 26, 2014 portion of the audit period, she is considered to be domiciled in Utah for the October 27, 2014 to December 31, 2016 portion of the audit period that the taxpayers were married.

34. Because the Commission has found that Mr. is considered to be domiciled in Utah for all of 2014, 2015, and 2016, and that Ms. is considered to be domiciled in Utah from October 27, 2014 to December 31, 2016 (the periods for which the Division determined that each taxpayer was a Utah

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74 *See, e.g., USTC Appeal No. 17-758.*

75 *See, e.g., USTC Appeal No. 17-1589.* However, the Commission has not found that remodeling a home is reasonable cause to rebut the Subsection 59-10-136(2)(a) presumption, even if the home is empty while the remodeling is occurring.

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

resident individual in its assessments), the Commission need not analyze the remaining subsections of Section 59-10-136 (i.e., Subsections 59-10-136(2)(b), (2)(c), and (3)) to determine whether the taxpayers are considered to be domiciled in Utah for these periods. However, it may prove useful to make some observations about these remaining subsections.

35. Subsection 59-10-136(2)(b). This subsection provides that there is a rebuttable presumption that an individual is considered to be domiciled in Utah if the individual *or* the individual's spouse is registered to vote in Utah. For reasons discussed earlier, the Commission has found that Mr. was registered to vote in Utah for all of the 2014, 2015, and 2016 tax years (including the October 27, 2014 to December 31, 2016 portion of the audit period that the taxpayers were married). Accordingly, under Subsection 59-10-136(2)(b): 1) Mr. will be considered to be domiciled in Utah from January 1, 2014, to October 26, 2014, unless he is able to rebut the presumption for all or a portion of this period; and 2) both taxpayers will be considered to be domiciled in Utah from October 27, 2014 to December 31, 2016, unless they are able to rebut the presumption for all or a portion of this period.[77]

36. The taxpayers also contend that they have rebutted the Subsection 59-10-136(2)(b) presumption by showing that Mr. had the requisite intent to make Texas his permanent home once he moved there on July 26, 2014; and that Ms. had the requisite intent to make Texas her permanent home throughout the audit period. For reasons explained earlier in regards to the Subsection 59-10-136(2)(a) presumption, an individual also cannot rebut the Subsection 59-10-136(2)(b) presumption because he or she would not be considered to be domiciled in Utah under Rule 52 (the property tax rule used to determine

77 Again, the Commission recognizes that Ms. has never been registered to vote in Utah. However, Ms. is the spouse of an individual (i.e., Mr.) who was registered to vote in Utah for that portion of the audit period that they were married. Accordingly, for the October 27, 2014 to December 31, 2016 portion of the audit period that the Subsection 59-10-136(2)(b) presumption has arisen for both taxpayers, the taxpayers cannot rebut the presumption for only one of the taxpayers. Either the presumption is rebutted for both taxpayers, or the presumption is not rebutted for both taxpayers. Again, this conclusion is supported by Subsection 59-10-136(5)(a), which provides that an individual is considered to have domicile in Utah if his or her spouse is considered to have domicile in Utah under Section 59-10-136.

income tax domicile for tax years prior to 2012) or because he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). Again, when a Subsection 59-10-136(2) presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not.

37. For example, if an individual is registered to vote in Utah, the Commission has found that the Subsection 59-10-136(2)(b) presumption can be rebutted from the date the individual moved out of Utah by showing that they registered to vote in the "new" state relatively soon after moving there; and if they did not register to vote in the new state relatively soon after moving there, the presumption is rebutted from the date they registered to vote in the new state.[78] Mr. registered to vote in Texas on June 10, 2015, which is approximately 10½ months after he moved to Texas on July 26, 2014. In addition, the taxpayers have not shown that Mr. was required, under Texas law, to wait 10½ months to register in Texas after moving there. While the Commission has found that registering to vote in a new state as much as 5 months after moving to the new state is sufficient to rebut the Subsection 59-10-136(2)(b) presumption from the date an individual moved to that new state, the Commission has also found that waiting 10½ months to register to vote in the new state is not sufficient to rebut the presumption from the date of the move.[79] Accordingly, Mr. registering to vote in Texas on June 10, 2015 is sufficient to rebut the Subsection 59-10-136(2)(b) presumption for the June 10, 2015 to December 31, 2016 portion of the audit period, but it is not sufficient to rebut the presumption for the January 1, 2014 to June 9, 2015 portion of the audit period.

38. Still at issue is whether Mr. has rebutted the Subsection 59-10-136(2)(b) presumption for the remaining January 1, 2014 to October 26, 2014 period that has arisen for him alone or for the remaining

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78 *See, e.g., USTC Appeal No. 15-720* (Initial Hearing Order Mar. 6, 2016); and *USTC Appeal No. 18-1841.*

79 *See, e.g., USTC Appeal No. 18-1841.*

October 27, 2014 to June 9, 2015 period that has arisen for the taxpayers together. The Commission has also found that the Subsection 59 10-136(2)(b) presumption can be rebutted if the individual who is registered to vote in Utah requested for their name to be removed from the Utah voter registry and the local county clerk or other official who received the request did not remove the individual's name from the registry.[80] No evidence was provided to show that Mr. ever asked for his name to be removed from the Utah voter registry prior to or during the January 1, 2014 to June 9, 2015 period for which the Subsection 59-10-136(2)(b) presumption has arisen but has not already been rebutted.

39. Furthermore, the Commission has found that the Subsection 59-10-136(2)(b) presumption can be rebutted from the date that Utah voting laws provide for an individual's name to be removed from the Utah voter registry and a local county clerk does not immediately remove their name from the registry.[81] The taxpayers, however, have not shown that Utah voting laws provided for Mr. name to be removed from the Utah voter registry at any time prior to or during the January 1, 2014 to June 9, 2015 period for which the Subsection 59-10-136(2)(b) presumption has arisen but has not already been rebutted.

40. The Commission has also found that it might find that the Subsection 59-10-136(2)(b) presumption may be rebutted if an individual moves from Utah to a state that does not require voter registration prior to voting and if the individual eventually votes in that state.[82] The taxpayers, however, have not shown that Texas allows an individual who moves there to vote in a Texas election without having first registered to vote in Texas. As a result, regardless of whether Mr. eventually voted in a Texas election, he does not meet this criterion to rebut the Subsection 59-10-136(2)(b) presumption for the January 1, 2014 to June 9, 2015 period that has not already been rebutted.

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80 *See, e.g., USTC Appeal No. 18-793.*
81 *See, e.g., USTC Appeal No. 18-539* (Initial Hearing Order Apr. 30, 2019).
82 *See, e.g., USTC Appeal No. 17-1552* (Initial Hearing Order Feb. 7, 2019).

41. The Commission has found that an individual cannot rebut the Subsection 59-10-136(2)(b) presumption by showing that they did not vote in Utah during the period at issue. The Commission has reached this decision because the Utah Legislature (at least for the 2014, 2015, and 2016 tax years currently at issue) elected to use voting registration, not actual voting, as the criterion that could trigger domicile under Subsection 59-10-136(2)(b).[83] As a result, even though Mr. did not vote in Utah during any portion of the audit period, this is insufficient to rebut the Subsection 59-10-136(2)(b) presumption for the January 1, 2014 to June 9, 2015 period for which the Subsection 59-10-136(2)(b) presumption has not already been rebutted.

42. The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(b) presumption. The taxpayers, however, have not proffered sufficient arguments or evidence to rebut the Subsection 59-10-136(2)(b) presumption for any portion of the January 1, 2014 to June 9, 2015 period for which the Subsection 59-10-136(2)(b) presumption has arisen but has not already been rebutted. Accordingly, under Subsection 59-10-136(2)(b), Mr. is considered to be domiciled in Utah from January 1, 2014 to June 9, 2015, but not from June 10, 2015 to December 31, 2016. In addition, under Subsection 59-10-136(2)(b), Ms. is considered to be domiciled in Utah for the October 27, 2014 to June 9, 2015 portion of the audit period that the taxpayers were married; but she is not considered to be domiciled in Utah for the January 1, 2014 to October 26, 2014 portion of the audit period before the taxpayers married, or for the June 10, 2015 to December 31, 2016 portion of the audit after the taxpayers married.

43. Subsection 59-10-136(2)(c). Under this subsection, there is a rebuttable presumption that an individual is considered to be domiciled in Utah if "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

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

for which the individual or the individual's spouse is a resident of this state." Neither taxpayer has filed a 2015 or 2016 Utah return. As a result, under Subsection 59-10-136(2)(c), neither taxpayer would be considered to be domiciled in Utah for any portion of 2015 or 2016.

44. For the 2014 tax year, however, Mr. originally filed a 2014 Utah return with a status of married filing separately on which a Utah residency was asserted for all of 2014. In late 2019, the taxpayers subsequently filed an amended 2014 Utah return with a status of married filing jointly on which a Utah part-year residency was asserted from January 1, 2014 to July 25, 2014. Accordingly, under Subsection 59-10-136(2)(c): 1) Mr. will be considered to be domiciled in Utah from January 1, 2014 to October 26, 2014, unless he is able to rebut the presumption for all or a portion of this period; and 2) both taxpayers will be considered to be domiciled in Utah for the October 27, 2014 to December 31, 2014 portion of 2014 that they were married, unless they are able to rebut the presumption for all or a portion of this period.[84]

45. The taxpayers also contend that they have rebutted the Subsection 59-10-136(2)(c) presumption by showing that Mr. had the requisite intent to make Texas his permanent home once he moved there on July 26, 2014; and that Ms. had the requisite intent to make Texas her permanent home throughout the audit period. For reasons explained earlier in regards to the Subsection 59-10-136(2)(a) presumption, an individual also cannot rebut the Subsection 59-10-136(2)(c) presumption because he or she would not be considered to be domiciled in Utah under Rule 52 (the property tax rule used to determine income tax domicile for tax years prior to 2012) or because he or she would not be considered to have domicile in Utah under the 12 factors listed in Subsection 59-10-136(3)(b). Again, when a Subsection 59-10-136(2)

84 One might argue that the Subsection 59-10-136(2)(c) presumption would also arise for Ms. for the January 1, 2014 to July 25, 2014 portion of 2014 that a Utah residency was declared on the amended 2014 Utah return that the taxpayers filed jointly. However, where the taxpayers did not marry until after the period of residency asserted on this joint return and where this return, on its face, shows that the taxpayers did not file the return to show that Ms. was a part-year resident from January 1, 2014 to July 25, 2014 (based on the way the taxpayers' 2014 income was allocated to Utah on the return), the Commission finds that the Subsection 59-10-136(2)(c) presumption does not arise for Ms. for the January 1, 2014 to July 25, 2014 period prior to the taxpayers' marriage.

presumption is considered in concert with Section 59-10-136 as a whole, the Commission has generally looked to actions or inactions related to the specific factor described in the presumption to determine whether an individual has rebutted the presumption or not.

46. In prior appeals, the Commission has found that the Subsection 59-10-136(2)(c) presumption is rebutted where evidence clearly shows that an individual has filed a Utah part-year resident return where the dates of the Utah part-year residency and the Utah part-year nonresidency were accidentally "flipped" (for example, where an individual had intended to claim a Utah part-year residency from January 1, 2012 to February 15, 2012, but had instead claimed a Utah part-year residency from February 16, 2012 to December 31, 2012).[85] Mr. original 2014 Utah return was filed as a full-year resident return, and the dates of the Utah part-year residency and nonresidency were not accidentally flipped on the taxpayer's amended 2014 part-year resident return. As a result, these particular circumstances for which the Commission has found that the Subsection 59-10-136(2)(c) presumption can be rebutted are not present in the instant case.

47. In addition, where an individual who is working in Utah and meets the 183 day test files a joint Utah resident return with their spouse (who does not live or work in Utah) and where neither of the spouses would be considered to be domiciled in Utah under any provision of Section 59-10-136 other than Subsection 59-10-136(2)(c), the Commission has found that the Subsection 59-10-136(2)(c) presumption that has arisen because of the taxpayers' complying with Utah law and filing a Utah resident return can be rebutted if three conditions are met.[86] This Commission found that these circumstances would be sufficient to rebut the Subsection 59-10-136(2)(c) presumption so that individuals who comply with Utah law by filing a Utah

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85 *See, e.g., USTC Appeal No. 17-1624* (Findings of Fact, Conclusions of Law, and Final Decision Nov. 14, 2019).

86 *See, e.g., USTC Appeal No. 16-1804* (Initial Hearing Order May 10, 2018); and *USTC Appeal No. 18-1653* (Initial Hearing Order Oct. 25, 2019). The conditions that must be met are that: 1) neither taxpayer meets any of the other domicile provisions of Section 59-10-136; 2) the Utah resident return that was filed "shows on its face that [the taxpayers] believed that some of their income was not subject to Utah taxation;" and 3) "evidence at the hearing clearly shows that [the taxpayers] believed that one (or both) of them was a Utah nonresident."

resident return are not disadvantaged in comparison to individuals who disregard Utah law and do not file the required Utah resident return. The taxpayers, however, do not meet these circumstances because they have been found to be domiciled in Utah under other subsections of Section 59-10-136. Specifically, under Subsections 59-10-136(2)(a) and (2)(b), Mr. has been found to be domiciled in Utah for all of 2014, while Ms. has been found to be domiciled in Utah for the October 27, 2014 to December 31, 2014 portion of 2014 that the taxpayers were married. As a result, these particular circumstances for which the Commission has found that the Subsection 59-10-136(2)(c) presumption can be rebutted are not present in the instant case.

48. The taxpayers argue that the Subsection 59-10-136(2)(c) presumption is rebutted for the July 26, 2014 to December 31, 2014 portion of 2014 for Mr. and for the October 27, 2014 to December 31, 2014 portion of 2014 for Ms. because the taxpayers' accounting firm erroneously filed a separate 2014 Utah return for Mr. before it eventually filed a joint 2014 Utah return for the taxpayers. The Commission disagrees. It appears that the taxpayers' accounting firm may have filed Mr. original 2014 Utah return as a separate, full-year resident return purposefully to avoid including Ms. on the return (which instructions for the Utah return allow for military personnel but not for other taxpayers). Under these circumstances, the Commission is not convinced that the Subsection 59-10-136(2)(c) presumption is rebutted for any portion of the 2014 tax year for which the presumption has arisen for Mr. or for the October 27, 2014 to December 31, 2014 period for which the presumption has arisen for Ms.

49. The Commission has also stated in prior cases that it could find in future cases that other circumstances would be sufficient to rebut the Subsection 59-10-136(2)(c) presumption. The taxpayers, however, have not provided any circumstances that are sufficient to rebut the presumption for any portion of the audit period that it has arisen for each of them. Accordingly, under Subsection 59-10-136(2)(c), Mr. is considered to be domiciled in Utah for the January 1, 2014 to December 31, 2014 portion of the

audit period, but is not considered to be domiciled in Utah for the January 1, 2015 to December 31, 2016 portion of the audit period; and Ms. is considered to be domiciled in Utah for the October 27, 2014 to December 31, 2014 portion of the audit period, but is not considered to be domiciled in Utah for the January 1, 2014 to October 26, 2014, or the January 1, 2015 to December 31, 2016 portions of the audit period.

50. Subsection 59-10-136(3). Even if an individual is not considered to be domiciled in Utah under Subsection (1), (2)(a), (2)(b), or (2)(c), he or she may still be considered to be domiciled in Utah based on a preponderance of the evidence relating to 12 specific facts and circumstances listed in Subsection 59-10-136(3)(b). Subsection 59-10-136(3), however, is only applicable "if the requirements of Subsection (1) or (2) are not met[.]" Under Subsection 59-10-136(2)(a), the Commission has already found that both taxpayers are considered to be domiciled in Utah for the periods asserted by the Division, specifically all of 2014, 2015, and 2016 for Mr. and the October 27, 2014 to December 31, 2016 portion of the audit period for Ms. Accordingly, Subsection 59-10-136(3) has no applicability to this case.[87]

51. Domicile Summary. Because the Commission has found that Mr. is considered to be domiciled in Utah for all of 2014, 2015, and 2016 under Subsections 59-10-136(2)(a), (2)(b), and/or (2)(c) and because the Commission has found that Mr. is not considered to *not* be domiciled in Utah for any portion of these years under Subsection 59-10-136(4), Mr. is considered to be domiciled in Utah for income tax purposes for all of 2014, 2015, and 2016. Because the Commission has found that Ms. is considered to be domiciled in Utah from October 27, 2014 to December 31, 2016 under Subsections 59-10-136(2)(a), (2)(b), and/or (2)(c) and because the Commission has found that Ms. is not considered to

87 The Commission has not found that Ms. is considered to be domiciled in Utah for the January 1, 2014 to October 26, 2014 portion of the audit period under Subsection 59-10-136(1), (2)(a), (2)(b), or (2)(c). As a result, had the Division asserted that Ms. was considered to be domiciled in Utah from January 1, 2014 to October 26, 2014, the Commission would have needed to analyze the 12 factors of Subsection 59-10-136(3) to determine whether she was or was not domiciled in Utah for this period. However, where the Division concedes that Ms. is not considered to be domiciled in Utah from January 1, 2014 to October 26, 2014, an analysis of Subsection 59-10-136(3) for this period for Ms. is not necessary.

not be domiciled in Utah for any portion of this period under Subsection 59-10-136(4), Ms. is considered to be domiciled in Utah for income tax purposes from October 27, 2014 to December 31, 2016. Accordingly, pursuant to Subsection 59-10-103(1)(q)(i)(A), Mr. is considered to be a Utah resident individual for all of the 2014, 2015, and 2016 tax years, while Ms. is considered to be a Utah resident individual from October 27, 2014 to December 31, 2016. As a result, all income that Mr. received during the audit period is subject to Utah income taxation, while all income that Ms. received from October 27, 2014 to December 31, 2016 is subject to Utah income taxation.

52. Penalties and Interest. For this case, the applicable law to determine whether the penalties and interest assessed to the taxpayers may be waived is found in Subsection 59-1-401(14) and Rule 42.[88] In Subsection 59-1-401(14), the Commission is authorized to waive penalties and interest upon a showing of reasonable cause. The Commission has adopted Rule 42 to provide guidance as to when reasonable cause exists to waive penalties and interest. Rule 42(2) provides that interest is waived only if a taxpayer shows that the Tax Commission gave the taxpayer erroneous information or took inappropriate action that contributed to the taxpayer's error.[89] The taxpayers did not fail to pay the Utah income taxes at issue for 2014, 2015, or 2016 because of Tax Commission error or erroneous advice. As a result, reasonable cause does not exist to waive any of the interest that has been imposed.

53. Pursuant to Subsection 59-1-401(14) and Rule 42, the Commission generally waives penalties in domicile cases because of the complexity and fact-sensitive nature of the issues and due to equitable

88 Different criteria concerning the imposition and/or waiver of penalties and interest are provided in Subsections 59-10-136(4)(d) and (4)(e), which apply if an individual did not file a Utah return based on a belief that he or she was not considered to be domiciled in Utah under Subsection 59-10-136(4)(a). Because the limited circumstances described in Subsections 59-10-136(4)(d) and (4)(e) are not present in this case, these specific provisions are not applicable in determining whether the penalties and interest assessed to the taxpayers may be waived.

89 The Rule 42 criteria to waive interest are more stringent than the rule's criteria to waive penalties because a taxpayer has had use of money that should have been paid to the state and because of the time value of this money.

considerations.[90] In addition, the Division stated at the hearing that it would not object to the Commission waiving the penalties it imposed. Accordingly, reasonable cause exists to waive all penalties imposed for the 2014, 2015, and 2016 tax years.

54. Conclusion. Based on the foregoing, Mr. is a Utah resident individual for all of 2014, 2015, and 2016, while Ms. is a Utah resident individual for the October 27, 2014 to December 31, 2016 portion of the audit period that the taxpayers were married. As a result, the Commission should sustain the Division's assessments for 2014, 2015, and 2016, with two exceptions: 1) the Commission should order the Division to revise the 2014 assessment to reflect that the portion of Ms. 2014 income that should be allocated to Utah is $139,834.83; and 2) the Commission should waive all penalties that the Division imposed in its assessments.

Kerry R. Chapman
Administrative Law Judge

90 In this case, it may also be appropriate to waive penalties pursuant to Rule 42(3)(i), which provides that reasonable cause to waive penalties exists when, under certain circumstances, a taxpayer relies on the advice of a competent tax advisor.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's 2014, 2015, and 2016 assessments, with two exceptions. First, the Commission orders the Division to revise its 2014 assessment to reflect that the portion of Ms. 2014 income that should be allocated to Utah is Second, the Commission waives all penalties that the Division imposed in its 2014, 2015, and 2016 assessments. It is so ordered.

DATED this 14 day of AUGUST, 2020.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

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

Utah State Tax Commission

USTC - Appeal

Certificate of Mailing

18-978

**** *CERTIFICATION* ****

I certify on this date I mailed a copy of the foregoing document addressed to each of the above named parties.

August 14, 2020

Date

Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December 2020, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF TAX COUNSEL** were served via E-mail upon the following:

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