

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

**IN THE MATTER OF THE PROTEST OF
WILLIAM C. SEVERNS
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L1943398784, L0715680128, L2080205184,
LI074899328, L0384412032, LI25551040, and LI308387712.**

No. 11-31

AMENDED DECISION AND ORDER

The original Decision and Order in this matter was issued on December 7, 2011.

Taxpayer appealed that decision to the Court of Appeals pursuant to NMSA 1978, Section 7-1-25 (1989). The Court of Appeals has resolved Taxpayer's appeal through Memorandum Opinion, No. 31,817 (April 1, 2013). In accord with that Opinion and the Court of Appeals' July 12, 2013 Remand Order, this decision was amended on July 31, 2013 to remove Mrs. Diane Severns from the case caption and to remove any reference to her as a party in this matter.

A hearing was held on the above captioned matter on August 23 and August 29, 2011 before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Mr. William C. Severns ("Taxpayer") appeared along with attorneys Clinton W. Marrs and David J. Abell. Taxpayer called the following witnesses to testify on his behalf: Mrs. Diane E. Severns, Carol Crawford, Kristen Owens née Severns, Ruth Vassaw, Sherry Schultz, Samantha Reed, Holly Reed, Mike Chelius, C.P.A., Attorney Mark Dodds, and Attorney Jason Walker. The Taxation and Revenue Department of the State of New Mexico ("Department") was represented by Staff Attorney Tonya Noonan Herring. Protest Auditor Andrick Tsabetsaye appeared as a witness for the Department. The admitted Department Exhibits, Taxpayer Exhibits (referred to as Protestant Exhibits throughout the hearing), and Stipulated Exhibits are identified and described thoroughly

in the Administrative Exhibit Coversheet. Taxpayer and the Department filed 81 Joint Stipulations of Fact, which are incorporated into this decision. Both Taxpayer and the Department submitted proposed findings of fact and conclusion of laws, some of which when appropriate to the weight of evidence have been adopted into the Findings of Facts. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Beginning at least as soon as 1977, when William and Diane Severns were married, Taxpayer and Mrs. Severns were residents and domiciles of Albuquerque, NM.
2. Between tax years 1977 through 2000, Taxpayer and Mrs. Severns filed jointly New Mexico personal income taxes.
3. In personal income tax years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, Taxpayer and Mrs. Severns did not file any personal income tax returns in New Mexico.
4. On June 13, 2008, the Department issued seven Notice of Assessments, Letter ID NOs. L1943398784, L0715680128, L2080205184, LI074899328, L0384412032, LI25551040, and LI308387712 to Taxpayer for unreported and unpaid personal income tax, penalty calculated to a maximum of 20%, and interest as follows:

<u>Tax Period Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
December 31, 2001	\$22,985.00	\$4,597.00	\$20,312.99	\$47,894.99
December 31, 2002	\$21,628.00	\$4,325.60	\$15,877.11	\$41,830.71
December 31, 2003	\$25,812.00	\$5,162.40	\$15,075.24	\$46,049.64
December 31, 2004	\$27,676.00	\$5,535.20	\$12,022.18	\$45,233.38
December 31, 2005	\$20,496.00	\$4,099.20	\$ 5,836.04	\$30,431.24
December 31, 2006	\$22,781.00	\$4,556.20	\$ 3,077.48	\$30,414.68
December 31, 2007	\$42,405.00	\$1,696.20	\$ 366.38	\$44,467.58

5. Taxpayer received the Notices of Assessment on December 15, 2008.

6. On December 30, 2008, Taxpayer timely filed written protest to the assessments, claiming that Taxpayer and Mrs. Severns had switched their place of residency from New Mexico to Nevada during the years in question. The Department acknowledged receipt of that protest on January 26, 2009.

7. During the protest hearing, Taxpayer conceded that he and Mrs. Severns were residents of New Mexico in 2005 under the applicable statute, and consequently Taxpayer withdrew his protest with respect to 2005 New Mexico personal income tax.

8. The tax years at issue remaining for this protest are 2001, 2002, 2003, 2004, 2006, and 2007.

9. Taxpayer's mother Lulu Severns was a resident of New Mexico and lived in Albuquerque until her death in late 2002.

10. Diane Severns was born to a military family in Albuquerque, New Mexico. Diane Severns' sister Holly Reed resided in New Mexico during the relevant tax periods. Taxpayer's niece Samantha Reed resided in New Mexico during the relevant tax periods.

11. Taxpayer and Mrs. Severns have two children, Brittany born in 1979 and Kristen born in 1983. The children both attended school in Albuquerque. After Brittany graduated from college, she moved to Texas. Kristen graduated from Albuquerque Prep in May 2001 and matriculated at the University of San Diego in San Diego, California, where she studied marine biology.

12. After Kristen's graduation in 2001, Taxpayer and Mrs. Severns were empty-nesters with no expectation that either Kristen or Brittany would return to New Mexico. Because Taxpayer and Mrs. Severns anticipated becoming empty-nesters and enjoyed boating and

spending time in their RV, Taxpayer and Mrs. Severns planned to move from New Mexico to a different location after Kristen's graduation.

13. Brittany Severns resided in Texas throughout the relevant tax period.

14. Kristen Severns returned to New Mexico in 2005 to marry Keith Owens in August. Since August 2005, Kristen has resided in Albuquerque, New Mexico.

15. Since January 2007, the Severns' grandchild resides in Albuquerque.

Taxpayer's and Mrs. Severns' Real Estate and Recreational Vehicles.

16. In 1987, Taxpayer and Mrs. Severns purchased their residential home and property at 11905 San Francisco NE, Albuquerque, New Mexico ("Albuquerque Home") for \$400,000.

17. Taxpayer's Albuquerque Home has five bedrooms, five bathrooms, two living areas, two fireplaces, a hobby room, a hot tub, a wet bar, a four-car garage, and a separate detached garage with room for two additional cars or a small RV. The home is approximately 6,000-square feet. The home sits on 1.620 acres of land. Additionally, Taxpayer and Mrs. Severns own two additional adjacent acres of land.

18. Since 1997, through the time of the protest hearing, Taxpayer and Mrs. Severns maintained ownership of their Albuquerque Home residential home.

19. Although there is no formal appraisal on the record to measure the home's value during the relevant period of time, Taxpayer and Mrs. Severns unsuccessfully attempted to sell the home and property at their Albuquerque Home in 2008 for \$1.1-1.5 million.

20. Taxpayer and Mrs. Severns wanted to move to Boulder City, Nevada. In order to prepare to move to a different location, sometime before or during 2000, Diane Severns divested herself of the accoutrements of her lifelong passion and hobby: horses and horse-riding. Riding

equipment, trailers, and horses were sold or donated by Mrs. Severns. The adjoining lot where the horse's grazed was sold by Taxpayer and Mrs. Severns.

21. Taxpayer was a scale-model railroad hobbyist. He operated a "child-sized" train and train track at the Albuquerque Home. He transported his train cars from the Albuquerque Home to storage facilities in Arizona and Texas.

22. Taxpayer and Mrs. Severns donated a substantial portion of their belongings and personal affects in preparation for their possible move. However, Taxpayer and Mrs. Severns stored personal affects that they could not bring with them in their RV's in plastic bins in the barn at the Severns' Albuquerque Home.

23. Other than allowing friends, family, and caretakers to live there, Taxpayer and Mrs. Severns did not rent or attempt to sell their Albuquerque Home during the tax years at issue in this protest.

24. During the tax years at issue, Taxpayer and Mrs. Severns continued to pay maintenance, cleaning, and utility costs totaling between \$250 and \$400 per month on their Albuquerque Home.

25. In 2003, Taxpayer and Mrs. Severns remodeled their master bathroom at their Albuquerque Home. Credit card receipts indicate that the remodeling project cost Taxpayer and Mrs. Severns \$45,000.

26. When on the road in their RV, Taxpayer and Mrs. Severns arranged for house-sitters to live in and check in on the Albuquerque Home, gather the mail, and forward it to them at whatever location Taxpayer and Mrs. Severns were then located. Because their Albuquerque Home was a central location for most of their RV routes and destinations, Taxpayer and Mrs. Severns used the Albuquerque Home as a "mail dump" location. From May 2003 until January

2005, Taxpayer and Mrs. Severns paid an acquaintance, Ruth Vassaw, to live in their Albuquerque Home. From May 2006 through June 2006, Taxpayer and Mrs. Severns allowed their niece Samantha Reid to live at their Albuquerque Home. In 2007, Taxpayer and Mrs. Severns arranged for their former neighbor, Ms. Sherry Schultz, to live at their Albuquerque Home.

27. In preparation for Kristen's 2001 graduation from High School in Albuquerque, and becoming empty-nesters, Taxpayer and Mrs. Severns began to search for another place to live in furtherance of their RV and boating lifestyle.

28. In 2001, Taxpayer and Mrs. Severns bought a \$40,000 RV-lot at 833 Oriole Way, Boulder Oaks/Red Mountain RV Resort, Boulder City, Nevada. Boulder City, Nevada is near Lake Meade and is a well-regarded retirement destination. The mailing address for this property is 1010 Industrial Road #186, Boulder City, Nevada, 89005.

29. In March 2001, Taxpayer and Mrs. Severns claimed and recorded a Declaration of Homestead in the State of Nevada for their RV-lot at 833 Oriole Way in Boulder City, NV. This Declaration of Homestead listed their mailing address as their Albuquerque address. [Taxpayer Exhibit# 14]

30. The RV-lot at 833 Oriole Way in Boulder City, NV is a platted, 0.05-acre cement slab. The lot is serviced with water, sewer, electricity, cable, and telephone. The Boulder Oaks/Red Mountain RV Resort is a community subject to restrictive covenants and association fees totaling \$123 per month. The community resort amenities include a substantial clubhouse with a party room, exercise room, library, billiards, sauna, spa, and pool.

31. Taxpayer and Mrs. Severns have made landscape and outdoor living improvements to their RV-lot at 833 Oriole Way in Boulder City, NV since they purchased that lot.

32. During the relevant tax years, Taxpayer and Mrs. Severns had their Nevada property tax bills for the RV-lot at 833 Oriole Way in Boulder City, NV mailed to their Albuquerque Home.

33. In October 2001, Taxpayer and Mrs. Severns purchased a model year 2002 40-foot RV ("2002 RV") in Missouri for \$192,319.00. Taxpayer and Mrs. Severns traded in an older RV then valued at \$70,000 towards their new 2002 RV.

34. After purchase, Taxpayer's 2002 RV was registered and titled with the Motor Vehicle Division ("MVD") of the State of New Mexico, listing Taxpayer's Albuquerque Home as the mailing address.

35. Taxpayer's 2002 RV remained registered and titled in New Mexico and not in Nevada or Florida through 2006.

36. In December 2004, Taxpayer and Mrs. Severns purchased a condominium lot at River Bend Motorcoach Resort in Labelle, Florida ("Florida RV Lot"). That lot is 0.115-acres. The River Bend RV development is serviced with water, sewer, electricity, cable, telephone and has many attractive/valuable community amenities.

37. Taxpayer and Mrs. Severns had their Florida RV Lot property tax bill mailed to their Albuquerque address.

38. In September 2006, Taxpayer, through a Montana LLC formed in order to avoid paying any sales tax on the anticipated purchase, bought a new model year 2007 45-foot RV ("2007 RV") for \$368,000 in Missouri.

39. Taxpayer did not register the 2007 RV in either Nevada or New Mexico. After purchase, Taxpayer located the 2007 RV at Taxpayer's RV lot in Florida.

40. Taxpayer and Mrs. Severns stored many sentimental and valuable personal items with them in their RV's. The RV's were secured with a burglar alarm and a home security system.

41. When not traveling, the RVs were stored at Taxpayer and Mrs. Severns Albuquerque Home.

Taxpayer and Mrs. Severns' Other Vehicles, Boat, and Trailers.

42. In April 2001, Taxpayer and Lulu Severns (William Severns' mother) purchased a 2002 Cadillac Escalade in Albuquerque, New Mexico. On May 10, 2001, Taxpayer registered and titled the vehicle with the New Mexico MVD using his Albuquerque Home address.

43. On September 4, 2001, Taxpayer and Lulu Severns registered that 2002 Cadillac Escalade in Nevada using Taxpayer's Boulder City, Nevada address.

44. In March 2004, Taxpayer and Mrs. Severns purchased a 2004 Dodge Ram truck. That Dodge truck was registered and titled with the New Mexico MVD, listing Taxpayer and Mrs. Severns' names and Albuquerque address.

45. During the relevant tax years, Taxpayer and Mrs. Severns also had a 1999 Cadillac DeVille registered in New Mexico listing their Albuquerque address.

46. In October 2005, Taxpayer titled and registered a new 2006 ShoreLand'r Boat Trailer with New Mexico's MVD, listing Taxpayer's Albuquerque address.

47. In April 2007, Taxpayer and Mrs. Severns titled and registered a 2007 Haulmark Trailer with New Mexico's MVD, listing Taxpayer and Mrs. Severns' Albuquerque address.

48. Taxpayer and Mrs. Severns owned a pontoon boat in New Mexico since around 1989. On November 3, 2005, and continuing through tax years 2006 and 2007, Taxpayer and Mrs. Severns titled the pontoon boat in Florida. In their registration paperwork, Taxpayer and Mrs. Severns listed their Albuquerque address as their address and indicated that they were not residents of Florida.

Taxpayer's and Mrs. Severns' Work History and Professional Licenses.

49. Taxpayer was a movie theater projectionist and retired in 1984 so that he could care for his two young daughters. Taxpayer remained retired and did not work during the relevant tax years.

50. Diane Severns worked as a New Mexico licensed, newborn intensive care registered nurse from 1979 until her retirement in 1994.

51. Diane Severns allowed her professional nursing license to lapse in 1999. Mrs. Severns has not renewed her nurse's license in any state since it lapsed. Mrs. Severns remained retired and did not work during the relevant tax years

Taxpayer's and Mrs. Severns' Voter Registration.

52. Diane Severns changed her voter registration from New Mexico to Nevada on September 4, 2001. Mrs. Severns has remained registered in Nevada ever since receiving her registration card on September 14, 2001. Mrs. Severns voted in Nevada on September 7, 2004 and November 2, 2004.

53. On September 4, 2001, at the same time as his wife, Taxpayer also attempted to register to vote with the State of Nevada at a voter registration location in a shopping mall. However, this attempt at registration failed.

54. In 2004, Taxpayer successfully changed his voter registration from New Mexico to Nevada. Taxpayer voted in Nevada on September 7, 2004 and November 2, 2004.

Taxpayer's and Mrs. Severns' Driver's Licenses.

55. On September 4, 2001, Diane Severns applied for and received a Nevada driver's license. At the time of her application with Nevada, Mrs. Severns surrendered her New Mexico driver's license. Mrs. Severns remained licensed in Nevada throughout the relevant tax period.

56. During the relevant tax years, Taxpayer had a New Mexico driver's license. In 2003, rather than apply for a license from the State of Nevada, Taxpayer renewed his New Mexico driver's license for eight-years.

Taxpayer and Mrs. Severns' Bank Accounts, Financial Accounting, and Tax Filings.

57. Taxpayer and Mrs. Severns are long-time customers with Bank of the West. Taxpayer and Mrs. Severns have at least two accounts with Bank of the West. Before 2001, Taxpayer and Mrs. Severns conducted their banking affairs at an Albuquerque branch of Bank of the West.

58. When in Nevada, Taxpayer and Mrs. Severns conducted their in-person banking business at a Bank of the West branch-bank in Henderson, Nevada, which is near their Boulder City RV-lot.

59. In 2001, Taxpayer and Mrs. Severns changed the address listed on their Bank of the West checks from their Albuquerque address to the mailing address of their Boulder City, Nevada RV-lot.

60. Taxpayer and Mrs. Severns Bank of the West bank statements were mailed to their Albuquerque address. [Department Exhibits X1-X2]

61. On April 12, 2004, Taxpayer and Mrs. Severns, along with their daughter Kristen, entered into a Safe Deposit Rental Agreement with Bank of the West, Sandia Plaza Branch in Albuquerque.

62. During the relevant tax years, Taxpayer and Mrs. Severns used accounting firms located in Albuquerque to prepare all their federal and state tax returns. These accounting firms mailed their tax information and billing statements to Taxpayer's and Mrs. Severns' Albuquerque address. [Department Exhibits DD1-3]

63. In tax years 2001 through 2007, Taxpayer and Mrs. Severns filed their Federal income tax returns using their Boulder City RV-lot mailing address.

64. Taxpayer is a beneficiary, fiduciary, and trustee in the complex Joseph Severns Family Trust. Taxpayer and Mrs. Severns are co-beneficiaries, fiduciaries, and trustees in the simple Joseph Severns Family Trust A-1. Some tax filings from both these trusts used Taxpayer's Albuquerque Home address and some filings used Taxpayer's Boulder City RV-lot address.

65. For tax years 2004 and 2006, Taxpayer received federal Form 1099's from Charles Schwab, Franklin Templeton Investments, and other financial institutions at his Albuquerque Home address.

66. During all the tax years at issue, federal Form 1099 from Bank of the West and Putnam and Smith Barney were sent to Taxpayer's Albuquerque address.

Taxpayer's Credit Cards, Usage, and Business of Living Transactions.

67. For some or all of the tax years at issues, Taxpayer and Mrs. Severns, either individually or jointly, possessed at least the following credit cards:

- a. For all years at issues, Taxpayer and Mrs. Severns used VISA credit cards underwritten by First USA, BankOne, and Chase BankOne. The address listed on the account statements on all the above-referenced credit cards is their Albuquerque Home address.
 - b. Taxpayer held a Citi Advantage Visa Signautre/Citi Gold AAdvantage Card from 2001 through 2004. The account statements for this credit card were mailed to Taxpayer's Boulder City, Nevada address.
 - c. Taxpayer held a Citibank Driver's Edge Platinum Select Visa credit card for some of the tax periods at issue. The account statements for this credit card were mailed to his Albuquerque Home address.
 - d. Diane E. Severns held a CitiGold AAdvantage Card account from approximately May 2001 through 2004. The account statements for these credit cards were mailed to Taxpayer's Albuquerque Home address.
 - e. Taxpayer and Mrs. Severns in 2002 through 2007 also possessed a Costco American Express card account using their Albuquerque Home address.
- [Department Exhibits JJ1-JJ5]

68. Based on a review of credit cards statements and the stipulations, Taxpayer and Mrs. Severns spent Thanksgiving, Christmas, and New Years Eve 2001 in New Mexico.

69. Based on a review of credit cards statements and the stipulations, Taxpayer and Mrs. Severns spent Christmas and New Years in New Mexico in 2002, 2003, 2005, and 2007. In 2004, Taxpayer and Mrs. Severns spent Christmas in San Diego, and in 2006, Taxpayer and Mrs. Severns spent Christmas in Florida.

70. For the tax years at issue, Taxpayer's and Mrs. Severns' primary care physicians and dentists were located in Albuquerque, New Mexico.

71. Taxpayer and Mrs. Severns received no medical care in Nevada and had no doctors or dentists in Nevada during any of the tax years at issue.

72. For all of the tax years at issue, Taxpayer and Mrs. Severns received medical and dental care and other related services such as laboratory tests, radiology, physical therapy and chiropractic services in Albuquerque, New Mexico.

73. When Taxpayer and Mrs. Severns needed the services of a medical specialist such as an oncologist, ophthalmologist/optometrist or dermatologist or other medical procedures such as a colonoscopy or surgery, these were performed in Albuquerque, New Mexico by New Mexico specialists. In May 2006, Taxpayer prepared for a colonoscopy procedure at his home in Albuquerque, New Mexico. The procedure was performed by Southwest Endoscopy, specialists located in Albuquerque, New Mexico. Diane Severns consulted an oncologist in August 2002 in Albuquerque, New Mexico and received treatment by a specialist in Albuquerque, New Mexico during the tax years at issue.

74. While traveling, Taxpayer and Mrs. Severns did incur incidental emergency medical charges outside of New Mexico in tax years 2004 and 2006.

75. During the tax years at issue, Taxpayer and Mrs. Severns primarily used Lenscrafters in Albuquerque, New Mexico for their eye care services. Taxpayer and Mrs. Severns credit card charges reflect that they used Lenscrafters once in Nevada over the seven-year tax period.

76. Taxpayer's and Mrs. Severns' dog had veterinarian care and was groomed in Albuquerque, New Mexico during the relevant period.

77. Taxpayer's and Mrs. Severns' dog never received any veterinarian care or grooming services in Nevada.

78. When Taxpayer and Mrs. Severns traveled without the dog, the dog stayed in Albuquerque, New Mexico either at their Albuquerque Home or with friends or family in New Mexico.

79. During all of the tax years at issue, Diane Severns had her hair and nails done in New Mexico on a regular basis or upon returning from an absence.

80. For tax years 2003, 2004, 2005, 2006, and 2007, Taxpayer and Mrs. Severns were members of the New Mexico American Automobile Association (AAA).

81. During all the tax years at issue, Taxpayer and Mrs. Severns had their RV and other vehicles they owned primarily serviced in Albuquerque, New Mexico.

82. While traveling, Taxpayer and Mrs. Severns did incur incidental charges outside of New Mexico for various automobile services.

Taxpayer and Mrs. Severns Physical Locations by Year.

83. In 2001, Taxpayer and Mrs. Severns were present in New Mexico for more than 185-days (approximately 233-days) and in Nevada for only 14-days.

84. In 2002, Taxpayer and Mrs. Severns were present in New Mexico for more than 185-days (approximately 222-days) and in Nevada for only 21-days.

85. In 2003, Taxpayer and Mrs. Severns were only present in Nevada for 23-days. Taxpayer and Mrs. Severns were in New Mexico for between 165-days to 183-days.

86. In 2004, Taxpayer and Mrs. Severns were only present in Nevada for 18-days and present in New Mexico for 153-days.

87. In 2005, Taxpayer and Mrs. Severns were present in New Mexico for at least 272-days and in Nevada for 25-days.

88. In 2006, Taxpayer and Mrs. Severns were present in New Mexico for 161-days and in Nevada for zero days.

89. In 2007, Taxpayer and Mrs. Severns were present in New Mexico for 171-days and in Nevada for four-days.

90. From 2001-2007, Taxpayer and Mrs. Severns were physically present in Nevada for a total of only 105-days, which is less than five-percent of that total seven-year time period. Even entirely excluding 2005 from the calculation, Taxpayer and Mrs. Severns 80-days in Nevada was less than four-percent of the remaining six-year time period.

91. Taxpayer and Mrs. Severns spent a majority of their time between 2001 and 2007 in New Mexico. In reviewing Taxpayer's Exhibit 24 (Taxpayer's route maps with days of travel and length of stay written in), the evidence strongly suggests that Taxpayer and Mrs. Severns also spent more time in Florida than the claimed residence in Nevada.

Taxpayer's and Mrs. Severns' Legal Consultations.

92. Twice in 2000 and again in January 2001, Taxpayer and Mrs. Severns consulted with John Laflin, a tax and estate-planning attorney, about their planned move to Nevada.

Taxpayer and Mrs. Severns sought Mr. Laflin's legal advice about what they needed to do to make the change in their residency/domicile. Taxpayer and Mrs. Severns informed Mr. Laflin that they were retired and would soon be empty nesters with their desire to move to Nevada and to become full-time RVers.

93. Mr. Laflin's invoice for Mr. and Mrs. Severns' January 2001 consultation states:

“Conference with clients regarding change of domicile. All facts considered in determining domicile. Review of facts which indicate change of Domicile to Nevada. Referred to Nevada estate planning attorneys from Best Lawyers.” [Taxpayer’s Exhibit 1(a)]

94. Taxpayer and Mrs. Severns recalled that Mr. Laflin informed them that they could retain their Albuquerque Home as a second home for investment purposes and still not be considered residents/domiciles of New Mexico.

95. Mr. Laflin advised Taxpayer and Mrs. Severns to consult with Nevada estate-planning attorneys in order to update their estate plans.

96. Per Mr. Laflin’s referral, upon purchasing their Boulder City, Nevada RV lot, Taxpayer and Mrs. Severns consulted with a Nevada estate planning lawyer, Attorney Mark Dodds, then of the Jeffery Burr Law Firm, on December 11, 2001.

97. Taxpayer and Mrs. Severns informed Mr. Dodds that they were domiciled residents of Nevada. Mr. Dodds had no basis to doubt their assertion of domicile in Nevada, and consequently, Mr. Dodds did no independent research or legal analysis of their domicile. Mr. Dodds updated Taxpayer and Mrs. Severns estate plans accordingly.

98. On February 1, 2002, both Taxpayer and Mrs. Severns executed their respective Last Wills and Testaments, which were prepared by Mr. Dodds. Taxpayer and Mrs. Severns each testified in their wills that they were residents of Clark County, Nevada. Taxpayer and Mrs. Severns also executed a declaration of trust listing themselves as residents of Clark County, Nevada.

99. Taxpayer and Mrs. Severns met with Attorney Jason Walker of the Jeffery Burr law firm in February 2008, well past the relevant tax period. Mr. Walker believed based on his review of the facts for 2008, they were residents and domiciles of Nevada.

Procedural History and Filings of the Protest Process.

100. After the Notice of Assessment were issued and Taxpayer timely protested, on April 21, 2009 the parties filed a Request for Hearing with the Department's Hearing Bureau.

101. On May 7, 2009, the Hearing Bureau sent Notice of Administrative Hearing, originally scheduling this matter for a protest hearing on August 11, 2009.

102. On July 9, 2009, Taxpayer filed a Motion to Vacate Administrative Hearing and Stay Proceeding. The Department concurred with Taxpayer's motion.

103. On July 14, 2009, the Hearing Bureau ordered that the August 11, 2009 hearing was vacated and further proceedings were stayed at the request of the parties.

104. On June 14, 2010, the parties filed a Joint Motion for Administrative Hearing and Scheduling Order.

105. On June 14, 2010, the Hearing Bureau sent Notice of Administrative Hearing, scheduling an administrative hearing for February 8, 2011 at 9:00 AM.

106. On March 14, 2011, the Department filed a motion in limine to exclude evidence. The Taxpayer filed his response on March 30, 2011. The Hearing Bureau issued an order denying the Department's motion on April 1, 2011.

107. On April 1, 2011, the Hearing Bureau sent new Notice of Administrative Hearing, scheduling the hearing on August 23, 2011.

108. On August 19, 2011, the parties filed their Joint Stipulation of Facts.

109. The administrative file contains a series of emails among the parties and the Hearing Bureau related to the scheduling of this hearing and the length of time necessary for the hearing.

110. The protest hearing in this matter occurred on August 23 and August 29, 2011. The parties waived the 30-day statutory decision requirement and both asked for more time to submit proposed findings of fact and conclusions of law. The parties were given until October 7, 2011 to submit their proposed findings. The parties also agreed to prepare and file a complete transcript of the protest hearing.

111. On August 30, 2011, the hearing officer emailed both parties a copy of the Administrative Exhibit Cover Sheet, listing the exhibits identified, tendered, withdrawn, and admitted into the record. The hearing officer further informed the parties of a technical defect in the audio quality of approximately a 1-hour period of the proceeding and asked the parties whether additional proceedings were necessary to address the situation.

112. On September 13, 2011, the parties informed the Hearing Bureau that after reviewing the audio in question, no additional evidentiary proceedings were necessary. The parties also advised that a complete transcript would be produced and submitted into the record.

113. On October 7, 2011, the parties submitted their respective Proposed Findings of Fact and Conclusions of Law. The parties, through Taxpayer, also on that day submitted a .pdf file via email containing the Transcription of the Protest Hearing. The parties indicated that they intended to supplement the transcript further where possible to address the portions of the audio where the technical defect interfered with the transcription.

114. On November 9, 2011, Taxpayer submitted, with the Department's approval, Amended Pages to Severns Hearing Transcript. Those Amended Pages have been placed in a binder containing the original transcript, with each amended page placed immediately in front of the original page.

DISCUSSION

There are three main issues to be determined in this protest. First, whether Taxpayer established a change of domicile from New Mexico to Nevada at any point during personal income tax years 2001, 2002, 2003, 2004, 2006, or 2007. Second, assuming Taxpayer failed to establish a change of domicile, whether Taxpayer nevertheless is entitled to an abatement of penalty based on his reliance on professional legal advice about the attempted change of domicile. The third issue is whether Taxpayer is entitled to recovery of any legal costs from the protest of this assessment.

In short answer, Taxpayer did not demonstrate a change from Taxpayer's established domicile in New Mexico to Nevada and failed to overcome the presumption of correctness of the assessments. Consequently, Taxpayer is liable for personal income tax for all relevant tax years. However, because Taxpayer relied on the advice of competent counsel in attempting to change domicile, Taxpayer is nonnegligent and thus not subject to civil penalty. Since Taxpayer did not prevail on the essential issue at protest, and because the Department had a reasonable basis to assess Taxpayer, Taxpayer is not entitled to the recovery of any legal fees.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments issued in this case are presumed to be correct. Consequently, Taxpayer has the burden to overcome the assessments and establish that Taxpayer was not required to pay the assessments. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972).

Issue I: Taxpayer's Residency/Domicile for Personal Income Tax Purposes.

Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1, *et seq.* Unless otherwise exempted by law, a tax is imposed "upon the net income of every" New

Mexico resident. NMSA 1978, §7-2-3 (1981). Here, of course, Taxpayer claims that he was no longer a resident of New Mexico during the relevant tax years, and thus not subject to New Mexico personal income tax.

a. *Legal Foundations of Residency.*

Because the tax periods at issue encompassed a change in statute and regulation surrounding residency, it is necessary to identify the statutes and regulations in effect in 2001 and 2002, and then identify the changes in statute and regulations that went into effect from 2003 through 2007. It is also important to consider case law precedent when considering questions of residency and domicile.

i. *2001-2002 Statutory and Regulatory Basis of Residency.*

In 2001 and 2002, NMSA 1978, § 7-2-2(S) (1993) of the Income Tax Act defined the term “resident” as follows:

“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 this period of time, residency is synonymous with domicile. Regulation 3.3.1.9(B) NMAC (12/14/00) 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.” Regulation 3.3.1.9(C) NMAC (12/14/00) 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.

ii. *2003-2007 Statutory and Regulatory Basis of Residency.*

In 2003, the legislature amended its definition of a resident under Income Tax Act.

Under NMSA § 7-2-2(S) (2003), a

“resident” means an individual who is domiciled in this state during any part of the taxable year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during the taxable year, who, on or before the last day of the taxable year, changed the individual's 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 [7-2-1 NMSA 1978] for periods after that change of abode.

Regulation §3.3.1.9(A) NMAC (4/29/2005) mirrors this statutory definition almost exactly by stating that a resident is either an individual who is domiciled in New Mexico or an individual who is physically present in New Mexico for a total of 185-days or more during the tax year. In other words, by statute and regulation there are two possible basis of residency in New Mexico: either the person was physically present in New Mexico for 185-days or the person was domiciled within the state during any part of the tax year.

The biggest change between the definition in affect from 2001-2002 and 2003-2007 is the addition of the 185-day physical presence test alternative basis of residency. The only time this 185-day physical presence test materially controls this protest is in 2005, a year for which Taxpayer has already withdrawn his protest. Since Taxpayer and Mrs. Severns were physically present in New Mexico for more than 185-days in 2005, regardless of the question of Taxpayer's domicile that year, Taxpayer rightly conceded that he was a resident for the purposes of NMSA § 7-2-2(S) (2003). Because Taxpayer was not physically present in New Mexico for 185-days or more in 2003, 2004, 2006 or 2007, the analysis of all remaining years after the 2003 statutory

amendment continues to turn on the basic domicile analysis contained in the statute both before and after the 2003 amendment.

Regulation 3.3.1.9(C)(1) NMAC (4/29/05) defines domicile substantively identically to its above-cited predecessor, Regulation 3.3.1.9(B) NMAC (12/14/00). However, Regulation 3.3.1.9(C)(1) NMAC (4/29/05) also added the provision that “(e)very individual has a domicile somewhere, and each individual has only one domicile at a time.”

Three other provisions of Regulation 3.3.1.9 NMAC (4/29/05) are important in determining the issue at protest. First, Regulation 3.3.1.9(C)(2) NMAC (4/29/05) makes clear that once domicile is established, in order to establish a change of domicile the person must move to a “new location with the bona fide intention of making that location his or her permanent home.” Second, Regulation 3.3.1.9(C)(4) NMAC (4/29/05) directs the Department to give “due weight to an individual’s declarations of intent. However, those declarations shall not be conclusive where they are contradicted by facts, circumstances and the individual’s conduct.”

Finally, Regulation §3.3.1.9(C)(4) NMAC (4/29/05) provides twelve domicile factors to consider when determining domicile:

- (a) homes or places of abode owned or rented (for the individual's use) by the individual, their location, size and value; and how they are used by the individual;

- (b) where the individual spends time during the tax year and how that time is spent; e.g., whether the individual is retired or is actively involved in a business, and whether the individual travels and the reasons for traveling, and where the individual spends time when not required to be at a location for employment or business reasons, and the overall pattern of residence of the individual;

- (c) employment, including how the individual earns a living, the location of the individual's place of employment, whether the individual owns a business, extent of involvement in business or profession and location of the business or professional office, and the proportion of in-state to out-of-state business activities;

- (d) home or place of abode of the individual's spouse, children and dependent parents, and where minor children attend school;

- (e) location of domicile in prior years;
- (f) ownership of real property other than residences;
- (g) location of transactions with financial institutions, including the individual's most active checking account and rental of safety deposit boxes;
- (h) place of community affiliations, such as club and professional and social organization memberships;
- (i) home address used for filing federal income tax returns;
- (j) place where individual is registered to vote;
- (k) state of driver's license or professional licenses;
- (m) where items or possessions that the individual considers "near and dear" to his or her heart are located, e.g., items of significant sentimental or economic value (such as art), family heirlooms, collections or valuables, or pets.

iii. Case Law Underpinnings of Residency.

Like the statutes and regulations codify, in *Murphy v. Taxation & Revenue Department*, 94 N.M. 54, 55, 607 P.2d 592, 593 (1980), the New Mexico Supreme Court declared that for income tax purposes, residency is synonymous with domicile: "A New Mexico 'resident' is an individual domiciled in New Mexico at anytime during the taxable year who does not intentionally change his domicile by the end of the year." This definition of residency as synonymous with domicile was further affirmed a year later by the New Mexico Supreme Court in *Hagan, v. Hardwick*, 95 N.M. 517, 518, 624 P.2d 26, 27 (1981).

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. *See Estate of Peck v. Chambers*, 80 N.M. 290, 292, 454 P.2d 772, 774 (1969). As the New Mexico Supreme Court explained in *Hagan*, "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...." *Hagen* at 519, 28, quoting *Allen v. Allen*, 52 NM 174, 194 P.2d 270 (1949) and *Shillkret v. Helvering*, 138 F.2d 925, 927 (D.C.Cir. 1943). Of importance to the resolution of this protest is the court's reference in *Hagen* to the presumption that once established, domicile continues until shown otherwise.

As the cases above indicate, intentions alone are insufficient to establish domicile. In a case that is salient to the present protest, including even elements of Taxpayer's argued modern RV-lifestyle transients, the United States Supreme Court in *Texas v. Florida*, et al., 306 U.S. 398, 59, S. Ct. 563, 83 L. Ed. 817 (1939) discussed this concept that intentions alone are insufficient to establish domicile. In *Florida et al.*, over a period of many years, a man repeatedly declared that he was a resident of Texas despite having little connection to Texas (a room he rented from a friend in Tyler, Texas) compared to his connections at various times over his life in New York (a leased apartment at a hotel while he looked after his ill mother), Florida (waterfront lots and a houseboat on the water where he lived most of the winter), and Massachusetts (a large country estate where he stayed just short of six-months to avoid tax consequences). Upon the man's death, when the four states involved all attempted to collect taxes against the man's estate, the Supreme Court had to determine the decedent's residency at the time of his death. The Supreme Court said that the determination of the decedent's domicile might be easy if a person's stated intentions and declarations "were alone sufficient to establish domicile." *id.* at 417, 573, 831.

However, in a passage of critical importance to resolution of the present protest, the Supreme Court in *Florida et al.* looked beyond a person's stated intentions to determine that person's true 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 and they are of slight weight when they conflict with the fact. 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. *id.* at 425, 576, 834.

Based on this analysis, the Supreme Court ultimately found that despite the evidence of the decedent's declared intentions to be a resident of Texas, the facts established that the decedent was a resident of Massachusetts because he spent more time at his home there than at any other

place and because the major interests of his life fixed upon his residence in Massachusetts. *id.* at 426, 576-577, 835.

b. *Application of Law to Taxpayer's Protest.*

Before jumping into the analysis of the well-developed facts in this matter (both parties did an excellent job in developing the facts), it is important to reiterate the dual burdens in this case. First, under the presumption of correctness established under NMSA 1978, § 7-1-17(C) (2007), Taxpayer has the burden to overcome the assessments. Second, since the evidence is uncontroverted that Taxpayer was a domicile of New Mexico in the years leading up to 2001, under *Hagen*, it is presumed that Taxpayer's domicile remained New Mexico until shown otherwise.

Taxpayer and Mrs. Severns presented a great deal of evidence about their intention to abandon their previously-established New Mexico domicile in favor of Nevada upon becoming "empty-nesters" in 2001. But intentions alone, no matter how genuinely believed, are insufficient if they conflict with the facts of Taxpayer's actual conduct. *See* Regulation 3.3.1.9(C)(4) NMAC (4/29/05) and *Florida et al.* Under the change of domicile standard articulated in *Estate of Peck* and *Hagen*, three sets of facts and circumstances specific to this protest undercut Taxpayer's expressed intentions to change domicile from New Mexico to Nevada. Given these three factors, Taxpayer did not overcome the presumption that domicile continues until changed and the presumption of correctness of the Department's assessments.

The first and perhaps most important of these factors is Taxpayer's physical presence throughout the relevant tax years. It is important to distinguish between the relevancy of physical presence and the relevancy of the 185-day physical presence test under NMSA § 7-2-2(S) (2003). While the 185-day physical presence test has no statutory meaning for tax years 2001 through

2002, and was only exceeded once in 2005, Taxpayer's physical presence is still a relevant consideration for the entire period at issue in this matter because it is an objective fact in which Taxpayer's intentions can be measured against Taxpayer's actions. Moreover, since *Estate of Peck* requires physical presence in a new locality with an intention to abandon the old domicile, Taxpayer's physical location during the claimed change of domicile is relevant.

Even granting the transient nature of the RV-lifestyle, it is highly improbable that Taxpayer and Mrs. Severns could have genuinely changed domicile from New Mexico to Nevada after having only spent 105-days, or less than 5% of the total time, in Nevada over a seven-year period. During that same period of time when Taxpayer claimed to have switched domicile from New Mexico to Nevada, Taxpayer and Mrs. Severns spent over half their time—1,377-days—in New Mexico. Considering the tax years at issue individually does little to change the mathematical discrepancies of Taxpayer's physical location in each respective year. The discrepancy in those numbers is so staggering that it is clear that New Mexico was more than just—as Taxpayer argued—a convenient centralized location where Taxpayer and Mrs. Severns collected their mail while passing through on the open road. Like in *Florida et al.*, it is clear that regardless of Taxpayer and Mrs. Severns stated intentions to start a new domicile in Nevada, New Mexico remained the hub of their familial interests, the common denominator in most of their travels, and the place where they were most frequently located throughout the relevant tax years. Again like in *Florida et al.*, while Taxpayer and Mrs. Severns did demonstrate some tangible connections to Nevada, it is hard in the face of these physical presence numbers to call their connection to Nevada anything other than “nominal” in nature. In any case, Taxpayer simply lacked enough physical presence in a new locality to pass the *Estate of Peck* and *Hagen* change of domicile standard.

Another factor that ties into the *Florida et al.* rationale cuts against Taxpayer in this protest. The evidence established that Taxpayer during the relevant period of time intentionally structured the 45-foot RV purchase in a manner to avoid paying sales tax. Like famously indicated by Judge Learned Hand in *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), there is nothing illegal or immoral about a person arranging transactions to minimize their tax liability. Nevertheless, the fact that Taxpayer was motivated to create a Montana LLC in order to avoid paying Missouri sales tax on the RV purchase is still potentially instructive as it relates to the Taxpayer's intentions and motivations in changing domicile. Given their nominal connection to Nevada compared to New Mexico, like the decedent in *Florida et al.*, this previous tax avoidance strategy raises the possibility that Taxpayer's claim of change of domicile to Nevada—a state without any income tax—was not motivated by a genuine, bona fide desire to change residence, as required under Regulation 3.3.1.9(C)(2) NMAC (4/29/05), but for the purposes of avoiding income tax in New Mexico or Florida, both of which have an income tax.

The final factor cutting against Taxpayer's claim of a change of domicile to Nevada is where Taxpayer and Mrs. Severns primarily conducted their daily living, or as the Department says, the "business of daily living." Taxpayer and Mrs. Severns used Albuquerque for a broad ranges of basic living activities, including medical appointments, vision appointments, shopping for necessities, veterinarian visits, storage of their RV's when not in use, vehicle registrations, and as a centralized mail location. Ultimately, where one consistently conducts the day-to-day routines of living is most likely the place that the person lives. Here, at a minimum, the continuing pattern of the business of living activities in Albuquerque undermines Taxpayer's claim of a change of domicile from New Mexico to Nevada.

Additionally to these three critical factors that affect all years at issue, under Regulation 3.3.1.9(C) NMAC (12/14/00), Taxpayer was presumed to be domiciled in New Mexico for tax years 2001 and 2002. Taxpayer possessed a New Mexico driver's license during those years. Further, despite his failed attempts to change his voter registration, Taxpayer remained a registered New Mexico voter until 2004. Since Taxpayer did not change his registration or his driver's license outside of New Mexico during those years, Taxpayer remained a New Mexico resident during 2001 and 2002.

Taxpayer spent a great deal of time discussing the transient and nomadic nature of the modern RV-lifestyle and how that modern mode of transportation alters the basic domicile concepts. While the RV may have made Taxpayer's travels more convenient and more frequent than the decedent in *Florida et al.*, some 80-years later the basic calculus of that decision remains true. Like the current Taxpayer, the decedent in that case was quite transient and nomadic in nature, spending summers in Massachusetts before living in his Florida houseboat during the winter. To the extent that Taxpayer and Mrs. Severns are using their mobile, RV-lifestyle as argument that they no longer have any domicile in the traditional sense of the term, they present no supporting authority for that proposition. By Regulation 3.3.1.9(C)(1) NMAC (4/29/05), everyone has only one domicile somewhere. And in any event, the facts in this case simply do not support that proposition that Taxpayer was without a domicile.

In sum, while each party can cite to certain facts that arguably support one of the twelve domicile factors, the three most compelling factors in this case—Taxpayer's physical presence, Taxpayer's possible motivations, and Taxpayer's business of living activity—are persuasive in determining the outcome of this protest. Because of these three factors, there is insufficient evidence to overcome the *Hagen* presumption that once established, domicile continues until

shown otherwise. Moreover, because of these three factors, Taxpayer did not overcome the presumption of correctness that attached to the Department's assessments.

Issue II: Whether Taxpayer is subject to Civil Negligence Penalty.

Under NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007), the Department shall assess civil negligence penalty "in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, ...or to file by the date required a return regardless of whether a tax is due..." Before January 1, 2008, the maximum civil negligence penalty under NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007) was capped at 10%.

Department Regulation 3.1.11.10 NMAC (1/15/01) defines the term "negligence" under NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007) as:

- (A) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances
- (B) inaction by taxpayers where action is required;
- (C) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In instances where a taxpayer or taxpayers might otherwise fall under the definition of civil negligence generally subject to penalty, NMSA 1978 Sec. 7-1-69 (B) (2003) provides a limited exception: "No penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Moreover, by Department Regulation 3.1.11.11 NMAC (1/15/01), there are several situations which can show a taxpayer's or taxpayers' nonnegligence. In such nonnegligent situations, the Department may either

choose not to assess civil penalty or may abate civil penalty. For the purposes of this protest, one potential nonnegligence situation is at issue: “the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or accountant as to the taxpayer’s liability after full disclosure of all relevant facts...” 3.1.11.11(D) NMAC (1/15/01).

In reviewing the evidence presented in this case, Taxpayer established by the preponderance that Taxpayer and Mrs. Severns sought and relied on the advice of competent counsel, New Mexico Attorney J. Laflin, before attempting to switch their domicile from New Mexico to Nevada. While the Department takes issue with the fact that Mr. Laflin was not called as a witness to speak of Taxpayer’s disclosure of facts to him and his advice to Taxpayer about domicile for tax purposes, Mr. Laflin’s invoice, admitted into the record as Taxpayer’s Exhibit #1A, speaks for itself in this regard. According to Mr. Laflin’s invoice, he held a “conference with clients (Taxpayer and Mrs. Severns) regarding change of domicile. All facts considered in determining domicile. Review of facts which indicate change of domicile to Nevada.” Mr. Laflin apparently also provided Taxpayer with the not unreasonable advice that Taxpayer and Mrs. Severns could own a second home for investment purposes in New Mexico and not necessarily be domiciled in New Mexico. It is clear from Taxpayer’s Exhibit #1A in conjunction with Mr. Severns’ own corroborating testimony, that Taxpayer relied on Mr. Laflin’s advice after Taxpayer and Mrs. Severns disclosed all relevant facts of their intention to abandon New Mexico domicile once their daughter graduated from high school. Indeed, in showing Taxpayer’s reliance on Mr. Laflin’s counsel, Taxpayer sought the advice of an attorney in Nevada, Mr. Mark Dodds, just as Mr. Laflin had recommended to them.

Consequently, Taxpayer established that under Regulation 3.1.11.11(D) NMAC (1/15/01) he was nonnegligent because Taxpayer’s failure to pay tax income tax in New Mexico was attributable to his reasonable reliance on the advice of attorney Laflin. Therefore, the imposition of penalty against the Taxpayer for the relevant tax years is not warranted and penalty should be abated.

Issue III: Whether Taxpayer is entitled to recover any attorney fees.

Taxpayer argued that under NMSA 1978, § 7-1-29.1 (2003), Taxpayer was entitled to attorney's fees if he prevailed in this protest. Both sides asked to reserve argument on this point pending the outcome of the decision. However, in light of this decision, no further briefing on this issue is merited, as the issue is largely moot.

NMSA 1978, § 7-1-29.1 (2003) provides that when a taxpayer is the prevailing party in an administrative proceeding before the Department, the taxpayer shall be awarded reasonable administrative costs, including attorneys fees. The taxpayer is a "prevailing party" if it has substantially prevailed with respect to (a) the amount in controversy or (b) most of the issues involved in the case or the most significant issue or set of issues involved in the case. § 7-1-29.1(C)(1). But the taxpayer will not be treated as a prevailing party if the Department "establishes that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case." § 7-1-29.1(C)(2).

In this case, while Taxpayer did prevail on the minor assessment of penalty issue, Taxpayer did not prevail on the most substantial question of the protest: whether or not Taxpayer was a resident of New Mexico during the relevant tax periods. Moreover, even if Taxpayer could have shown that he was not a New Mexico resident in some or all of the remaining years at protest, the fact that Taxpayer conceded the Department's assessment for tax year 2005 was correct established that the position of the Department in this proceeding was based on a reasonable application of the law to the facts of this protest. In other words, because Taxpayer was a resident for income tax purposes both immediately before and right in the middle of the relevant tax periods at issue, the Department certainly had a reasonable basis to

argue that Taxpayer was a resident during all the tax periods at issue. Taxpayer's request for attorney's fees is therefore denied.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest of the Notices of Assessment issued for 2001, 2002, 2003, 2004, 2005, 2006 and 2007 personal income taxes, penalty, and interest issued in this matter. Jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer withdrew his protest with respect to 2005.

3. Taxpayer failed to overcome the presumption of correctness on the assessments for tax years 2001, 2002, 2003, 2004, 2006, and 2007 because the evidence is insufficient to establish a change from the established New Mexico domicile to Nevada, as required under *Hagan, v. Hardwick*, 95 N.M. 517, 518, 624 P.2d 26, 27 (1981).

4. Taxpayer established that he was nonnegligent under Regulation 3.1.11.11(D) NMAC (1/15/01) and thus not subject to civil negligence penalty for any of the tax years at protest.

5. Taxpayer is liable for personal income tax principal and interest for tax years 2001, 2002, 2003, 2004, 2006, and 2007.

For the foregoing reasons, Taxpayer's protest **IS GRANTED IN PART AND DENIED IN PART**: the Department is ordered to abate penalty and Taxpayer is ordered to pay personal income tax plus interest for tax years 2001, 2002, 2003, 2004, 2006, and 2007.

DATED: July 31, 2013.

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