

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

**IN THE MATTER OF THE PROTEST OF
EDWARD P. & REBECCA A. McNAIR TO
ASSESSMENT OF PERSONAL INCOME TAX
ISSUED UNDER LETTER ID L2104874496**

No. 06-17

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 12, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Lewis J. Terr, Special Assistant Attorney General. Edward and Rebecca McNair (“Taxpayers”) represented themselves. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. In 1967, the Taxpayers established their residence and domicile in the state of New Jersey.
2. Mrs. McNair taught school in New Jersey for 25 years and currently receives a pension and health benefits through the New Jersey Teachers’ Pension and Annuity Fund.
3. Both of the Taxpayers were very active in their church during the time they lived in New Jersey.
4. The Taxpayers made many friends during the time they lived in New Jersey, most of whom still live in New Jersey.
5. Mrs. McNair’s brother and Mr. McNair’s cousins live in New York, which is an easy drive from New Jersey.

6. When the Taxpayers were ready to retire, they decided to move to Las Cruces, New Mexico, in order to enjoy the climate and the stimulation of a new environment.

7. In 1999, the Taxpayers sold their home in New Jersey, where they had lived for 31 years, and purchased a home in New Mexico, where they have lived for the past seven years.

8. The Taxpayers' children, who are all adults, live in Arizona, Florida and Georgia; none of the Taxpayers' children live in New Jersey.

9. The Taxpayers do not currently own any property in New Jersey.

10. The Taxpayers do not have any business interests in New Jersey.

11. The Taxpayers have one retirement account with a New Jersey bank; the Taxpayers also have bank accounts in Texas and New Mexico and an annuity from a company in Colorado.

12. After moving to New Mexico, the Taxpayers registered to vote, obtained New Mexico driver's licenses, and registered their automobile in New Mexico.

13. After moving to New Mexico, the Taxpayers returned to New Jersey for two visits: once in 1999 for approximately 18 days and once in 2004 for approximately 23 days.

14. Five or six couples the Taxpayers knew in New Jersey have come to visit them in New Mexico. The Taxpayers also keep in touch with their friends in New Jersey through telephone calls and e-mail.

15. Under the terms of Mrs. McNair's health plan, the Taxpayers pay higher health care costs in New Mexico than they would if they lived in New Jersey.

16. The Taxpayers have planned for future contingencies and have decided that if they develop health problems or become unable to drive, they will return to New Jersey where health care and public transportation are more readily available than in New Mexico.

17. In any event, the Taxpayers plan to return to New Jersey at the end of 2020 (when Mr. McNair will be 90 and Mrs. McNair will be 85) and purchase a small maintenance-free condominium.

18. For the 2001 tax year, the Taxpayers filed a federal income tax return listing their address in Las Cruces, New Mexico.

19. The Taxpayers did not file a 2001 New Mexico income tax return.

20. The Taxpayers filed a 2001 New Jersey income tax return as nonresident domiciliaries. Because New Jersey provides generous exclusions for social security and retirement income, the Taxpayers did not have any tax liability to New Jersey.

21. In 2005, pursuant to an information exchange agreement, the Department received information from the Internal Revenue Service concerning the income reported on the Taxpayers' 2001 federal income tax return.

22. On August 15, 2005, after determining that the Taxpayers had not filed a 2001 New Mexico income tax return, the Department assessed them for \$2,371 of personal income tax, plus interest, on the income reported on their federal return.

23. On September 2, 2005, the Taxpayers filed a written protest to the assessment.

DISCUSSION

The Taxpayers challenge the Department's assessment of New Mexico personal income tax for the 2001 tax year based on their contention that since 1967 they have been, and continue

to be, domiciliaries of New Jersey. The Department asserts that the Taxpayers changed their domicile from New Jersey to New Mexico in 1999 and were New Mexico residents for purposes of reporting and paying 2001 state income taxes.

Determination of Residency Based on Domicile. NMSA 1978, § 7-2-3 imposes an income tax on the net income of “every resident individual.” For the 2001 tax year, NMSA 1978, § 7-2-2 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.

Department 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.” 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....”

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 2001 tax year.

New Jersey uses much the same criteria to determine a person's domicile. In *Lyon v. Glaser*, 288 A.2d 12 (N.J. 1972), the Supreme Court of New Jersey addressed the issue of whether a decedent was a domiciliary of New Jersey or Maryland at the time of her death. The court first noted that Mrs. Lyon's long-time residence in New Jersey during her marriage created a presumption that her domicile was in New Jersey. As a result, "her estate which claims that Maryland became her new domicil long before her death, became burdened with the duty of going forward with evidence to rebut the presumption." *Id.*, 288 A.2d at 21. The court noted, however, that the existence of certain facts will serve to weaken or even destroy the presumption of continued domicile:

For example, a home or residence in another state is commonly regarded as Prima facie evidence of domicil, and the longer the period of the new residence the stronger the Prima facie case becomes. It has been said also that proof of residence elsewhere is sufficient to rebut the presumption, and to return the onus of going forward with the proof that the former domicil has not been abandoned to the proponent of continuance. And the same concept has been put in another form; When a residence is taken up elsewhere, a presumption arises that the original residence has been abandoned. *Mitchell v. Delaware State Tax Comm'r.*, 49 Del. 598, 42 A.2d 19 (Super.Ct.1945); *Felker v. Henderson*, 78 N.H. 509, 102 A. 623; 25 Am.Jur.2d, Domicil, *Supra*, s 86, p. 62.

Id. See also, *Matter of Unanue*, 605 A.2d 279, 287 (N.J. Super. Ct. 1991) (a change of domicile is effected if a person actually moves to a new location intending to remain there for an indefinite time, "notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time").

When the issue of domicile is raised as a defense in tax cases, courts give greater weight to the objective facts relating to domicile than to the taxpayer's statements of intent. As the New Jersey Tax Court explained in *Goffredo v. Director, Division of Taxation*, 9 N.J.Tax 135, 146 (N.J. Tax Ct. 1987):

[T]he court places greater weight upon the objective facts placed in evidence over the alleged intentions as orally stated by plaintiffs in these proceedings. *Swain v. Neeld*, 28 N.J. 60, 64, 145 A.2d 320 (1958). "[Declarations] of domicile motivated by tax considerations may be carefully scrutinized and readily rejected when negated by the objective circumstances." *Lyons v. Glaser, supra*, 60 N.J. at 281, 288 A.2d 12 (Jacobs, J. dissenting). As to the relative weight to be given to various types of evidence produced to establish domicile such as "formal declarations," "informal declarations" and "acts," *See Restatement, Conflict of Laws 2d, supra*, at 82, 83. "Actions speak louder than words, and the courts rely most heavily upon them." *Id.* at 82.

See also, Citizens Bank & Trust Co. v. Glaser, 357 A.2d 753, 759 (N.J. 1976) (registration to vote and payment of income taxes from a New Jersey address "were deliberate tactics to lay a basis for avoidance of the Virginia state income tax" and could not overcome other evidence of domicile in Virginia). In *Texas v. Florida*, 306 U.S. 398, 425-426 (1939) the United States Supreme Court applied similar reasoning to settle a dispute concerning a decedent's domicile:

While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; [citations omitted] and they are of slight weight when they conflict with the fact. [citations omitted] This is the more so where, as here, decedent's declarations are shown to have been inspired by the desire to establish a nominal residence for tax purposes, different from his actual residence in fact....

...

Whatever floating intention Green may have had after 1911 to return to Texas and to make his home there, it is plain that it receded into the background after his mother's death and had completely vanished when he began to build up his extensive estate at Round Hills in Massachusetts.... He could not elect to make his home in one place in point of interest and attachment and for the general purposes of life, and in another, where he in fact had no residence, for the purpose of taxation.

Application of the Law of Domicile to the Facts of this Case. Pursuant to NMSA 1978, § 7-1-17, the Department's assessment has a statutory presumption of correctness. That presumption is overcome, however, when the taxpayer comes forward "with some countervailing evidence tending to dispute the factual correctness of the assessment...." Regulation 3.1.6.12(A)

NMAC; *MPC Ltd. v. New Mexico Taxation & Revenue Department*, 2003-NMCA-21, ¶ 13, 133 N.M. 217, 62 P.3d 308. In this case, the presumption of correctness was overcome when the Taxpayers provided evidence that they were domiciled in New Jersey prior to their move to New Mexico and intended to retain their original domicile. At that point, it was the Department's burden to overcome the presumption in both New Jersey and New Mexico law that the Taxpayer's domicile continued to be in New Jersey. The Department met this burden by establishing that the Taxpayers sold their New Jersey home and acquired a new home in New Mexico in 1999, two years prior to the tax year at issue. As stated in *Lyon v. Glaser, supra*, 288 A.2d at 21: "proof of residence elsewhere is sufficient to rebut the presumption, and to return the onus of going forward with the proof that the former domicile has not been abandoned to the proponent of continuance."

From 1999 forward, the Taxpayers' only residence was in New Mexico and that is where their activities of daily life were conducted, including registering to vote, registering their automobile and obtaining driver's licenses. In support of their contention that they have never abandoned their New Jersey domicile, the Taxpayers point to the fact that they owned their home there for 31 years, were active in the local church, and still have many friends located in New Jersey. There is no dispute, however, that the Taxpayers sold their New Jersey home and do not currently own any property in that state. Since moving to New Mexico, the Taxpayers are no longer in a position to participate in the religious and social activities of their New Jersey church. And, while it is true that the Taxpayers have stayed in touch with some of their New Jersey friends, these contacts have, of necessity, been sporadic. During the last seven years, the Taxpayers have made only two visits and spent a total of 41 days in New Jersey. Much of their

socializing with old friends has been conducted in New Mexico, where they have hosted five or six couples who have traveled to the Southwest to visit the Taxpayers in their new home.

Finally, it should be noted that none of the Taxpayers' children remain in New Jersey, but are scattered across the country in Georgia, Florida and Arizona.

The evidence establishes that the Taxpayers moved to New Mexico in 1999 with the intention of remaining in the state indefinitely, if not permanently. Nonetheless, the Taxpayers continue to claim a New Jersey domicile for purposes of reporting and paying state income tax. In resolving such conflicts, "actions speak louder than words." *Goffredo, supra*, 9 N.J.Tax at 146. The Taxpayers' stated plan to return to New Jersey at some point in the future is not sufficient to maintain their domicile in that state during their residence in New Mexico—a residence that has already lasted for seven years and may, according to their own testimony, continue for another fourteen years. As the New Jersey Superior Court found in *Matter of Unanue, supra*, 605 A.2d at 287, a change of domicile is effected if a person actually moves to a new location intending to remain there for an indefinite time, "notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time." In this case, the Taxpayers effected a change of domicile to New Mexico in 1999 and are liable for New Mexico personal income tax for the 2001 tax year.

CONCLUSIONS OF LAW

A. The Taxpayers filed a timely, written protest to the assessment of tax issued under Letter ID L2104874496, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayers abandoned their New Jersey domicile in 1999 and established a new domicile in New Mexico.

C. During 2001, the Taxpayers were residents of New Mexico as defined in the Income Tax Act and are liable for New Mexico personal income tax for that year.

For the foregoing reasons, the Taxpayers' protest IS DENIED.

DATED October 19, 2006.