

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
HOWARD B. HENDERSON TO ASSESSMENTS OF
2000 and 2001 PERSONAL INCOME TAX ISSUED
UNDER LETTER ID L1760393728 & L1257887232**

No. 06-09

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 3, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Elizabeth K. Korsmo, Special Assistant Attorney General. Howard B. Henderson (“Taxpayer”) represented himself. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Since the mid-1990s, the Taxpayer and his wife have rented the same house in Albuquerque, New Mexico, which they have furnished with their own belongings.
2. During the last 10 to 12 years, the Taxpayer has had job assignments in several states, including New Mexico, California, Arizona, Colorado and Texas.
3. The Taxpayer’s wife did not move to each new job location with her husband, but remained in their Albuquerque home with their two children (until they left for college). Whenever one of his out-of-state jobs ended, the Taxpayer returned to the house in Albuquerque.
4. In 1998, the Taxpayer signed a 5-year employment agreement with A-1 Homes Group, Inc. to work as the general manager of the Albuquerque division of the company’s mobile home business.

5. The Taxpayer remained in Albuquerque until September of 2000, when A-1 Homes Group closed its Albuquerque store and transferred the Taxpayer to Texas. At that time, he rented a furnished apartment in East Dallas, Texas, while his wife remained in the house in Albuquerque.

6. When he filed his 2000 New Mexico personal income tax return, the Taxpayer reported the income he earned in New Mexico during 2000, but did not report the income he earned in Texas between September and December 2000.

7. The Taxpayer did not report or pay New Mexico personal income tax on the income he earned in Texas during the 2001 tax year.

8. The Taxpayer, who was registered to vote in New Mexico, did not register to vote in Texas after he was transferred to Texas in September 2000.

9. The Taxpayer maintained his New Mexico driver's license and the New Mexico registration on his automobiles during the period of time he worked in Texas.

10. In July 2002, the Taxpayer's employment with A-1 Homes Group ended and he returned to Albuquerque to the home he shared with his wife.

11. The Taxpayer filed a New Mexico personal income tax return for the 2002 tax year and voted in New Mexico in 2003.

12. The Taxpayer subsequently obtained work with Fleetwood Homes in Amarillo, Texas, and moved to that location while his wife remained in Albuquerque.

13. When the job with Fleetwood Homes ended in January 2006, the Taxpayer returned, once again, to his Albuquerque home.

14. On May 9, 2005, the Department assessed the Taxpayer under Letter ID L1760393728 for \$2,720.13 of personal income tax, penalty and interest for the 2000 tax year.

15. On August 1, 2005, pursuant to an extension of time granted by the Department, the Taxpayer filed a written protest to the assessment of tax for the 2000 tax year.

16. On August 15, 2005, the Department assessed the Taxpayer under Letter ID L1257887232 for \$5,537.21 of personal income tax, penalty and interest for the 2001 tax year.

17. On October 7, 2005, pursuant to an extension of time granted by the Department, the Taxpayer filed a written protest to the assessment of tax for the 2001 tax year.

DISCUSSION

The Taxpayer challenges the Department's assessments of New Mexico personal income tax for the 2000 and 2001 tax years based on his contention that he was a resident of Texas from September 2000 through July 2002. The Department asserts that although the Taxpayer was living in Texas during the relevant time period, he did not abandon his New Mexico domicile and was a New Mexico resident for personal income tax purposes.

Effect of Residency on Liability for New Mexico Income Tax. Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1, *et seq.* When a taxpayer has income that is taxable both within and without New Mexico, NMSA 1978, § 7-2-11 allows the taxpayer to allocate and apportion certain categories of income between New Mexico and non-New Mexico sources. Pursuant to § 7-2-11(A)(3), New Mexico residents are required to allocate 100 percent of certain categories of income—including compensation for personal services—to New Mexico, regardless of the source of that income. *See also*, Department Regulation 3.3.11.11 NMAC.

In this case, the Taxpayer reported the income he earned in New Mexico on his 2000 New Mexico income tax return, but did not report the income he earned in Texas between

September and December 2000. The Taxpayer did not report or pay tax on the income he earned in Texas during the 2001 tax year. If the Taxpayer was still a New Mexico resident, however, he was required to report all of the compensation he earned from his employment with A-1 Homes Group to New Mexico, without regard to the state in which the income was earned. The right of a state to impose tax on all income received by its residents, including income attributable to activities in other states, is one of long-standing. More than 85 years ago, the United States Supreme Court recognized the rights of the several states “to exercise the widest liberty with respect to the imposition of internal taxes” noting that “states have full power to tax their own people....” *Shaffer v. Carter*, 252 U.S. 37, 51 (1919). *See also, Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276 (1932) (upholding Mississippi’s right to tax a Mississippi resident on income earned from services performed on a construction project in the state of Tennessee).

At the administrative hearing, the Taxpayer cited to NMSA 1978, § 7-4-4, which states that a taxpayer is taxable in another state if that state has jurisdiction to subject the taxpayer to a net income tax. Because the Taxpayer earned his income in Texas and Texas would have jurisdiction to tax that income, the Taxpayer maintains that he cannot be taxed by New Mexico. Section 7-4-4 is part of the Uniform Division of Income for Tax Purposes Act (“UDITPA”). Pursuant to NMSA 1978, § 7-2-1(A)(2) and § 7-4-3, the allocation and apportionment rules of UDITPA do not apply to compensation for personal services, which covers the income the Taxpayer earned under his employment agreement with A-1 Homes Group, Inc.

In addition, the fact that a person is subject to tax in one state does not mean he cannot be subject to tax in another state. As discussed above, when a person is a resident of one state, but

earns income from personal services performed in a second state, both states have jurisdiction to tax that income. In that situation, New Mexico has taken steps to insure that its residents are not subject to double taxation by providing a credit for the amount of any tax paid to the second state. NMSA 1978, § 7-2-13. Because Texas does not impose a personal income tax, double taxation is not an issue in this case. If it is determined that the Taxpayer was still a resident of New Mexico during the 2000 and 2001 tax years, tax is due to New Mexico on the income he earned in Texas.

Determination of Residency Based on Domicile. NMSA 1978, § 7-2-2 of the Income Tax Act, as it existed in 2000 and 2001, defined the term “resident” as follows:¹

“resident” means an individual who is domiciled in this state during any part of the taxable year; but any individual who, on or before the last day of the taxable year, changed his place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a resident for the purposes of the Income Tax Act.

For the years at issue, residency is synonymous with domicile. Subsection B of Regulation 3.3.1.9(B) NMAC defines “domicile” as “a place of a true, fixed home and a permanent establishment to which one intends to return when absent and where a person has voluntarily fixed habitation of self and family with the intention of making a permanent home.” Subsection C of the regulation provides that an individual who is registered to vote in New Mexico or holds a valid New Mexico driver’s license, and has not subsequently registered to vote or obtained a driver’s license in any other state, is presumed to be domiciled in New Mexico.

¹ Effective for 2003 and subsequent tax years, § 7-2-2 was amended to expand the definition of residency to include persons who are physically present in New Mexico for 185 days or more during the taxable year. Laws 2003, ch. 275, § 1. The statutes and regulations cited in this decision are to the versions that were in effect during the 2000 and 2001 tax years.

In *Murphy v. Taxation and Revenue Department*, 94 N.M. 54, 55, 607 P.2d 592, 593 (1980), the New Mexico Supreme Court held that a "resident" for purposes of New Mexico personal income tax is an individual domiciled in New Mexico at any time during the taxable year who does not intentionally change his domicile by the end of the year. A change of domicile requires both physical presence in the new locality and an intention to abandon the old domicile and to make a home in the new dwelling place. *Estate of Peck v. Chambers*, 80 N.M. 290, 292, 454 P.2d 772, 774 (1969). In *Hagan v. Hardwick*, 95 N.M. 517, 519, 624 P.2d 26, 28 (1981), the New Mexico Supreme Court set out the following standard for determining a change in domicile: "to effect a change from an old and established domicile to a new one, there must be...a fixed purpose to remain in the new location permanently or indefinitely. For domicile once acquired is presumed to continue until it is shown to have changed...."

Texas uses the same basic criteria as New Mexico in determining a person's domicile. In Texas, the essential elements of domicile are an actual residence and the intent to make it one's permanent home. *Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951). "Home" is defined to mean a person's "true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Id.* In *Pecos v. N.T. Ry. Co. v. Thompson*, 167 S.W. 801, 803 (Tex. 1914), the Texas Supreme Court defined domicile in the following terms:

"Residence" means living in a particular locality, but "domicile" means living in that locality with the intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile.

See also, Owens Corning v. Carter, 997 S.W.2d 560, 571 (Tex. 1999) (a permanent residence in Texas requires a home and fixed place of habitation to which a person intends to return when

away). As the cases makes clear, domicile is not determined by intention alone or by physical presence alone.

Application of the Law of Domicile to the Facts of this Case. Based on the laws of both New Mexico and Texas, there is a presumption that once established, the Taxpayer's domicile continued to be in New Mexico. In order to overcome this presumption, the Taxpayer must show that he had an actual residence in Texas coupled with the concurrent intent to abandon his domicile in New Mexico and make the Texas residence his permanent home.

The Taxpayer meets the first part of this test. There is no dispute that from September 2000 through July 2002, he maintained a furnished apartment in East Dallas and worked for his employer at various locations in Texas. During the same time period, however, the Taxpayer also maintained a house in Albuquerque where his wife had lived for a period of at least 12 years and where he lived between his various out-of-state job assignments. The issue to be decided is whether the Taxpayer's true domicile was the apartment in Texas or the house in New Mexico. As set forth below, the evidence presented supports the conclusion that the Taxpayer's domicile remained in New Mexico:

- Since the mid-1990s, the Taxpayer and his wife have rented the same house in Albuquerque, New Mexico, which is furnished with their own belongings. The Taxpayer has had job assignments in several states other than New Mexico during the last 10 to 12 years, including California, Arizona, Colorado and Texas. The Taxpayer's wife did not move to each new job location with her husband, but remained in their Albuquerque home with their children. Once an out-of-state job ended, the Taxpayer returned to the house in Albuquerque.
- In 1998, the Taxpayer signed a 5-year employment agreement with A-1 Homes Group, Inc. to work as the general manager of the company's Albuquerque division. In September of 2000, A-1 Homes Group closed its Albuquerque store and the Taxpayer's job was transferred to Texas. At that time, he rented a small furnished apartment in East Dallas, Texas, while his wife remained in the house in Albuquerque. The Taxpayer, who was registered to vote in New Mexico, did not register to vote in Texas after his transfer. The Taxpayer also maintained his New Mexico driver's license and the New Mexico registration on his automobiles.

■ In July 2002, the Taxpayer's employment with A-1 Homes Group ended and he returned to Albuquerque to the home he shared with his wife. The Taxpayer filed a New Mexico personal income tax return for the 2002 tax year and voted in New Mexico in 2003.

■ The Taxpayer subsequently obtained work with Fleetwood Homes in Amarillo, Texas, and moved to that location while his wife remained in Albuquerque. When the job with Fleetwood Homes ended in January 2006, the Taxpayer returned, once again, to his Albuquerque home.

The evidence establishes that the Taxpayer has led a somewhat nomadic life and has physically resided in many different states over the last decade. The one constant has been the house in Albuquerque where his wife lived continuously for the past 10 or 12 years and where he lived between out-of-state job assignments. Although the Taxpayer testified that he wanted to move his wife to Texas after his transfer in September 2000, this never happened. Instead, the Taxpayer returned to New Mexico when the job with A-1 Homes Group ended in July 2002, just as he had after all of his other out-of-state jobs. The Taxpayer never registered to vote in Texas and never changed his driver's license or car registration to Texas. There is no evidence that the move to Texas in 2000 was any different than the other frequent, but temporary, moves he had made in the past and does not support the conclusion that he abandoned his New Mexico domicile in September 2000 with the intent of making Texas his permanent home.

CONCLUSIONS OF LAW

A. The Taxpayer filed timely, written protests to the assessments issued under Letter ID Nos. L1760393728 and L1257887232, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer did not abandon his New Mexico domicile and establish a new domicile in Texas after he was transferred to Texas in September 2000.

C. The Taxpayer was a resident of New Mexico during tax years 2000 and 2001.

D. The income the Taxpayer earned in Texas during 2000 and 2001 was subject to New Mexico personal income tax.

For the foregoing reasons, the Taxpayer's protest IS DENIED.

DATED May 9, 2006.