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

IN THE MATTER OF THE PROTEST OF
JAMES AND NORA TUTT **No. 13-36**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NOs. L0133980224, L0986402880, L0258404416,
L0988878912 and L0215992384

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on October 9, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. James and Nora Tutt ("Taxpayers") appeared, represented by attorneys Earl Mettler and Daniel P. Estes. Staff attorney Cordelia Friedman represented the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Thomas Dillon appeared as a witness for the Department. Taxpayer Exhibits #1-29 were admitted into the record. Department Exhibits A-K were admitted into the record. As discussed in more detail below, Department Exhibit L will not be admitted into the record because it is not reliable. *See* 3.1.8.10 (B) NMAC (08/30/01). All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. The parties submitted joint stipulations of facts into the record before the hearing on October 9, 2013. After the hearing, on October 25, 2013, the Department asked for the taking of administrative notice of certain facts, a request that Taxpayers opposed on October 28, 2013. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 15, 2009, the Department issued five Notices of Assessment, Letter ID NOs. L0133980224, L0986402880, L0258404416, L0988878912, and L0215992384, to Taxpayers for unpaid personal income tax, penalty, and interest as follows:

Tax Period Ending	Tax	Penalty	Interest	Total
December 31, 2002	$4,282.00	$856.40	$3,449.60	$8,588.00
December 31, 2003	$4,409.00	$881.80	$2,890.29	$8,181.09
December 31, 2004	$4,627.00	$925.40	$2,340.77	$7,893.17
December 31, 2005	$3,885.00	$777.00	$1,380.82	$6,042.82
December 31, 2006	$4,205.00	$841.00	$867.00	$5,913.00

2. On December 28, 2009, Taxpayers protested the Department's assessments.

3. On January 5, 2010, the Department acknowledged receipt of Taxpayers' protest.

4. On January 7, 2010, the Department's Tom Dillon wrote a letter to Mr. Tutt informing Mr. Tutt of the Department's conclusion that despite living on the Navajo Nation in Crownpoint, NM during the relevant period, Mr. Tutt remained domiciled in Farmington, NM. The letter also asked Taxpayers whether they wished to have a formal protest hearing or withdraw their protest in light of the Department's conclusion. **[Department Ex. A]**.

5. On January 25, 2010, Mr. Dillon again wrote Mr. Tutt and reiterated the Department's position that Mr. Tutt was only temporarily living on the Navajo Nation in Crownpoint, NM but remained domiciled in Farmington. Mr. Dillon again asked Mr. Tutt whether Taxpayers wished to proceed to formal hearing or withdraw their protest. **[Department Ex. B]**.

6. On February 10, 2010, Mr. Dillon wrote Taxpayers through their attorney Barton L. Palmer, indicating that the matter had been assigned to Staff Attorney Peter Breen. **[Department Ex. C]**.

7. On June 25, 2010, Taxpayers, through their then attorney Barton L. Palmer, filed a notice of unavailability for a period of July 8, 2010 through August 5, 2010. **[Department Ex. D]**.

8. On August 5, 2013, the Department requested a hearing with the Hearings Bureau.

9. On August 6, 2013, the Hearings Bureau issued Notice of Administrative Hearing, scheduling this matter for a formal protest hearing on October 9, 2013.

10. On August 26, 2013, attorneys Earl Mettler and Daniel Estes entered their appearances on behalf of Taxpayers.

11. In 1975, Taxpayers bought their home at 2108 Placer in Farmington, NM. Taxpayers continue to own that property through the present day.

12. In 2002, 2003, 2004, 2005, and 2006, James and Nora Tutt filed their federal and state personal income tax returns "married filing jointly." Taxpayers listed their address on their tax returns as 2108 Placer, Farmington, NM 87401. **[Taxpayers Ex. #19]**.

13. At all relevant times, Nora Tutt lived and worked in Farmington, NM. Taxpayers paid New Mexico personal income tax on all of Mrs. Tutt's income during the relevant time.

14. Taxpayers' adult-age son Dustin Tutt also lived with Nora Tutt at 2108 Placer, Farmington, NM 87401 during the relevant period. Dustin attended college in Durango during this time.

15. Taxpayers claimed an exemption from income tax on all of Mr. Tutt's income during the relevant time, and that is the income at dispute in this protest.

16. In 2002 through 2006, Mr. Tutt was registered to vote in New Mexico using the 2108 Placer, Farmington, NM 87401 address.

17. In 2002 through 2006, Mr. Tutt registered all his personal vehicles in New Mexico using the 2108 Placer, Farmington, NM 87401 address.

18. Mr. Tutt is an enrolled member of the Navajo Nation. **[Taxpayers Ex. #1]**.

19. Mr. Tutt voted in Navajo Nation elections in 2002, 2004, and twice in 2006 in Red Valley, AZ. Red Valley is located southwest of Shiprock, NM. **[Taxpayers Ex. # 29]**.

20. Mr. Tutt is an engineer by education and training.

21. Mr. Tutt has a long and distinguished history as an educator and administrator at college institutions on the Navajo Nation.

22. Before the relevant period, Mr. Tutt did not claim an exemption from his New Mexico personal income taxes during times he worked for Navajo Community College ("NCC") on the Navajo Nation in both Tsalie, AZ and Shiprock, NM because he spent most of his time living in Farmington, NM.

23. In 1989, Mr. Tutt accepted the position of President of the Crownpoint Institute of Technology ("CIT")[1] in Crownpoint, NM. Mr. Tutt remained in this position until October 2006.

24. Crownpoint, NM and CIT is located within the exterior boundaries of the Navajo Nation.

25. CIT was incorporated by the Navajo Nation as technical/vocational college designed to provide work skills and basic adult education using traditional Navajo ways and teaching methods. CIT is governed by a Board of Directors appointed by the President of the Navajo Nation. CIT is funded by the Navajo Nation, the United States government, and private donors.

26. While employed with CIT, and as part of his employment agreement, CIT provided Mr. Tutt with an on-campus apartment and vehicle as part of his employment package. **[Taxpayers Ex. #2; Taxpayers Ex. #4]**.

27. CIT provided its employees with housing because it promoted community involvement, it was a hiring incentive, and because it was otherwise difficult to secure housing in Crownpoint.

[1] CIT changed its name to Navajo Technical College in 2006. In 2013, it changed its name again to Navajo Technical University. For simplicity sake, that institution will be called CIT throughout this decision and order.

28. The utility bills for Mr. Tutt's on-campus apartment were deducted directly from his pay checks. **[Taxpayers Ex. #6]**.

29. Mr. Tutt lived in Apartment B1 at CIT on the Navajo Nation in Crownpoint, NM while employed as President of CIT.

30. While living at CIT, Mr. Tutt routinely attended to CIT business, meetings, and Board Meetings in furtherance of CIT's mission. [**Taxpayers Ex. #10, Taxpayers #11; Taxpayers Ex. #12**].

31. In 2002 through 2006, Mr. Tutt maintained a P.O. Box in Crownpoint, NM.

32. During the relevant period, Mr. Tutt attended some medical appointments at Indian Health Services on the Navajo Nation. **[Taxpayers Ex. #13]**. However, most of Mr. Tutt's medical appointments involved specialists living in Farmington, NM. **[Taxpayers Ex. #14]**.

33. Beginning upon receiving the Department's assessments through the time of hearing, Mr. Tutt credibly reconstructed his monthly calendars in 2002 through 2006 using his paystubs, his attendance at CIT Board Meetings, his leave requests, and other scheduling notes/materials, to the extent available. [**Taxpayers Ex. #6, Taxpayers Ex. #7; Taxpayers Ex. #8, Taxpayers Ex. #10, Taxpayers #13; Taxpayers Ex. #14; Taxpayers Ex. #20; Taxpayers Ex. #26**].

34. Based on those calendar reconstructions and Mr. Tutt's credible testimony, Mr. Tutt lived within Crownpoint or attended CIT business for 235-days in 2002, 269-days in 2003, 263-days in 2004, 255-days in 2005, and 224-days in 2006. [**Taxpayers Ex. #6, Taxpayers Ex. #7; Taxpayers Ex. #8, Taxpayers Ex. #10, Taxpayers #13; Taxpayers Ex. #14, Taxpayers Ex. #26**].

35. While Mr. Tutt acknowledged some dozen errors on his calendar reconstruction, such errors are reasonable given that the relevant period occurred seven-to-11 years ago and encompassed 1,460-days. These errors do not fundamentally alter the fact that Mr. Tutt lived within the Navajo Nation during the relevant period.

36. Mr. Tutt was a particularly credible and convincing witness. Mr. Tutt was sincere throughout the hearing, quickly acknowledged mistakes in his reconstruction of the monthly calendars, and acknowledged when he did not know the answer to a particular question. Mr. Tutt also demonstrated a genuine commitment to the betterment of the Navajo Nation through his role at CIT and his later role with Nizhoni Smiles, Inc.

37. Taxpayers maintained a joint checking account with Wells Fargo. However, Nora Tutt was responsible for nearly 95% of the transactions in the joint account. [**Taxpayers Ex. #27**].

38. All of Mr. Tutt's W-2 forms for his work at CIT listed Mr. Tutt's address in Crownpoint. **[Department Ex. F-I]**.

39. Nizhoni Smiles, Inc., a corporation for which Mr. Tutt is a board member, listed its place of business as Taxpayers' Farmington address. Nizhoni Smiles is a non-profit dental agency that provides dental services to low income members of the Navajo Nation on a sliding cost scale. **[Department Ex. G-J]**.

40. After leaving CIT in October 2006, Mr. Tutt returned to living at his home in Farmington, NM.

41. In November 2006 Mr. Tutt became CEO of Nizhoni Smiles, Inc.

42. Since leaving his position with CIT in Crownpoint, Mr. Tutt has not claimed the exemption for income tax under Section 7-5.5 because he no longer lives within the Navajo Nation.

DISCUSSION

The base issue at protest is whether Mr. Tutt's personal income in tax years 2002, 2003, 2004, 2005, and 2006 was exempt from New Mexico Personal Income tax under the "earnings by Indians… on Indian lands" exemption, as found under to NMSA 1978, Section 7-2-5.5 (1995). Although Nora Tutt was named in each assessment, she never claimed the exemption on her income and she has no outstanding tax obligations in dispute (except for her interest in the marital community property). Taxpayers and the Department also made five other arguments that will be recited and addressed after discussion of the main, substantive issue at protest.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessment issued in this case is presumed correct. Consequently, Taxpayer has the burden to overcome the assessment. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Moreover, "[w]here 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*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447. 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*, 2003-NMCA-21, ¶13, 133 N.M. 217.

Personal Income Tax and the Exemption.

Payment of New Mexico personal income tax is governed by NMSA 1978, Section 7-2-1 to -36. 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, Section 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 Taxpayers can demonstrate that Mr. Tutt's income was exempted under Section 7-2-5.5 during the relevant time, then that income 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 Section 7-2-5.5 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 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 Americans "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 under Section 7-2-5.5. The exemption under Section 7-2-5.5 can be set out 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 that Mr. Tutt is a member of the federally recognized Navajo Nation.

The second element under Section 7-2-5.5 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 Mr. Tutt derived income from working for CIT, a college located on the Navajo Nation and funded by the Navajo Nation.

The third element under Section 7-2-5.5 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 domicile analysis is the appropriate standard to determine whether under Section 7-2-5.5 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 domicile approach advocated by the

Department, and has instead considered whether the person lived and had a physical presence within the boundaries of Native American land . *See Matter of Protest of Aurelia Shorty,* No. 11-17, *Matter of Protest of John and Bonnie Yearley,* No. 11-29, and *Matter of Edward J. Clah and Melvina Murphy,* No. 12-19. This case is no different.

Although the entire exemption is cited above, the portion of Section 7-2-5.5 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…" 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.

The Department's position would require reading the word "domicile" into the statute, where that word is currently not present. Since the statute does not use the word "domicile," that word should not be added to Section 7-2-5.5's "lives within" requirement. Despite the fact that the Legislature was aware of the meaning of "domicile" given it gave that word legal significance under a separate statute, NMSA 1978, Section 7-2-2 (S) (2003), the Legislature chose instead to use the distinct phrase "lives within the boundaries" under the exemption, Section 7-2-5.5. Moreover, the exemption under Section 7-2-5.5 does not cross reference the New Mexico statutes and regulations on "domicile," Section 7-2-2 (S) and Regulation 3.3.1.7 NMAC (4/29/2005). Regulation 3.3.4.12 NMAC (5/15/01), which addresses the exemption at issue under Section 7-2-5.5 neither defines "lives within the boundaries" as equivalent to "domicile," nor references the word "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 physical

presence within a defined geographical location. "Lives within the boundaries" suggests a continuing physical presence inside a defined geographical space. This reading of "lives within the boundaries" under the exemption statute is consistent with the federal case law addressed by *McClanahan* and its progeny. *McClanahan* found that treaties and relevant statutes must be read against the policy background of tribal sovereignty. *See id*. at 172. Further, in *Wagnon*, 112, the Supreme Court emphasized that the significant geographical component of tribal sovereignty serves a backdrop in reading relevant treaties and statutes. 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 and physical presence 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. Therefore, domicile is not the determinative factor under the exemption at issue in this protest.

Application of Exemption to the Facts at Protest.

In this case, especially in light of the stipulations of facts, there is no doubt that Taxpayer remained "domiciled" in Farmington, NM throughout the relevant period. Mr. Tutt and Mrs. Tutt owned a home in Farmington where his wife and college-aged son lived throughout the period. Mr. Tutt attended most of his medical appointments in Farmington (though Mr. Tutt also attended medical appointments in Crownpoint). Mr. Tutt registered his personal vehicles in Farmington. Mr. Tutt was registered to vote in New Mexico using his Farmington address. Mr. Tutt conducted business on behalf of Nizoni Smiles in Farmington. *See* Regulation §3.3.1.9 NMAC (4/29/2005). To that extent, if the Department is correct that domicile is the appropriate analysis to determine whether a person is entitled to the Section 7-2-5.5 exemption, then Taxpayer is liable for all assessed tax regardless of his physical location in each year.

However, the United Stated Supreme Court decided *McClanahan* regardless of residency. In *McClanahan*, the taxpayer conceded that she was a resident of Arizona under Arizona law. *See id*. at 166, footnote 3. Similarly, Mr. Tutt meets the legal definition of a domiciled resident of New Mexico. However, like in *McClanahan*, the analysis in this matter does not stop with that fact of New Mexico domicile.

Here, Mr. Tutt physically lived in Crownpoint while working for CIT, a Navajo Nation community college. In addition to being an employee benefit, it is perfectly logical for Mr. Tutt to reside in his CIT apartment while working for CIT because it benefited CIT. By living on campus, Mr. Tutt was part of the community of students and faculty at CIT in furtherance of CIT's mission. The convenience of the apartment allowed Mr. Tutt to focus on CIT operations and to attend numerous CIT board meetings both on campus and across the Navajo Nation. Mr. Tutt's work at CIT was closely attached to one of the core sovereign values of the Navajo Nation: providing job training and an education to tribal members using traditional Navajo values. Like in *McClanahan*, New Mexico cannot impose an income tax on Mr. Tutt's income from CIT while he was living within the boundaries of the Navajo Nation even if he also met the legal definition of being domiciled in New Mexico.

Mr. Tutt lived within the boundaries of the Navajo Nation during the relevant period, satisfying the plain language requirements of Section 7-2-5.5 and the federal case law establishing an exemption of state income taxes on Native Americans living on native lands. Mr. Tutt was a highly credible, believable, and sincere witness. His testimony was highly persuasive in this matter. While even Mr. Tutt acknowledged that his reconstruction of where he lived during the relevant period was not perfect, Taxpayers easily established by the preponderance that Mr. Tutt was physically present within the Navajo Nation or conducting CIT business more

than half the time of each relevant year. In fact, although the Department did find dozen or so days over the reconstruction where Mr. Tutt was in error as to where he was located, even with those errors, Mr. Tutt still spent a majority of each relevant year living within the Navajo Nation and attending CIT business. Mr. Tutt was not physically present in New Mexico outside of the Navajo Nation for 185-days or more in any of the relevant years.

Mr. Tutt's credibility is further bolstered by the fact that Taxpayers did not always attempt to claim the exemption under Section 7-2-5.5 in years where Mr. Tutt did not live within the Navajo Nation for most of the year. While working for NCC on the Navajo Nation in Tsalie and Shiprock before the relevant period, Mr. Tutt spent most of his time living with his wife in their Farmington home. Therefore Taxpayers did not attempt to claim the exemption on Mr. Tutt's NCC income during that time. Moreover, after leaving CIT, Taxpayers have not attempted to claim the exemption on Mr. Tutt's income because he returned to living with his wife in Farmington and working with the non-profit Nizoni Smiles headquartered in Farmington to provide dental services across the Navajo Nation.

Once Taxpayers overcame the presumption of correctness, the burden shifted to the Department to substantiate the validity of the assessments. *See MPC Ltd.*, ¶13. Here, the Department did successfully point out some discrepancies in Mr. Tutt's calendar reconstruction, but as discussed above, these discrepancies do not fundamentally alter Mr. Tutt's credibility or his continuing physical presence within the Navajo Nation during the relevant period.

The Department also tendered its own calendar reconstruction summary as Department Ex. L. Department Ex. L was a controversial exhibit tendered into the record late in the hearing process that had not previously been disclosed to Taxpayers. The undersigned hearing officer initially indicated that he intended to reserve ruling, but then expressed the position that

Department Ex. L would be admitted, with its weight significantly limited by the cross-examination of Mr. Dillon. However, upon further consideration, Department Ex. L is not admitted into the record because it simply is not reliable enough to consider.

Mr. Dillon prepared Department Ex. L before the hearing. Mr. Dillon, who has always been an extremely credible and conscientious witness in protest hearings, acknowledged that after hearing the testimony over the course of the protest hearing, he had concerns about the reliability of the Department Ex. L. In particular, Mr. Dillon indicated that Department Ex. L was construed in part by relying on the locations of financial transactions listed on Taxpayers' joint bank account, Taxpayers Ex. #27. However, as Mr. Tutt credibly testified and Mr. Dillon acknowledged, Ms. Tutt was responsible for 95% of the transactions that occurred in the couples' joint bank account. It is undisputed that Ms. Tutt's lived and worked exclusively in Farmington. Consequently, a transaction in Farmington from the couples' joint bank account does not establish that Mr. Tutt was present in Farmington at the time of the transaction because it is far more likely that Ms. Tutt was responsible for the transaction. In light of these reliability concerns from the credible witness who prepared the document before the hearing, Department Ex. L is not admitted under Regulation 3.1.8.10 (B) NMAC (8/30/01), which states that unreliable evidence may be excluded. Even if Department Ex. L is arguably admissible, its lack of reliability undermines its weight significantly, and it is insufficient in the face of Mr. Tutt's credible testimony to establish the validity of the assessments.

Other Issues in Dispute.

In addition to the main substance of the protest, Taxpayers raised four other issues. First, Taxpayers argued that their protest must be granted in light of the extensive prehearing delay. Both parties briefed this issue before the hearing and argued the issue at hearing.

The Department assessed Taxpayers on December 15, 2009. On December 28, 2009, Taxpayers protested the assessments. On January 5, 2010, the Department acknowledged receipts of Taxpayers' protest. Mr. Dillon twice wrote Taxpayers for additional information in January 2010. On June 25, 2010, Taxpayers attorney filed a notice of unavailability for a hearing from July 8, 2010 through August 5, 2010. The Department requested a hearing with the Hearings Bureau on August 5, 2013. Upon receipt of the request for hearing, which is the first indication the Hearings Bureau had about this pending protest, the Hearings Bureau promptly sent notice of hearing, setting this matter for October 9, 2013.

NMSA 1978, Section 7-1-24 (D) (2003, before 2013) requires the Department or the hearing office to "promptly set a date for hearing" for a timely received protest. In this case, the protest hearing did not occur until nearly 4-years after Taxpayers protest. However, the New Mexico Court of Appeals squarely addressed a claim of undue delay under Section 7-1-24 (D) in *Ranchers-Tufco Limestone v. Revenue*, 1983-NMCA-126, ¶13, 100 NM 632. In that case, the Court of Appeals found that the general rule applies under Section 7-1-24: that is, tardiness of public officers in the performance of statutory duties is not a defense to an action by the state to enforce a public right or protect public interest. *See id*. The Department is statutorily obligated to pursue an outstanding tax liability exceeding $25.00 under Section 7-1-17 of the Tax Administration Act. Moreover, the Department is arguably obligated to pursue an outstanding tax liability under the anti-donation clause of the New Mexico Constitution, Article IX, §14. Therefore, under *Ranchers-Tufco Limestone*, the prehearing delay is not a defense against the Department's action to enforce a public right under the Tax Administration Act and the State Constitution.

Second, Taxpayers argued that the presumption of correctness does not attach in this matter because the above-discussed federal law established its own presumption against taxation of native people on native lands. However, since Taxpayers prevail even under the presumption of correctness in this matter, it is not necessary to reach Taxpayers arguments against the application of the presumption of correctness. Therefore, the undersigned Hearing Officer reserves ruling on this issue.

Third, Taxpayers argued that the three-year statute of limitations on the Department's ability to assess taxes should preclude the assessment of taxes for tax years 2002, 2003, and 2004. Again, since Taxpayers prevailed on the merits of the protest, it is not necessary to address this issue in detail. Under NMSA 1978, Section 7-1-18 (D) (1994), the Department has six years from the end of the calendar year in which the taxes were due to assess taxes in the event Taxpayers underreported their liability by more than 25%. Since Taxpayers claimed an exemption on all of Mr. Tutt's income, if that exemption did not apply, then Taxpayers certainly would have underreported their income by more than 25% in their joint tax filings. Therefore, the Department had authority to assess taxes for 2002, 2003, and 2004 under the six-year period articulated in Section 7-1-18(D).

Fourth, in its prehearing memorandum, Taxpayers asked for all appropriate costs and fees under NMSA 1978, Section 7-1-29.1. However, that issue was not raised during the seven-hour hearing. As such, there is no basis to consider this argument further. Moreover, while Taxpayers ultimately prevailed under the legal analysis under Section 7-2-5.5, the exemption under Section 7-2-5.5 is difficult factually. This specific case largely turned on a close examination of the facts and a credibility determination. While the undersigned Hearing Officer has a differing view of the legal standard under Section 7-2-5.5 than the Department, it must be acknowledged that the

New Mexico Court of Appeals has never considered the issue. Consequently, Taxpayers are not entitled to costs and fees because under Section 7-1-29.1 (C) (2), the Department had a reasonable application of the facts in this matter even if it did not ultimately prevail under the final legal analysis.

After the Hearing, on October 25, 2013, the Department asked the undersigned hearing officer to take administrative notice of certain facts regarding the agency location of Mr. Tutt's voting history on the Navajo Nation. On October, 28, 2013, Taxpayers opposed the Department's request. During the hearing, Mr. Tutt testified that he voted in Navajo Nation elections in Red Valley, Arizona, which he testified was located southwest of Shiprock, NM. The undersigned hearing officer declines to take any additional administrative notice beyond Mr. Tutt's own testimony. This testimony, and the reasonable inferences drawn there from, established that Mr. Tutt did not vote in tribal elections near Crownpoint but rather near Shiprock.

CONCLUSIONS OF LAW

A. Taxpayers filed a timely, written protest of the assessments for 2002, 2003, 2004, 2005, and 2006 personal income taxes, penalty, and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. Mr. Tutt was domiciled in Farmington, NM during the relevant period.

C. Mr. Tutt is a registered and enrolled member of the Navajo Member, a federally recognized sovereign tribe.

D. During the relevant period, Mr. Tutt earned income from CIT, an institution within the Navajo Nation and chartered by the Navajo Nation.

E. Mr. Tutt was physically present and living within the boundaries of the Navajo Nation at CIT in Crownpoint during the relevant period. Therefore, Mr. Tutt's income during that period was entitled to the exemption under NMSA 1978, §7-2-5.5 (1995). *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1972).

For the foregoing reasons, the Taxpayers' protest **IS GRANTED.**

DATED: November 27, 2013.

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Tax Hearing Officer
Taxation & Revenue Department
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