

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

**IN THE MATTER OF THE PROTEST OF
JOSEPH & KATHY MAILANDER
TO ASSESSMENT OF 2004 PERSONAL INCOME
TAX ISSUED UNDER LETTER ID L0704564864**

No. 08-02

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on April 16, 2008, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department (“Department”) was represented by Peter Breen, Special Assistant Attorney General. Joseph and Kathy Mailander were represented by Joseph Mailander (“Taxpayer”). Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is a life-long resident of New Mexico.
2. Since at least 1998, the Taxpayer and his wife have owned a home on 2+ acres in Las Cruces, New Mexico, have been registered to vote in New Mexico, have held New Mexico driver’s licenses, and have had several vehicles registered in New Mexico.
3. During this same period, Mrs. Mailander has operated a small business as a mobile home broker out of the couple’s Las Cruces home.
4. In July 1998, the Taxpayer accepted a manager position with an automobile dealer in El Paso, Texas.
5. The Taxpayer was at the dealership six days a week; he was the closing manager two to three nights a week and, on those nights, did not leave the dealership until eight or nine o’clock.

6. Because of his hours, the Taxpayer leased a 430-square-foot studio apartment in El Paso where he could stay on nights when it was too late to make the hour-long commute to his home and family in Las Cruces.

7. When he began working for the Texas dealership, the Taxpayer called the Department to ask whether his Texas wages would be subject to New Mexico income tax.

8. The Taxpayer was told that he would not be subject to tax in New Mexico if he established residence in Texas and spent fewer than 185 days in New Mexico each year.

9. The Taxpayer did not ask what factors were used to determine residency and did not make any attempt to research New Mexico's tax laws, tax regulations or personal income tax instructions defining residency.

10. The Taxpayer did not maintain a log, calendar or other record of the number of days that he remained in El Paso overnight rather than returning to his home in Las Cruces.

11. After the Taxpayer leased the studio apartment in El Paso, he and his wife stopped filing New Mexico income tax returns.

12. In 2005, the Taxpayer received inquiries from the Department regarding his 2000 and 2001 taxes. He responded in writing that he had a "full time residence in El Paso TX" and provided the Department with a copy of his Texas apartment lease.

13. The Department did not make any further inquiries, and the Taxpayer did not advise the Department that he regularly commuted from El Paso to a home he owned in New Mexico, where his wife continued to live full-time, or that he maintained New Mexico voter and vehicle registrations and a New Mexico driver's license.

14. Based on the Taxpayer's response to its inquiry letters, the Department told the Taxpayer that he was not liable for New Mexico income tax for tax years 2000 and 2001.

15. The Taxpayer heard nothing further from the Department until 2007, when he received an inquiry concerning income taxes for the 2004 tax year.

16. At the Taxpayer's request, the matter was referred to a Department supervisor.

17. The supervisor conducted additional research and discovered that the Taxpayer had a New Mexico voter registration, a New Mexico driver's license and four vehicles registered in the state. After discussing the matter with the Taxpayer, the supervisor also learned that the Las Cruces address the Taxpayer used to report his federal income taxes was a permanent home that was significantly larger than the Texas apartment the Taxpayer identified as his full-time residence.

18. Based on this new information, the Department assessed the Mailanders for \$4,832.00 of New Mexico personal income tax for the 2004 tax year, plus interest and penalty.

19. On December 5, 2007, the Taxpayer filed a written protest to the assessment of 2004 personal income tax, which was accepted by the Department under a retroactive extension of time granted pursuant to NMSA 1978, § 7-1-24.

DISCUSSION

The issue to be decided is whether the Mailanders are required to pay the \$4,832.00 of New Mexico income tax, plus interest and penalty, assessed against them for the 2004 tax year. At the administrative hearing, the Taxpayer conceded that he and his wife were residents of New Mexico during the period in question, but raised an argument of estoppel. The Taxpayer maintains that the Department accepted his representations that he was a Texas resident for tax years 2000 and 2001 and should not be allowed to "go back in time and review an established precedent." Taxpayer Exhibit 2.

Burden of Proof. Any assessment of tax made by the Department is presumed to be correct. NMSA 1978, § 7-1-17(C); *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34,

¶ 4, 133 N.M. 11, 59 P.3d 491. In addition, a party relying on the doctrine of estoppel has the burden of establishing all facts necessary to support his claim. *In re Estates of Salas*, 105 N.M. 472, 475, 734 P.2d 250, 253 (Ct. App. 1987). Accordingly, it is the Mailanders' burden to come forward with evidence and legal argument to establish that they are entitled to an abatement of the Department's assessment of 2004 personal income tax.

Rules Pertaining to Estoppel. As a general rule, courts are reluctant to apply the doctrine of estoppel against the state. This general rule is given even greater weight in cases involving the assessment and collection of taxes. *Kerr-McGee Nuclear Corp. v. Property Tax Division*, 95 N.M. 685, 625 P.2d 1202 (Ct. App. 1980). In such cases, estoppel applies only pursuant to statute or when "right and justice demand it." *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989).

Estoppel Based on Statute. NMSA 1978, § 7-1-60 provides for estoppel against the Department when a taxpayer has acted according to a written regulation or a written ruling addressed to the taxpayer. There is no evidence that the Taxpayer in this case requested a ruling from the Department. Nor is there any regulation that would have led the Taxpayer to believe he had established a Texas residence for purposes of New Mexico income tax. The Department regulation in effect in 1998 defined a resident as follows:

3 NMAC 3.1.9 RESIDENCY SHOWN BY VOTER REGISTRATION AND OTHER EVIDENCE

9.1 Section 7-2-2 defines a "resident" as an individual who is domiciled in this state on the last day of the taxable year. Every individual has a domicile somewhere and each individual has only one domicile at one time.

9.2 A domicile is 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.

The regulation gave several examples of activities that would create a presumption of residency for tax purposes, including being registered to vote in New Mexico and holding a New Mexico driver's license. The Department's regulation was amended in 2000, 2005 and 2006 to provide additional information and examples of residency and domicile. The 2005 changes also addressed the legislature's 2003 amendment of the definition of a "resident" to include individuals who are physically present in New Mexico for 185 days or more during the tax year. There is nothing in the Department's regulation that would support a finding of estoppel.

Estoppel Based "Right and Justice." Equitable estoppel is applied against the state in exceptional circumstances where there is "a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State of New Mexico, Human Services Department*, 1998-NMSC-11, ¶17, 125 N.M. 140, 958 P.2d 98. The party seeking estoppel must show: (1) lack of knowledge of the true facts in question; (2) detrimental reliance on the other party's conduct; and (3) that the reliance was reasonable. *Johnson & Johnson v. Taxation and Revenue Department*, 1997-NMCA-030, ¶ 28, 123 N.M. 190, 936 N.M. 872, *cert. denied*, 123 N.M. 167, 936 P.2d 337 (1997). New Mexico courts have also held that a taxpayer's reliance on oral representations of Department employees is not reasonable and will not support a finding of estoppel. *Taxation and Revenue Department v. Bien Mur Indian Market*, 108 N.M. 228, 231, 770 P.2d 873, 876 (1989); *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 28, 136 N.M. 440, 99 P.3d 690.

In this case, the Taxpayer was told that he would not have to pay New Mexico income tax on his Texas wages if he established his residence in Texas and spent fewer than 185 days in New Mexico during the tax year. This information was correct. A misunderstanding arose because the Taxpayer never asked how residency was determined, nor did he provide the Department with all of the facts necessary to accurately determine his state of residence. In response to the Department's

2005 and 2007 inquiries, the Taxpayer represented that he worked in Texas and maintained a “full time residence in El Paso TX.” (emphasis added). *See*, Taxpayer’s handwritten notes on inquiry notices dated August 3, 2005 and May 9, 2007. The Taxpayer’s response did not indicate that he was regularly commuting between El Paso and a home that he owned in Las Cruces, New Mexico. Nor did the Taxpayer disclose that he was still registered to vote in New Mexico, that he held a New Mexico driver’s license or that his vehicles were registered in the state. This information did not come to the Department’s attention until October 2007 when it was investigating the Taxpayer’s 2004 tax liability.

In the Taxpayer’s response to the Department’s October 2007 letter setting out its findings concerning his driver’s license and voter registration, he objected that “[t]he items that you list as indicators of NM residency have never been discussed with me....” Taxpayer’s Exhibit 2. The Taxpayer apparently believes that it was the Department’s responsibility to ascertain the details of his living arrangements and advise him as to every circumstance that could affect his residency status. This misunderstands the nature of New Mexico’s self-reporting tax system. It is not possible for the Department to conduct a detailed investigation into the facts underlying each of the thousands of taxpayer accounts its deals with each year. For this reason, the legislature has placed the obligation on taxpayers, who have the most direct knowledge of their activities, to determine their tax liabilities and accurately report those liabilities to the state. *See*, NMSA 1978, § 7-1-13; *Tiffany Construction Co. v. Bureau of Revenue*, 90 N.M. 16, 17, 558 P.2d 1155, 1156 (Ct.App.1976).

Here, the Taxpayer had first-hand knowledge of the facts that established his liability for New Mexico income tax. Unfortunately, he failed to fully communicate these facts to the Department. He also failed to review New Mexico’s statutes, regulations and instructions on the subject of residency. Had he done so, he would have known that leasing a studio apartment in Texas was not sufficient to

change his New Mexico tax residence when he continued to maintain a home, driver's license and voter registration in New Mexico. As the New Mexico Supreme Court noted in *Patten v. Santa Fe National Life Ins. Co.*, 47 N.M. 202, 208, 138 P.2d 1019, 1023 (1943), a party seeking estoppel "must have exercised such reasonable diligence as the circumstances of the case require. If he conducts himself with a careless indifference to means of information reasonably at hand...he cannot invoke the doctrine of estoppel."

Failure to File. The Taxpayer's belief that he had established his residence in Texas does not adequately explain why the Mailanders have not filed New Mexico income tax returns for the last ten years. Although the Taxpayer was working full time in Texas, his wife continued to work and live in New Mexico. Mrs. Mailander testified that she operated a business as a mobile home broker out of the couple's Las Cruces home. Upon questioning, she conceded that the income from this business should have been reported to New Mexico.

In addition, the Taxpayer was unable to prove that he was not physically present in New Mexico for 185 days during the 2004 tax year at issue. NMSA 1978, § 7-1-10(A) requires every person to "maintain books of account or other records in a manner that will permit the accurate computation of state taxes...." Although the Taxpayer estimates that he spent three to four nights a week in El Paso, the Department is not required to accept an unsubstantiated estimate in lieu of proper record keeping. *See*, Regulation 3.1.6.12 NMAC. Even assuming that the Taxpayer spent an average of 3.5 nights a week in El Paso for 50 weeks a year (allowing two weeks for sick leave, holidays and vacation) he still would have been physically present in New Mexico for 190 days. Regardless of the issue of residency, this alone would subject him to New Mexico income tax and justify the Department's assessment of 2004 personal income taxes.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely, written protest to the assessment issued under Letter ID L0704564864, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer and his wife were residents of New Mexico during the 2004 tax year and were subject to New Mexico personal income tax.

C. The Taxpayer has not met his burden of proving that the Department misled him into believing that he did not owe New Mexico income tax on his 2004 income or that he reasonably believed he was not subject to tax in New Mexico.

D. The Taxpayer has not met his burden of proving that he was not physically present in New Mexico for 185 days or more during the 2004 tax year.

For the foregoing reasons, the protest of Joseph and Kathy Mailander IS DENIED.

Dated May 2, 2008.