

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

**IN THE MATTER OF THE PROTEST OF  
TOM CONWAY  
TO ASSESSMENT ISSUED UNDER LETTER  
ID NO. L1050416768**

**No. 12-21**

**DECISION AND ORDER**

A protest hearing occurred on the above captioned matter on August 30, 2012 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Mr. Tom Conway (“Taxpayer”) appeared pro se. Staff attorney Peter Breen represented the Taxation and Revenue Department of the State of New Mexico (“Department”). Protest Auditor Sonya Varela appeared as a witness for the Department. Taxpayer Exhibits #1-7 and Department Exhibit B were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Taxpayer also submitted a written summary of his argument during the hearing, which is part of the administrative file in this matter. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. It is undisputed that for at least the ten years before 2004, Taxpayer was a resident and domicile of Las Cruces, New Mexico.
2. Taxpayer and his wife rented a home at 927 Weinrich Road in Las Cruces until 2003.
3. Since 2003, Taxpayer has possessed a United States Passport, issued from the Houston Passport Agency. [Taxpayer Exhibit #7]. This passport provides no conclusive information about which state Taxpayer resided in during any period of the passport’s validity.

4. Taxpayer's wife has a serious medical condition that precludes her from working.
5. Taxpayer ran his own business in Las Cruces until 2003.
6. After closing his Las Cruces business in 2003, Taxpayer sought work for needed income and medical insurance for his wife's ongoing medical expenses.
7. In late 2003, Taxpayer sought employment with the United States Merchant Marines.
8. Taxpayer left Las Cruces for Jacksonville, Florida in order to prepare to obtain a position with the Merchant Marines and secure a permanent posting onboard a ship.
9. Taxpayer's wife remained in Las Cruces because of her reoccurring medical treatments and because her family, medical, and social support network was in the area.
10. When Taxpayer left for Florida, Taxpayer's wife moved out of their rented home at 927 Weinrich Road, Las Cruces, NM into a mobile home Taxpayer's brother owned at 926 Fawn Lane in Las Cruces. [Taxpayer Exhibit #2 & #4].
11. In Jacksonville, FL, Taxpayer joined the Seafarers International Union in order to qualify for a possible position with the Merchant Marines. [Taxpayer Exhibit #1].
12. In January 2004, Taxpayer obtained a temporary position of employment with the Merchant Marines aboard the USNS Regulus, ported out of Jacksonville, FL. [Taxpayer Exhibit #1 & #3].
13. As a condition of his employment, Taxpayer was required to have an address within commuting distance of the ship in the event of an emergency deployment.
14. In 2004, Taxpayer lived aboard the USNS Regulus while at sea and when in port.
15. In 2004, Taxpayer made three round-trips to Kuwait aboard the USNS Regulus. [Taxpayer Exhibit #1].

16. Taxpayer's Exhibit #8 is a union log of days when Taxpayer received credit for working on the USNS Regulus.

17. In 2004, Taxpayer received 255-days of credit for working on USNS Regulus. [Taxpayer Exhibit #8].

18. Whether the USNS Regulus was at sea or in port during those times, Taxpayer could not have possibly been in New Mexico on those 255-days during 2004.

19. In 2004, Taxpayer returned to New Mexico to visit family approximately in August and September.

20. Assuming that Taxpayer left for New Mexico upon completion of his duties on the USNS Regulus on July 23, 2004 and did not return from New Mexico until he resumed his duty on the USNS Regulus on October 18, 2004, Taxpayer spent 87-days in New Mexico in 2004. [Taxpayer Exhibit #8].

21. In 2004, Taxpayer was registered to vote in New Mexico. [Department Exhibit B].

22. In 2004, Taxpayer changed his New Mexico voter registration address from 927 Weinrich Road to 926 Fawn Lane, Las Cruces.

23. Taxpayer early voted for the 2004 general election in New Mexico. [Department Exhibit B].

24. Taxpayer had three cars registered in New Mexico during 2004.

25. At some unspecified point in 2004, Taxpayer spoke with Christi Michander, C.P.A., about his New Mexico personal income tax obligations. Taxpayer did not hire Ms. Michander. The evidence is unclear which facts Taxpayer disclosed to Ms. Michander about his

tax situation. Ms. Michander apparently advised Taxpayer that no New Mexico income tax was due.

26. In 2005, Taxpayer received a permanent posting on the ship the USNS Benavidez ported out of Corpus Christi, Texas. [Taxpayer Exhibit #1].

27. Taxpayer maintained his posting on the USNS Benavidez through 2010, when his position was eliminated. [Taxpayer Exhibit #5].

28. In 2006, Taxpayer purchased and registered a vehicle in New Mexico.

29. On July 10, 2007, because of a mismatch with Taxpayer's IRS returns under the tape match program, New Mexico assessed Taxpayer for \$2,554.00 in 2004 personal income tax, \$255.40 in penalty, and \$840.85 in interest for a then total assessment of \$3,650.25 under letter identification number L1050416768.

30. On July 1, 2007 (before the issuance of the formal assessment), Taxpayer submitted a letter of protest of the assessment.

31. On July 13, 2007, the Department acknowledged receipt of Taxpayer's protest.

32. In 2008, Taxpayer registered to vote in the State of Texas. [Taxpayer Exhibit #6].

33. On July 9, 2008, Taxpayer was issued a U.S. Merchant Mariner's Document listing his address as 5601 SO. Padre Island Dr D-110, Corpus Christi, TX 78412. [Taxpayer Exhibit #6].

34. At some unspecified date in 2008 or 2009, Taxpayer received a Texas driver's license.

35. On January 21, 2009, Taxpayer re-registered his vehicle in Texas. [Taxpayer Exhibit #7].

36. At some unspecified point, Taxpayer also spoke with another unidentified tax professional in Norfolk, VA, and someone from H&R Block in 2010 about his New Mexico personal income tax obligations. Taxpayer did not retain either of these individuals professionally. The evidence is unclear which facts Taxpayer disclosed to these individuals before receiving their advice that he was not required to pay New Mexico personal income tax.

37. On March 8, 2012, the Department submitted a request for hearing on Taxpayer's protest.

38. On March 27, 2012, the Department's Hearings Bureau sent Notice of Administrative Hearing, scheduling the protest hearing for June 19, 2012.

39. On April 12, 2012, Taxpayer moved to continue the scheduled June 19, 2012 hearing.

40. On April 27, 2012, the Hearings Bureau issued an Order Continuing the June 19, 2012 hearing until August 30, 2012 at 2:00 PM.

41. On August 6, 2012, the Hearings Bureau issued an Amended Notice of Administrative Hearing, scheduling this matter for August 30, 2012 at 12:00 PM.

42. As of the date of the hearing, Taxpayer owed \$2,554.00 in 2004 personal income tax, \$510.80 in penalty, and \$1,539.62 in interest.

## **DISCUSSION**

At issue in this protest is whether Taxpayer was a resident of New Mexico in 2004, and thus subject to New Mexico Personal Income Tax for that year. Also at issue is whether Taxpayer is liable for penalty because of his reliance on advice of tax professionals in not filing and paying 2004 New Mexico personal income tax. In short answer, Taxpayer was a domicile of New Mexico in 2004, making Taxpayer a resident subject to personal income tax that year.

### **Presumption of Correctness and Burden of Proof**

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment 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).

### **Personal Income Tax, Residency, and Domicile**

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). The question in this protest is whether Taxpayer was a resident of New Mexico in income tax year 2004.

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 and did not change domicile to a new location by the last day of the tax year.

In this case, the evidence clearly established that Taxpayer was not physically present in New Mexico for 185-days or more in 2004. Therefore, the only possible basis of residency under NMSA 1978, § 7-2-2 (S) (2003) for income tax purposes is if Taxpayer was domiciled within New Mexico during any part of income tax year 2004 and did not change that domicile before the last day of the taxable year.

Regulation 3.3.1.9 (C) (1) 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.

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.” Further, 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.”

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.

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.

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) and the presumption that once established, domicile continues until shown otherwise, Taxpayer did not establish he had abandoned his New Mexico domicile in 2004. To the contrary, the factors establish that it is more likely that he was domiciled in New Mexico in 2004 than not.

Four factors under Regulation 3.3.1.9(C)(4) NMAC (4/29/2005) were either not applicable to the facts of this case or neither party presented any information to make a determination under that factor. There is no evidence on this record under factor (F) ownership of real property other than residences. There is no evidence on this record under factor (G) about the location of financial transactions during 2004. There is no evidence on this record under factor (I) about the address Taxpayer used in filing his federal income taxes in 2004. Finally, there is no evidence on this record under factor (M) about where Taxpayer maintained possession of items of significant sentimental value.

Two factors under Regulation 3.3.1.9(C)(4) NMAC (4/29/2005) support Taxpayer’s position that he had abandoned New Mexico domicile in 2004. Under factor (C), Taxpayer’s place of employment was out of New Mexico on a ship ported out of Jacksonville, FL. Taxpayer also had a professional membership with the Seafarers Union in Jacksonville, FL, satisfying factor (H).

Six factors under Regulation 3.3.1.9(C)(4) NMAC (4/29/2005) support the Department's contention that Taxpayer remained domiciled in New Mexico during 2004. Under factor (A), location of homes owned and rented, while Taxpayer did not have any rentals in Florida in 2004, he did use his Fawn Lane, Las Cruces rental address in 2004 to update his New Mexico voter registration. When Taxpayer had free time in 2004 and did not have to work on the ship, he returned to New Mexico to visit his family for two months in August and September, pushing factor (B) to the Department. Under factor (D), the evidence is undisputed that Taxpayer's wife remained in Las Cruces throughout 2004. It is also undisputed that under factor (E), Taxpayer was domiciled in New Mexico in each of the 10-years before 2004. Under factor (J), Taxpayer was registered to vote in New Mexico in 2004, changed his voter registration to the Fawn Lane, Las Cruces address in 2004, and early voted in New Mexico in 2004. Finally, under factor (K), Taxpayer maintained his New Mexico driver's license and had three vehicles registered in New Mexico during 2004.

Some of the evidence that Taxpayer did produce in this case was largely not relevant and of very little weight in determining Taxpayer's residency and domicile in 2004. Taxpayer's passport, issued in 2003, sheds no light on which state Taxpayer resided in during 2004. The fact that the passport was issued from the Houston passport agency means nothing, as each passport lists its issuance location<sup>1</sup>. Taxpayer updated his voter registration, his vehicle registration, and his driver's license only after the Department issued its 2006 assessment, leaving these documents virtually no weight in assessing Taxpayer's true intentions and domicile in 2004.

Because Taxpayer's long term domicile before 2004 was in New Mexico, Taxpayer needed to clearly establish that under Regulation 3.3.1.9(C)(2) NMAC (4/29/05) and *Hagan* that

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<sup>1</sup> For instance, the undersigned hearing officer's passport says it was issued from New Orleans, but unfortunately the undersigned hearing officer has never even been to New Orleans let alone resided there.

he intended to make his new location Florida during 2004 his permanent home. While in 2004 Taxpayer left New Mexico for Jacksonville, FL, there is little evidence that Taxpayer intended to make Jacksonville, FL, his permanent home. In fact, Taxpayer's testimony about securing a more permanent posting in Texas in 2005 suggests that Taxpayer only believed that his 2004 posting in Jacksonville was temporary until he could secure the union membership needed to join the Merchant Marines and secure enough ship experience in order to obtain a better, more permanent posting on a ship in the Merchant Marines. Only when Taxpayer reached Texas did he assume he would live in Texas indefinitely. Therefore, under Regulation 3.3.1.9(C)(2) NMAC (4/29/05) and *Hagan*, Taxpayer had not found a place in 2004 that he intended to make his permanent home.

While domicile can hardly be reduced to a basic mathematical equation, it is difficult to imagine Taxpayer being able to overcome the presumption of correctness when only two of the 12-factors support his contention that he established domicile outside of New Mexico in 2004. Additionally, six factors support the Department's determination that Taxpayer remained domiciled in New Mexico during 2004. Under Regulation 3.3.1.9(C)(4) NMAC (4/29/2005), Taxpayer was domiciled in New Mexico in 2004. The evidence Taxpayer presented was not sufficient to meet the requirements of *Hagen* for Taxpayer to demonstrate he abandoned his long-term, established domicile in favor of a new home with "a fixed purpose to remain in the new location permanently or indefinitely." Consequently, the Department's assessment of 2004 personal income tax was proper in this case.

### **Assessment of Interest**

When a taxpayer fails to make timely payment of taxes due to the state, "interest shall be paid to the state on that amount from the first day following the day on which the tax becomes

due...until it is paid.” NMSA 1978, Section 7-1-67 (2001). Under the statute, the Department has no discretion in the imposition of interest, as the statutory use of the word “shall” makes the imposition of interest mandatory. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues.

Taxpayer was informed in the Department’s July 13, 2007 acknowledgement of protest letter that interest would continue to accrue throughout the protest period, but that Taxpayer had the option to pay the assessment to stop accrual of further interest pending the outcome of the protest. Because no such payment was made, interest continued to accrue in this matter in accord with the statutory mandate.

**Assessment of Penalty.**

The Department imposed penalty as part of its assessment in this case. Taxpayer presented some evidence that he consulted with tax professionals about his New Mexico tax obligations and determined that he did not owe any New Mexico personal income taxes. This evidence was insufficient to establish nonnegligence.

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 tax in 2004 when due. Taxpayer's inaction in failing to pay personal income tax when required meets the legal definition of "civil negligence" under the penalty statute.

In instances where a taxpayer or taxpayers might otherwise fall under the definition of civil negligence generally subject to penalty, NMSA 1978 §. 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." 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 either may 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..." Regulation 3.1.11.11(D) NMAC (1/15/01).

Taxpayer did present some evidence that he relied on the advice of a Christie Michander, C.P.A., another unidentified tax professional in Norfolk, Virginia, and someone from H & R

Block about his tax obligations. Taxpayer further indicated that those people he consulted did tell him that he did not have to file New Mexico personal income returns. However, there is no evidence that Taxpayer fully disclosed all relevant facts to any of the people he consulted or that he actually retained the services of any of these individuals on a professional capacity. Therefore, without evidence of full disclosure of all relevant facts, Taxpayer is unable to meet the requirements of Regulation 3.1.11.11(D) NMAC (1/15/01) for abatement of penalty. Moreover, as the Department persuasively argued, reliance on free, curbstone advice does not qualify as “a mistake of law made in good faith and on reasonable grounds” contemplated under NMSA 1978 §. 7-1-69 (B) (2003). Finally, the advice of H&R Block in 2010 is not relevant to Taxpayer’s decision to not file and pay personal income tax for tax year 2004. Consequently, Taxpayer is liable for penalty.

### **CONCLUSIONS OF LAW**

A. Taxpayer filed a timely, written protest of the assessment for 2004 for personal income taxes, penalty, and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer was domiciled in New Mexico before 2004, did not demonstrate a change of domicile in 2004, and therefore Taxpayer was a resident of New Mexico in 2004 for personal income tax purposes.

C. Taxpayer was civilly negligent in not filing and paying 2004 personal income tax.

D. Taxpayer is liable for \$2,554 in 2004 personal income tax principal, \$1,539.62 in interest as of the date of hearing, and \$510.80 in penalty. Interest continues to accrue until the tax obligation is satisfied.

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

DATED: October 4, 2012.

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