

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

**IN THE MATTER OF THE PROTEST OF
EDWARD J. CLAH & MELVINA MURPHY
TO ASSESSMENT ISSUED UNDER LETTER
ID NOS. L2024160832, L1755725376, L0587583040,
L0050712128, L2097532480 and L0933084736**

No. 12-19

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on September 6, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Edward J. Clah (“Taxpayer”) appeared represented by attorney Jeffery Loubet. Ms. Melvina Murphy appeared as a witness on behalf of Taxpayer. Staff attorney Peter Breen represented the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Milagros Bernardo and retired Tax Fraud investigator Barry Wilson appeared as witnesses for the Department. Taxpayer Exhibits #1-10 were admitted into the record. Department Exhibits A, B, C, C1, I, T, V, W, X, AA, BB, CC, DD, EE, FF, and GG were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The New Mexico personal income tax periods at issue in this protest are 2004, 2005, 2007, 2008, 2009, and 2010.
2. Taxpayer is an enrolled tribal member of the Navajo Nation.
3. Taxpayer is a member of the Iyanbito Chapter, about 20 miles east of Gallup, New Mexico.

4. Taxpayer is married to Melvina Murphy, also an enrolled member of the Navajo Nation, Iyanbito Chapter. Although Melvina Murphy is listed by name in the assessments, both parties conceded that Melvina Murphy's tax obligations were not at issue in this protest. The Department indicated it listed her name on the assessments simply for the possibility of enforcing any favorable judgment against community property.

5. Taxpayer and Melvina Murphy have three children: Clinton Clah, Meloney Clah (spelling uncertain), and Mikhala Clah.

6. Taxpayer and Melvina Murphy own a homesite lease with a home on Navajo Nation tribal trust land near Iyanbito. The address of this property is 21 Dakota Loop, Iyanbito, NM (herein referenced as "Iyanbito home").

7. Taxpayer and Melvina Murphy purchased the Iyanbito home for approximately \$51,000 in 1993 as the result of a foreclosure action involving Vickie and Curtis Hand. The parties contentiously litigated that matter over a period of years, at least through 1999 in the District Court of the Navajo Nation. [Department Exhibit DD and Administrative Notice of *Opinion and Order of the District Court of the Navajo Nation*]

8. The Iyanbito home is approximately 2,800 square feet with four bedrooms and two-and-half baths.

9. On December 6, 1999, Taxpayer and Melvina Murphy purchased another home at 1940 Milda Ave. in Gallup, New Mexico (herein referenced as "Gallup home") for \$150,300.00. [Department Exhibit I].

10. The Gallup home is approximately 1,700 square feet.

11. Because of her occupation as an on-call registered nurse at the hospital in Gallup, Melvina Murphy resided at the Gallup home during the entire period at issue from 2004 through

2010. Mikhala Clah resided with her mother Melvina Murphy during the entire relevant period. In tax years 2004 and 2005, Meloney Clah also resided with Melvina Murphy at the Gallup home.

12. Because she resided in Gallup, and worked off tribal land in Gallup, Melvina Murphy paid New Mexico personal income taxes in each relevant period.

13. Taxpayer was employed with Chevron Mining Inc. (formerly known as the Pittsburgh & Midway Coal Co.) at the McKinley Mine from February 29, 1992 until July 30, 2005. [Taxpayer Exhibit #1].

14. The McKinley Mine is located on the Navajo Nation, about 25-miles northwest of Gallup and about 40-miles from Iyanbito. The commute to the McKinley Mine from Taxpayer's Gallup home address is about 25-minutes less than the commute from Taxpayer's Iyanbito home.

15. Taxpayer left McKinley Mine for a different position of employment off of the Navajo Nation from July 2005 through 2006. In 2007, Taxpayer was rehired for work with Chevron Mining Inc. at the McKinley Mine on the Navajo Nation, where he continued working through 2011.

16. Taxpayer claimed that he resided at the Iyanbito home with his son Clinton Clah in tax year 2004, 2005, 2006, 2007, 2008, 2009, and 2010. Taxpayer claimed that he would live at the Iyanbito home Sunday through Friday every week, attend work every day at the mine during the week, and then get provisions and visit his wife and daughters on Saturday in Gallup.

17. Clinton Clah attended school in Gallup during the relevant period.

18. During the relevant period, Taxpayer maintained his mailing address at his Gallup home.

19. During the relevant period, Taxpayer was registered to vote at his Gallup home address. [Department Exhibit B].

20. Although Taxpayer testified that he never voted, Taxpayer's voter registration information showed that in 2004, Taxpayer used his Gallup voter registration to absentee vote in the general election and vote early in the 2008 general election. [Department Exhibit B].

21. In 2008, Taxpayer obtained a New Mexico driver's license listing the Gallup home as both his residential and mailing address. [Department Exhibit C1].

22. Taxpayer's son Clinton Clah, whom Taxpayer claimed resided with him at the Iyanbito home, also listed the Gallup home as both his residential and mailing address on his 2010 driver's license application.

23. In 2003, Taxpayer registered a Ford vehicle with the State using his Gallup home address as both his mailing and residential address. [Department Exhibit BB].

24. In 2009, Taxpayer registered a Chevrolet vehicle with the State using his Gallup home address. Although there is a space on the title and registration form for a separate "residence address if different than mailing address," Taxpayer did not specify any address in that space. [Department Exhibit CC].

25. In tax years 2004-2009, Taxpayer filed his Federal and State personal income taxes as head of household, separately from his wife Melvina Murphy, as follows:

a. For tax year 2004, Taxpayer claimed Clinton Clah as a dependent and used an address of PO Box 2651, Gallup, NM 87305. Taxpayer's 2004 W2 listed PO Box 2651, Gallup, NM 87305 as his address. [Taxpayer Exhibit #4].

b. For tax year 2005, Taxpayer claimed Clinton Clah as a dependent and used an address of PO Box 2651, Gallup, NM 87305. Taxpayer had two W2's in

2005, one listing PO Box 2651, Gallup, NM 87305 as his address with the other listing his address at the Gallup home. [Taxpayer Exhibit #5].

c. For tax year 2006, Taxpayer claimed Clinton Clah as a dependent and used an address of PMB 455 2418 E. HWY 66, Gallup, NM 87301. Taxpayer's 2006 W2 listed his address at the Gallup home. [Taxpayer Exhibit #6].

d. For tax year 2007, Taxpayer claimed Clinton Clah as a dependent and used an address of PMB 455 2418 E. Historic Hwy 66, Gallup, NM 87301. Taxpayer had two W2's in 2007, one listing PO Box 2651, Gallup, NM 87305 as his address with the other listing his address at the Gallup home. [Taxpayer Exhibit #7].

e. For tax year 2008, Taxpayer claimed Clinton Clah as a dependent and used his Gallup home address. Taxpayer's 2008 W2 listed his Gallup home address. [Taxpayer Exhibit #8].

26. In tax years 2009-2010, Taxpayer filed his Federal and State personal income tax returns jointly with his wife Melvina Murphy, as follows:

a. For tax year 2009, Taxpayer and Murphy claimed Clinton Clah and Mikhala Clah as dependents and used Taxpayer's Gallup home address. Taxpayer's 2009 W2 listed his Gallup home address as his address. [Taxpayer Exhibit #9].

b. For tax year 2010, Taxpayer and Murphy claimed Clinton Clah and Mikhala Clah as dependents and used Taxpayer's Gallup home address. Taxpayer's 2010 W2 listed his Gallup home address as his address. [Taxpayer Exhibit #10].

27. Taxpayer claimed an exemption for all income earned at the McKinley Mine on the Navajo Nation land pursuant to NMSA 1978, Section 7-2-5.5 (1995) for New Mexico personal income tax in tax years 2004, 2005, 2007, 2008, 2009, and 2010. Taxpayer did not claim that exemption in 2006 and paid New Mexico personal income tax that year.

28. On November 28, 2011, the Department assessed Taxpayer for personal income tax, penalty, and interest as follows:

a. Under letter id. no. L0933084736 for tax year ending 12/31/2004, \$3,367 in personal income tax, \$673.40 in penalty, and \$1,952.13 in interest, for a then total assessment of \$5,992.53.

b. Under letter id. no. L2097532480 for tax year ending 12/31/2005, \$3,575 in personal income tax, \$715.00 in penalty, and \$1,534.80 in interest, for a then total assessment of \$5,824.80.

c. Under letter id. no. L0050712128 for tax year ending 12/31/2007, \$1,463.00 in personal income tax, \$292.60 in penalty, and \$225.33 in interest, for a then total assessment of \$1,980.93.

d. Under letter id. no. L0587583040 for tax year ending 12/31/2008, \$4,731.00 in personal income tax, \$946.20 in penalty, and \$472.97 in interest, for a then total assessment of \$6,150.17.

e. Under letter id. no. L1755725376 for tax year ending 12/31/2009, \$8,535.00 in personal income tax, \$1,707.00 in penalty, and \$511.87 in interest, for a then total assessment of \$10,753.87.

f. Under letter id. no. L2024160832 for tax year ending 12/31/2010, \$8,851.00 in personal income tax, \$1,416.16 in penalty, and \$198.60 in interest, for a then total assessment of \$10,465.76.

29. On November 28, 2011, Taxpayer contacted Mr. Barry Wilson, Investigator with the Department's Tax Fraud Investigations Division, about the issued assessments.

30. Mr. Wilson has over 40-years of experience as an auditor/investigator with the IRS and with the Department.

31. During the November 28, 2011 conversation with Taxpayer, Mr. Wilson took detailed notes. Taxpayer told Mr. Wilson that he, his wife, son, and daughter lived at the Iyanbito home. Taxpayer further told Mr. Wilson that he had never rented the Iyanbito home.

[Department Exhibit DD].

32. On November 29, 2011, Taxpayer filed a protest of assessment of 2010 personal income tax, penalty, and interest.

33. On December 8, 2011, Taxpayer filed a protest of assessments of 2004, 2005, 2007, 2008, and 2009 personal income taxes, penalty, and interest.

34. On December 9, 2011 and December 21, 2011, the Department acknowledged receipt of Taxpayer's respective protests.

35. The Department's investigator Mr. Wilson visited Taxpayer's Gallup home and Iyanbito home in February of 2012.

36. While visiting the Iyanbito home, Mr. Wilson discovered that Ms. Julia Gabehart lived at the Iyanbito home. Mr. Wilson had a brief conversation with Ms. Gabehart, whom was on the phone at the time. Ms. Gabehart reported renting that location for about two-years.

37. Ms. Julia Gabehart applied for a New Mexico driver's license listing the Iyanbito home address on September 14, 2010. [Department Exhibit AA].

38. In doing a property record search on the Iyanbito home address, Mr. Wilson discovered a listing for Ms. Terri Tom. On February 14, 2012, the Department's Mr. Wilson had a telephone conversation with Ms. Terri Tom. Ms. Tom reported that she, her husband, and two kids had rented the Iyanbito home in 2003 through 2008 and paid Taxpayer \$500 per month in rent. Ms. Tom reported that Taxpayer had moved with his whole family to Gallup during that time. [Department Exhibit EE].

39. Ms. Terri Tom is the sister of Vickie Hand, the other party involved in contentious litigation with Taxpayer over the foreclosure of the Iyanbito home.

40. On March 1, 2012, the Department requested a protest hearing in this matter.

41. On March 2, 2012, the Hearings Bureau of the Taxation and Revenue Department sent notice of hearing, setting this matter for hearing on June 5, 2012.

42. On May 31, 2012, upon Taxpayer's requests, the Hearings Bureau continued the June 5, 2012 protest hearing and rescheduled the matter for September 6, 2012.

43. As of the scheduled hearing on September 6, 2012, the Department calculated that Taxpayer owed \$30,522.00 in unpaid personal income tax, \$6,104.40 in penalty, and \$5,629.03 in interest under the issued assessments. [Department Exhibit GG]

DISCUSSION

At issue in this protest is whether Taxpayer's personal income in tax years 2004, 2005, 2007, 2008, 2009, and 2010 was exempt from New Mexico Personal Income tax under the "earnings by Indians... on Indian lands" exemption, as found under to NMSA 1978, §7-2-5.5 (1995). Tax year 2006 is not at issue because Taxpayer did not claim the exemption that year and

the Department did not issue an assessment for that year. Further, although Melvina Murphy was named in each assessment, the parties agree that she never claimed the exemption at issue and that she has no outstanding tax obligations at dispute (except for her interest in the marital community property).

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, the Taxpayer has the burden to overcome the assessments and show he was entitled to an exemption of personal income tax. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 220, 2003 NMCA 21, ¶13, 62 P.3d 308, 311 (N.M. Ct. App. 2002).

Taxpayer is claiming an exemption to payment of New Mexico personal income tax. “Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer.” *Wing Pawn Shop v. Taxation and Revenue Department*, 111 N.M. 735, 740, 809 P.2d 649, 654 (Ct. App. 1991). In other words, in addition to the presumption of correctness, because an exemption is at issue, Taxpayer must clearly establish that he qualified for the exemption.

Personal Income Tax and the Exemption.

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).

Under NMSA 1978, §7-2-5.5 (1995), “Exemption; earnings by Indians, their Indian spouses and Indian dependants on Indian lands,”

Income earned by a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, his spouse or dependent, who is a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, is exempt from state income tax if the income is earned from work performed within and the member, spouse or dependent lives within the boundaries of the Indian member's or the spouse's reservation or pueblo grant or within the boundaries of lands held in trust by the United States for the benefit of the member or spouse or his nation, tribe, band or pueblo, subject to restriction against alienation imposed by the United States.

If Taxpayer can demonstrate that he was entitled to the exemption under NMSA 1978, §7-2-5.5 (1995) during the relevant time, then Taxpayer’s income attributable to his work at the McKinley Mine on the Navajo Nation during tax years 2004, 2005, 2007, 2008, 2009, and 2010 would not be subject to New Mexico personal income tax and the assessments would not be supported.

Federal Origins of the Exemption.

Before breaking down the exemption under NMSA 1978, §7-2-5.5 (1995) further, it is necessary to discuss the clear federal underpinnings necessitating that State exemption. The seminal federal case on the prohibition of state personal income taxes imposed on tribal members living on tribal lands from income derived from within tribal territory is the United States Supreme Court case *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1972). In *McClanahan*, the State of Arizona attempted to impose an income tax on an enrolled member of the Navajo Nation living on the portion of that reservation within the State of Arizona. *See id.* at 165-166. The taxpayer at issue in *McClanahan* conceded that for purposes of Arizona law, she was a resident of Arizona. *See id.* at 166, footnote 3. However, the fact that the *McClanahan*

taxpayer legally qualified as a resident of Arizona played no role in the Supreme Court’s analysis of the issue or in the Supreme Court’s ultimate holding.

Three other factors were of greater importance to the Supreme Court in *McClanahan*. First, the Supreme Court determined that Indian Sovereignty Doctrine—that is that native peoples have the power to self-regulate their own affairs on native lands—provided a relevant policy background against which the treaties and relevant statutes must be read. *See id.* at 172. Second, the Supreme Court considered the express terms of the United States and Navajo Nation treaty (which is the same treaty involved in this protest) and found that the treaty precluded the extension of state tax law to “Indians on the Navajo Reservation.” *id.* at 175. Finally, the Supreme Court considered the Arizona Enabling Act (which the Supreme Court noted in footnote 14 matched New Mexico’s Enabling Act) and found that under the Enabling Act, Arizona was both precluded from asserting claims to lands within the Navajo Nation and prohibited from taxing any lands within the Navajo Nation. *See id.* at 175-176. Against this backdrop, even if the tribal member at issue in that case was also a resident of Arizona, the Supreme Court ultimately held that Arizona could not impose a state personal income tax on a tribal member living on tribal land whose income “derived wholly from reservation resources.” *id.* at 179.

Subsequent United States Supreme Court cases have affirmed and expanded on the rationale of the *McClanahan* holding. In the case *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (U.S. 1993), the United States Supreme Court emphasized that the *McClanahan* holding “relied heavily on the doctrine of tribal sovereignty.” *id.* at 123. Because of this concept of tribal sovereignty expressed in *McClanahan*, the Supreme Court in *Oklahoma Tax Comm'n v.*

Sac & Fox Nation found that there is a presumption against taxability for Native American “living and working” on tribal lands. *id.* at 124.

Although the term “residence” was mentioned at least twice in *Oklahoma Tax Comm'n v. Sac & Fox Nation*, given the tribal Sovereignty Doctrine underlying its analysis, the Supreme Court’s focus was much more on the physical location of the tribal member vis-à-vis tribal lands than any analysis of domicile or that tribal member’s intent. In fact, the Supreme Court stated in *Oklahoma Tax Comm'n v. Sac & Fox Nation* that to be exempt from State income tax, it is enough that the tribal “member live in ‘Indian Country’.” *id.* at 123. Further, the Supreme Court explained that “Indian sovereignty serves as a ‘backdrop’ only for those tribal members who **live on** the reservation, and all others fall outside of *McClanahan*’s presumption against taxation.” *id.* at 124 (bold added for emphasis). It is not a surprise then, based on this final point noted in *Oklahoma Tax Comm'n v. Sac & Fox Nation*, that the Supreme Court allowed State taxation of tribal members not living within tribal lands. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-463 (U.S. 1995).

More recently, in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (U.S. 2005), the United States Supreme Court again affirmed the *McClanahan* presumption against taxation for tribal members living on tribal lands. Importantly in *Wagnon*, the Supreme Court stated that in its “unique Indian tax immunity jurisprudence”, the concept of tribal sovereignty “has a significant geographical component.” *id.* This significant geographical component of tribal sovereignty provides the “backdrop” in which the relevant treaties and statutes must be analyzed in order to assess a State’s attempt at taxation of tribal members. *id.* In the discussion in *Wagnon*, the geographical component appears to be the decisive operational distinction for the Supreme Court: while Native Americans living within a reservation are generally protected by

the *McClanahan* presumption against taxation, Native Americans “going beyond reservation boundaries” are generally subject to State tax. *id.* at 112-113.

The Statutory Exemption.

This historical background provides context to the statutory exemption NMSA 1978, §7-2-5.5 (1995) cited above. The statute cannot be interpreted to conflict with the federal constitutional law discussed in the above-cited cases.

The exemption under NMSA 1978, §7-2-5.5 (1995) can be broken down further into three elements. First, there must be earned income by a member of a New Mexico federally recognized Indian nation. *See id.* In this case, the evidence clearly established—and the Department does not dispute—that the Taxpayer is a member of a federally recognized Indian Nation, the Navajo Nation.

The second element under NMSA 1978, §7-2-5.5 (1995) is that the earned income derived from work performed within the boundaries of the Indian member’s or spouses’ land. *See id.* By regulation, the Department requires that the income derive “from... activities on the tribal territories”. *See* 3.3.4.12(C) NMAC (5/15/2001). In this case, there is no dispute that Taxpayer derived income from working for the McKinley Mine on the Navajo Nation.

The third element under NMSA 1978, §7-2-5.5 (1995) presents the main controversy in this matter: the “member, spouse or dependent” claiming the exemption “lives within the boundaries” of the applicable tribal land. Neither the statute nor the regulation interpreting the statute provide a definition, standard, or test to determine what is meant to “live within the boundaries” of tribal land.

The Department argues that a residency/domicile analysis is the appropriate standard to determine whether under NMSA 1978, §7-2-5.5 (1995) a person lives within the boundaries of

tribal land. In other decisions and orders issued by the Department's Hearings Bureau, the undersigned hearing officer has declined to fully adopt and apply the residency and domicile approach advocated by the Department. *See Matter of Protest of Aurelia Shorty*, No. 11-17, and *Matter of Protest of John and Bonnie Yearley*, No. 11-29.

Statutory Construction of the Exemption.

Any question of statutory construction must begin with a plain meaning reading of the statute. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12, 250 P.3d 881, 884 (N.M. Ct. App. 2010), *cert denied* Sup. Ct. No. 32,792. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See Johnson v. N.M. Oil Conservation Comm'n*, 1999 NMSC 21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333 (NM 1999). Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 146 N.M. 473, 477, 212 P.3d 361, 365 (N.M. 2009).

Although the entire exemption is cited above, the portion of NMSA 1978, §7-2-5.5 (1995) subject to interpretative dispute is worth restating here: whether the tribal member "...lives within the boundaries of the Indian member's or the spouse's reservation or pueblo grant or within the boundaries of lands held in trust by the United States..."

Considering this plain meaning requirement, a close reading of the exemption does not support the Department's contention that a domicile analysis is the appropriate method of analysis to determine whether a taxpayer "lived within the boundaries." The words "residency" and/or "domicile" are not used in the exemption statute. Despite the fact that the legislature was aware of the meaning of "residency" and "domicile" given it gave those words legal significance

under a separate statute, NMSA 1978, § 7-2-2 (S) (2003), the legislature choose to use the distinct phrase “lives within the boundaries” under the exemption, NMSA 1978, §7-2-5.5 (1995). Moreover, the exemption statute NMSA 1978, § 7-2-5.5 (1995) does not cross reference the New Mexico statutes and regulations on “residency” and “domicile,” NMSA 1978, § 7-2-2 (S) (2003) and Regulation 3.3.1.7 NMAC (4/29/2005). The Department’s own accompanying regulation under the exemption statute, Regulation 3.3.4.12 NMAC (5/15/01), neither defines “lives within the boundaries” as equivalent to “residency” and/or “domicile,” nor references the words “residency” or “domicile” in any manner.

Unlike “domicile”, which also gives weight to a person’s intention, the term “lives within the boundaries” used in the exemption is much more literal phrase related to a person’s geographical location. “Lives within the boundaries” suggests a continuing physical presence inside a defined geographical space. This more literal reading of “lives within the boundaries” under the exemption statute is consistent with the federal case law addressed by *McClanahan* and its progeny, which placed a strong emphasis on the geographical component of tribal sovereignty in the Indian income tax exemption context. In light of this geographical component in the federal case law, it is logical that the legislature would give greater priority to the geographical location of a person within Native American land rather than that person’s intent and the other factors that are part of a classic domicile analysis. In light of the plain language reading of the exemption and the federal case law addressing the issue of taxability of native peoples on native lands, domicile does not appear to be the determinative factor under the exemption at issue in this protest.

Application of Exemption to the Facts at Protest.

Taxpayer asserts that he lived within the Navajo Nation during the relevant period. However, Taxpayer did not carry his burden under the presumption of correctness to overcome the assessment and to establish that he was entitled to exemption of personal income tax. While it is possible that Taxpayer in fact lived at his Iyanbito home, it is equally possible based on the other evidence that Taxpayer lived off the Navajo Nation in Gallup during the relevant period. Consequently, since the evidence does not support by the preponderance that Taxpayer lived within the Navajo Nation at his Iyanbito home during the relevant period of time, Taxpayer was not entitled to claim the exemption from personal income under NMSA 1978, §7-2-5.5 (1995) and the Department's assessment is correct.

Almost all of the documentary evidence in the record suggests that Taxpayer resided at that Gallup home address during the relevant period. Taxpayer maintained his voter's registration at the Gallup home. Although Taxpayer affirmatively testified that he did not vote, the evidence showed that Taxpayer in fact voted using his Gallup home registration in the 2004 and 2008 general elections. Taxpayer maintained his driver's license listing his Gallup home address as both a mailing and physical address. Taxpayer registered and maintained vehicle registrations on two separate vehicles during the period at issue using his Gallup home address.

Taxpayer explained that he used the Gallup home address consistently as a mailing address on forms because Iyanbito did not have mail delivery. However, when given an opportunity to list a separate physical address on his Ford vehicle registration address, Department Exhibit BB, Taxpayer nevertheless listed his Gallup home address as both his mailing address and his physical address. On Department Exhibit CC, Taxpayer declined to list

any separate physical address different from his Gallup home mailing address on the Chevrolet vehicle registration.

Taxpayer testified that for cultural reasons, it was very important for him to live with his son Clinton at the Iyanbito home on the Navajo Nation. While Taxpayer's testimony about living with Clinton at the Iyanbito home is plausible in light of the clear importance Taxpayer placed on cultural tradition, all other documentary evidence in this record is contradictory and suggests that Clinton Clah lived at the Gallup home address. As Taxpayer acknowledged, Clinton Clah attended school in Gallup, which naturally made the Gallup home address far more convenient during the school year than the Iyanbito home address some 20-miles away from Gallup. Clinton Clah used the Gallup home address as both a physical address and a mailing address for his New Mexico driver's license. While Taxpayer, filing separately as head of household, claimed Clinton Clah as a dependent on his income tax returns in 2004 through 2008, all of those returns listed a Gallup address rather than Taxpayer's Iyanbito home address. In 2009 and 2010, Taxpayer and Melvina Murphy filed their income tax returns jointly using their Gallup home address and claimed Clinton Clah and Mikhala Clah as dependents.

By some 25-minutes each way of commuting time, Taxpayer's work at the McKinley Mine during the relevant period was closer to Taxpayer's Gallup home than to Taxpayer's Iyanbito home. In fact, looking at Google maps it appears that in order for Taxpayer to get to work from his Iyanbito home, Taxpayer would need to drive through Gallup. Considering that Taxpayer's wife and daughter also resided in Gallup and that Clinton Clah attended school in Gallup, it is not particularly plausible that for six-years Taxpayer would choose to live away from his family and hub of his family activity despite driving through that town every day in order to get back and forth to work. It is also worth mentioning that on November 29, 2011,

Taxpayer told the Department's Barry Wilson that he and his entire family lived at the Iyanbito home during the relevant period. That earlier statement differs significantly from the undisputed evidence presented at hearing, Taxpayer's sworn testimony at hearing, and Ms. Murphy's sworn testimony at hearing that Ms. Murphy and the couples' two daughters at all times resided at the Gallup home.

Taxpayer also filed all six of his tax returns under penalty of perjury with the IRS listing an address in Gallup. In 2004 and 2005, Taxpayer listed a PO Box 2652, Gallup, NM 87305 on his returns. Neither party presented any evidence on the record about this PO Box 2652, Gallup, NM 87305 address, so it is impossible to say much about it other than that address is in Gallup rather than Iyanbito. In tax years 2006 and 2007, Taxpayer filed his tax returns listing his address as PMB 455 2418 E. Historic Hwy 66, Gallup, NM 87301. Again, neither party established any evidence about this address, but the address is in Gallup rather than Iyanbito. In tax years 2008, 2009, and 2010, Taxpayer's income tax returns all list his Gallup home address. Because Taxpayer self-reported (under penalty of perjury) his home address in Gallup on his tax returns for all six years, there is convincing evidence that Taxpayer in fact lived within Gallup and not Iyanbito on the Navajo Nation during the relevant period.

In 2012, Ms. Julia Gabehart told Department investigator Barry Wilson that she had been renting the Iyanbito home for two years. Ms. Gabehart had no known motive of hostility against Taxpayer. Further, that fact that Ms. Gabehart used the Iyanbito home address when applying for her New Mexico driver's license on September 14, 2010, provides an indication that her hearsay statement is reliable. Since Ms. Gabehart's rental period largely fell outside of the period in question, the statements of Ms. Gabehart alone do not establish whether Taxpayer lived at the

Iyanbito home during that period, but they do show that Taxpayer had rented the Iyanbito home contrary to his November 29, 2011 statement to Mr. Wilson that he had never rented that home.

The Department presented hearsay evidence from Terri Tom that in 2003 through 2008 she rented the Iyanbito home from Taxpayer for \$500 per month. While hearsay is generally admissible in an administrative hearing, it is only given weight to the extent it is reliable. In this case, there is evidence that Terri Tom is the sister of Vickie Hand, whom was involved in contentious litigation with Taxpayer over the foreclosure of the Iyanbito home. Consequently, the hearsay statements of Ms. Tom are of limited weight given the potential for hostility related to the litigation. However, while alone insufficient to raise questions about whether Taxpayer lived at his Iyanbito address, this evidence still has some persuasive weight taken in conjunction with the other competent documentary evidence cited above and the statements of Ms. Julia Gabehart that Taxpayer had rented her the Iyanbito home.

Moreover, three inconsistencies in the record undermined the credibility of Taxpayer's assertion of residency in Iyanbito. The first inconsistency is Taxpayer's testimony that he never voted, which was contradicted by evidence that Taxpayer voted in 2004 and 2008. The second inconsistency is that Taxpayer told Mr. Wilson that his whole family had lived with him in Iyanbito. However, it is undisputed that Ms. Murphy and Taxpayer's daughter at all times resided at the Gallup home and not in Iyanbito. The final potential inconsistency is when Taxpayer told Mr. Wilson that he had never rented the Iyanbito home, which was contradicted by Ms. Gabehart's statement, license application, and presence at the Iyanbito home.

In sum Taxpayer simply did not factually prove that he lived in Iyanbito during the relevant period by the preponderance of the evidence. If anything the bulk of the evidence showed that it was more likely than not that Taxpayer resided in Gallup during the period at

issue. Considering Taxpayer's dual burdens of establishing he was entitled to an exemption from income tax and to overcome the presumption of correctness of the assessments, Taxpayer's testimony is insufficient in the face of significant contradictory evidence. Since Taxpayer did not establish that he lived within the boundaries of the Navajo Nation, he was not entitled to an exemption of income tax under NMSA 1978, §7-2-5.5 (1995).

Residency and Domicile

While the domicile factors are not dispositive of the analysis under the exemption, those factors nevertheless have some relevancy in the analysis to the extent that the domicile factors coincide with factual indicators of where someone is physically located during any specific period. Moreover, because the Department persisted with its domicile argument in this matter, for the sake of argument, those factors will be addressed.

NMSA 1978, § 7-2-2 (S) (2003) of the Income Tax Act defines the term "resident" as:

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.

Regulation §3.3.1.9 NMAC (4/29/2005) defines “domicile” as the

place where an individual has a true, fixed home, is a permanent establishment to which the individual intends to return after an absence, and is where the individual has voluntarily fixed habitation of self and family with the intention of making a permanent home. Every individual has a domicile somewhere, and each individual has only one domicile at a time.

To determine domicile, Regulation §3.3.1.9(C)(4) NMAC (4/29/2005) provides twelve domicile factors to consider:

(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.

Considering the evidence in this protest within the rubric of the twelve domicile factors articulated under Regulation §3.3.1.9(C)(4) NMAC (4/29/2005), Taxpayer did not establish he

was domiciled on the Navajo Nation in his Iyanbito home during the relevant period. Of the twelve factors, four factors are not applicable or the record is devoid of information to make any determination: (e) domicile in previous years (which is too closely related to the dispute of the protest to determine separately from the protest); (f) ownership of real property other than residences (the record is devoid of this evidence); (g) location of financial transactions (the record is devoid of this evidence); and (m) possessions of significant sentimental value (the record is devoid of this evidence).

Granting Taxpayer every reasonable inference, Taxpayer has four factors supporting domicile in Iyanbito: (a) homes owned (the Iyanbito home is larger than the Gallup home); (b) where individual spends their time (Taxpayer testified that he was only in Gallup one-day a week while he spent the rest of the time based out of the Iyanbito home); (c) place of employment (Taxpayer works on the Navajo Nation, though the Iyanbito home is located further away from his work than Taxpayer's Gallup home); and (h) place of community affiliations (Taxpayer is member of the Navajo Nation and feels a strong obligation to pass on those community values to his son).

Four factors support the Department's position that Taxpayer was domiciled in Gallup: (d) home of person's family (wife, daughter, and most likely son based on documentary evidence resided in Gallup); (i) home address for filing federal income taxes (alls returns list a Gallup address); (j) voter registration (Taxpayer is registered to vote in Gallup); (k) driver's licenses and other professional licenses (Taxpayer is licensed with his Gallup home listed as his mailing and physical address).

Under the domicile analysis four factors support Taxpayer's position and four factors support the Department's position. Although the domicile factors determination cannot be

reduced to a simple mathematical equation, it is difficult to see Taxpayer prevailing under the presumption of correctness when the factors are balanced so closely between the parties.

Taxpayer's argument fails to persuade both under the "lives within" standard contained under the exemption and under the Department's alternative domicile theory of the exemption.

Assessment of Penalty.

Taxpayer argued that imposition of penalty was inappropriate in this matter given that Taxpayer did not claim the exemption in 2006, when he was not working at McKinley Mine on the Navajo Nation. Taxpayer's argument is not persuasive.

When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2007) requires that

there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid. (*italics added for emphasis*)

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional.

Regulation §3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

In this case, Taxpayer did not file and pay the appropriate New Mexico personal income taxes in 2004, 2005, 2007, 2008, 2009, and 2010 when due. Taxpayer's inaction in failing to pay

personal income taxes when required meets the legal definition of “civil negligence” under the penalty statute. Taxpayer presented no evidence under Regulation §3.1.11.11 NMAC (1/15/01) to demonstrate nonnegligence. As such, the Department is legally required by statute to impose penalty on the assessments.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest of the assessments for 2004, 2005, 2007, 2008, 2009, and 2010 personal income taxes, penalty, and interest, and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayer failed to demonstrate that he lived within the boundaries of the Navajo Nation during the relevant period, as required in order to claim the applicable exemption under NMSA 1978, §7-2-5.5 (1995).

3. In the alternative, Taxpayer failed to demonstrate that he was domiciled on the Navajo Nation during the relevant period.

4. Since the exemption under NMSA 1978, §7-2-5.5 (1995) does not apply, the Taxpayer is liable for personal income tax principal totaling \$30,522, interest as of the date of hearing totaling \$5,629.03, and penalty totaling \$6,104.40 in tax years 2004, 2005, 2007, 2008, 2009, and 2010. Interest continues to accrue until the tax obligation is satisfied.

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

DATED: September 21, 2012.

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