

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

**IN THE MATTER OF THE PROTEST OF  
KEVIN FENNER,  
TO ASSESSMENTS ISSUED UNDER  
ID NOS. L0330070480, L1614874064, L0421194192  
L1672247760, L1263204816, L1583610320, and L1321327232**

**No. 14-39**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held July 24 and 25, 2014, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Ms. Milagros Bernardo, Auditor, Mr. Michael Potter, Tax Examiner, Ms. Beth Bailey, Legal Assistant, and Ms. Valerie Bristol, Forensic Auditor appeared as witnesses on behalf of the Department. Ms. Gail Fenumiai, Director of Alaska Division Elections, also appeared by telephone as a witness on behalf of the Department. Mr. Kevin Fenner (Taxpayer) appeared for the hearing and represented himself.

The Taxpayer objected to Ms. Fenumiai's testimony and appearance by phone. The Department argued that her testimony was in rebuttal to documents presented by the Taxpayer just before the hearing. The objection was overruled, and Ms. Fenumiai's testimony was taken by telephone. *See* 3.1.8.9 NMAC (2001) (giving the hearing officer the authority to regulate the course of the hearing and to rule on the admission of evidence). *See also* 3.1.8.14 NMAC (2001) (giving the hearing officer the authority to fashion remedies when a party fails to make a timely disclosure). Given that Ms. Fenumiai's residence is in Alaska, it was not unreasonable for the Department to request that she testify by telephone when the Department did not know her testimony would be necessary until the Taxpayer provided Ex. 50-1 on or about July 18, 2014.

The Hearing Officer took notice of all documents in the administrative file. Numerous exhibits from both parties were admitted into the record during the hearing. References to exhibits will be noted throughout the decision as “Ex.” followed by the number or letter of the exhibit. Any number following a dash after the number or letter of the exhibit refers to the page number of that exhibit. The parties were given until August 8, 2014 to provide a written closing argument. Both parties submitted timely closing arguments. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

### **FINDINGS OF FACT**

1. On February 27, 2007, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the tax period ending on December 31, 2003. The assessment was for \$6,295.00 tax, \$629.50 penalty, and \$2,671.28 interest. **[L1321327232]**
2. The Taxpayer filed a timely protest to the assessment on April 4, 2007.
3. The Hearings Bureau was notified of the protest on December 23, 2013 when the Department filed a Request for Hearing asking that the Taxpayer’s protest be scheduled for a formal administrative hearing.
4. On November 20, 2013, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2005 tax year. The assessment was for \$10,583.31 tax, \$5,291.65 penalty, and \$5,175.95 interest. **[L0330070480]**
5. On November 20, 2013, the Department assessed the Taxpayer for personal income tax and interest for the 2006 tax year. The assessment was for \$16,116.50 tax and \$5,476.83 interest. No penalty was assessed. **[L1614874064]**

6. On November 20, 2013, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2007 tax year. The assessment was for \$18,573.94 tax, \$9,286.97 penalty, and \$3,970.63 interest. **[L0421194192]**
7. On November 20, 2013, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2008 tax year. The assessment was for \$8,551.30 tax, \$4,255.65 penalty, and \$1,365.87 interest. **[L1672247760]**
8. On November 20, 2013, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2009 tax year. The assessment was for \$2,692.00 tax, \$1,346.00 penalty, and \$322.30 interest. **[L1263204816]**
9. On November 20, 2013, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2010 tax year. The assessment was for \$12,732.83 tax, \$6,366.41 penalty, and \$1,042.35 interest. **[L1583610320]**
10. On January 2, 2014, the Taxpayer filed a timely protest to the assessments.
11. On January 31, 2014, the Department filed a Request for Hearing asking that the Taxpayer's protests be scheduled for a formal administrative hearing.
12. On February 4, 2014, the Hearings Bureau issued a notice of hearing for the protests of the assessments for the 2005-2010 tax years. The hearing date was set within ninety days of the protest.
13. A hearing was also set for the 2003 tax year's protest.
14. On February 26, 2014, the Taxpayer requested a continuance of the hearings and requested that the protests for 2005-2010 be consolidated with the protest for 2003.
15. On March 5, 2014, the requests for continuance and for consolidation were granted, and the delay of the hearings was attributable to the Taxpayer. The order also set out

deadlines for the parties to exchange documents and evidence. The Taxpayer's deadline was April 30, 2014. The Department's deadline was June 13, 2014.

16. On March 5, 2014, the Hearings Bureau sent amended notices of hearing.
17. On July 23, 2014, the Department requested to present rebuttal exhibits and to allow a witness to appear by telephone in response to the Taxpayer's late exchange of documents. The Taxpayer did not send any material to the Department until July 18, 2014.
18. The Department's request was granted at the hearing over the Taxpayer's objection.
19. Prior to becoming a New Mexico resident in 1994, the Taxpayer lived in and was a resident of several other states, including Alaska. The Taxpayer maintains a desire to reside in Alaska and still intends to return there someday.
20. The Taxpayer has owned and continues to own real property in several different states.
21. The Taxpayer was an undisputed resident of New Mexico from 1994 through 1996.
22. The Taxpayer obtained a divorce, which was commenced in 1996. The Taxpayer was ordered to share custody of his minor daughter.
23. The Taxpayer accepted a job in California in 1997. The Taxpayer did not start the job until June of 1997 so that he could stay in New Mexico for his other daughter's graduation.
24. The Taxpayer obtained a New Mexico driver's license in April 1997.
25. The Taxpayer spent time in Washington and Nevada in 1998 and 1999.
26. The Taxpayer registered a vehicle in New Mexico in 1998 and provided an address on 39<sup>th</sup> Street in Los Alamos, New Mexico (39<sup>th</sup> Street Los Alamos address).
27. In 1999, the Taxpayer began to live a transient lifestyle. The Taxpayer had a recreational vehicle (RV) in which he lived.

28. In June 1999, the Taxpayer applied for a New Mexico driver's license again and gave an address on Iris in Los Alamos, New Mexico (Iris Los Alamos address). The Taxpayer signed that application under penalty of perjury and indicated that he was not currently licensed anywhere.
29. On July 2, 1999, the Taxpayer was issued a Nevada driver's license. That license had a PO Box address in Mesquite, Nevada.
30. The Taxpayer registered the RV in Alaska in November 1999. On his application for registration, the Taxpayer provided a residential address on Fountain Drive in Anchorage, Alaska (Fountain Alaska address) and a mailing address on Montezuma Avenue in Santa Fe, New Mexico (Montezuma Santa Fe address).
31. In 2000, the Taxpayer began working for a company that required him to travel extensively for his job.
32. On March 24, 2000, the Taxpayer opened an access checking account with a bank in Los Alamos, New Mexico.
33. The Taxpayer also had bank accounts that were opened in an Alaska branch of a national banking chain.
34. In March 2000, the Taxpayer purchased a condominium on Oppenheimer Drive in Los Alamos, New Mexico (Oppenheimer Los Alamos address).
35. In October 2000, the Taxpayer filed a motion with the Domestic Relations Hearing Officer to modify child support.
36. On July 9, 2001, the Taxpayer filed documents with the court in New Mexico objecting to the findings of the Domestic Relations Hearing Officer.

37. The Taxpayer claimed that he was spending more than 35% of the time with his minor daughter and had provided a home for her in Los Alamos, New Mexico. The Taxpayer claimed that he had continued to spend more than 35% of the time with his daughter since November 2000.
38. The Taxpayer provided the Oppenheimer Los Alamos address to the court.
39. On July 13, 2001, the Taxpayer registered a vehicle in Alaska. The Taxpayer provided the Fountain Alaska address as his residential address and the Oppenheimer Los Alamos address as his mailing address.
40. In September 2001, the Taxpayer executed a new mortgage on the Oppenheimer Los Alamos address which released the lien filed in March 2000. The new mortgage contained a provision that required the Taxpayer to occupy and use the Oppenheimer Los Alamos address as his principal residence within 60 days of the mortgage. The Taxpayer was also required to maintain the Oppenheimer Los Alamos address as his principal residence for at least one year.
41. On April 23, 2003, the Department issued an assessment to the Taxpayer for the 1999 tax year. The assessment went to the Fountain Alaska address.
42. The Taxpayer claims that the assessment was closed without need for payment after a telephone conversation he had with an employee of the Department on May 9, 2003.
43. In July 2003, the Taxpayer began renting a room from a friend in Clam Gulch, Alaska to try to establish his residency there. The Taxpayer never used this address on anything.
44. The Taxpayer admitted that he never resided at the Fountain Alaska address or at the Gwenn Alaska address. These addresses belonged to a friend, and the Taxpayer explained that he was using these addresses as mailing addresses.

45. On July 3, 2003, the Taxpayer filed an application for the renewal of his New Mexico driver's license. The Taxpayer provided the Oppenheimer Los Alamos address as his residential address and indicated that he was currently licensed in New Mexico. It was also noted on the form that the Taxpayer presented a New Mexico driver's license as positive proof of his identification. The Taxpayer signed the application under penalty of perjury.
46. On July 28, 2003, the Taxpayer was issued an Alaska driver's license. The license had the Fountain Alaska address on it.
47. On July 28, 2003, the Taxpayer registered to vote in Alaska and listed the Fountain Alaska address as his residence and as his mailing address.
48. In 2004, the Taxpayer's banks in both New Mexico and Alaska had the Oppenheimer Los Alamos address.
49. In 2004, the Taxpayer was making in-person deposits in the bank in Los Alamos, New Mexico.
50. Sometime in 2004 or 2005, the Department audited the Taxpayer for the 2000 tax year.
51. On January 11, 2005, the Taxpayer registered a vehicle in New Mexico and used the Oppenheimer Los Alamos address.
52. On January 27, 2005, the Department notified the Taxpayer that no further action would be taken on the 2000 tax year.
53. In 2005, the Taxpayer became engaged to a resident of Utah.
54. On June 20, 2005, the Taxpayer refinanced the residence at the Oppenheimer Los Alamos address with the bank in Los Alamos. His loan application listed only two bank

- accounts, both in New Mexico. He also listed four vehicles and the real property at the Oppenheimer Los Alamos address.
55. His loan application also indicated that he intended to occupy the property as his primary residence. The Taxpayer signed an affidavit indicating that he occupied the Oppenheimer Los Alamos address as his principal residence.
  56. The loan application was done in person at the bank in Los Alamos, New Mexico.
  57. The mortgage executed on June 20, 2005 also required that the Taxpayer occupy and use the Oppenheimer Los Alamos address as his principal residence for at least one year, beginning within 60 days of the execution of the mortgage.
  58. On June 24, 2005, the Taxpayer opened a home equity line of credit account at the bank in Los Alamos, New Mexico and a line of credit mortgage was executed on the Oppenheimer Los Alamos address.
  59. The Taxpayer had two vehicles registered in Alaska in 2005. The registrations expired on July 31, 2005 and December 31, 2005. Both registrations listed the Fountain Alaska address as the Taxpayer's residence and the Oppenheimer Los Alamos address as the mailing address.
  60. On July 21, 2006, the Taxpayer registered a vehicle in New Mexico and used the Oppenheimer Los Alamos address.
  61. On February 7, 2007, the Department sent a follow-up notice to the Taxpayer at the Oppenheimer Los Alamos address and extended the time to provide records for the 2003 tax year. The notice indicated that the original notice of audit had been sent approximately 60 days prior.

62. The Taxpayer responded by mail on February 13, 2007. The envelope was postmarked in Albuquerque, New Mexico. The Taxpayer provided copies of several documents.
63. The Taxpayer provided a copy of his Alaska driver's license that was issued on July 28, 2003.
64. The Taxpayer provided a copy of his 2003 W-2, which showed the Oppenheimer Los Alamos address.
65. The Taxpayer provided a copy of a voter information document from Alaska that had the Fountain Alaska address.
66. The Taxpayer provided a copy of two payroll stubs to show that Alaska workers' compensation was withheld.
67. On February 27, 2007, the Department assessed the Taxpayer for the 2003 tax year.
68. The Taxpayer protested the assessment.
69. The Taxpayer had two vehicles registered in Alaska in 2007. The registrations expired on March 31, 2007 and December 31, 2007. Both registrations list the Fountain Alaska address as the Taxpayer's residence and the Oppenheimer Los Alamos address as his mailing address.
70. On August 3, 2007, the Taxpayer registered again to vote in Alaska. The Taxpayer provided a residential address on Gwenn Drive in Anchorage, Alaska (Gwenn Alaska address) and a mailing address on North 1070 West (North Utah address) in Pleasant Grove, Utah.
71. On August 3, 2007, the Taxpayer was also issued another Alaska driver's license. The North Utah address was used.

72. In 2008, the Taxpayer became disabled and required extensive medical care. The Taxpayer maintains that most of his medical care occurred in Utah during that year.
73. On September 24, 2008, the Taxpayer applied for a loan to purchase the residence on Camino Cereza in Los Alamos, New Mexico (Camino Los Alamos address).
74. His loan application listed only two bank accounts, both in New Mexico, the real property at the Oppenheimer Los Alamos address, and the real property at the North Utah address.
75. His loan application also indicated that he intended to occupy the property as his primary residence. The Taxpayer also signed an affidavit indicating that he intended to occupy the Camino Los Alamos address as his principal residence.
76. The loan application was done in person at the bank in Los Alamos, New Mexico, and the Taxpayer also engaged in other banking transactions in person on that date.
77. The mortgage was executed on the Camino Los Alamos address on September 24, 2008. The mortgage required that the Taxpayer occupy and use the Camino Los Alamos address as his principal residence for at least one year, beginning within 60 days of the execution of the mortgage.
78. On September 29, 2008, the Taxpayer submitted an application to vote by absentee mail ballot in Alaska. The Taxpayer provided the Gwenn Alaska address as a residential address. The Taxpayer provided the Camino Los Alamos address as his permanent mailing address, and provided the Oppenheimer Los Alamos address as the address where his ballot should be mailed.

79. On January 5, 2009, the Los Alamos bank sent a letter confirming that the Taxpayer's address had changed from the Oppenheimer Los Alamos address to the Camino Los Alamos address.
80. On January 22, 2009, the Taxpayer applied to refinance the Camino Los Alamos address.
81. His loan application did not include any bank accounts and listed only the real property at the Camino Los Alamos address.
82. His loan application also indicated that he intended to occupy the property as his primary residence.
83. The loan application was done in person at the bank in Los Alamos, New Mexico.
84. On January 22, 2009, the mortgage was executed on the Camino Los Alamos address and required that the Taxpayer occupy and use the Camino Los Alamos address as his principal residence for at least one year, beginning within 60 days of the execution of the mortgage.
85. On January 30, 2009, an employee of the Internal Revenue Service (IRS) was contacted by the Taxpayer by telephone. The Taxpayer advised that his residence was at the Gwenn Alaska address, but advised that he was currently staying at the Camino Los Alamos address for medical reasons and would probably be there for the next year. The Taxpayer requested that the IRS mail any correspondence to him at the Camino Los Alamos address.
86. On May 10, 2009, the Taxpayer engaged in banking transactions in person at the bank in Los Alamos, New Mexico.
87. The Taxpayer sold the property at the Oppenheimer Los Alamos address and executed a warranty deed on October 26, 2009.

88. On May 13, 2010, the Department issued a notice of audit to the Taxpayer regarding the 2006 tax year. The notice was sent to the Camino Los Alamos address.
89. The Taxpayer responded to the notice in July 2010. The Taxpayer provided copies of his 2006 W-2, which showed the Gwenn Alaska address. The Taxpayer provided a copy of the voter information document that showed the North Utah address. The Taxpayer also provided copies of his Alaska driver's licenses, which were issued in July 2003 and in August 2007.
90. On August 30, 2010, the Taxpayer began the process for refinancing again on the Camino Los Alamos address. The Taxpayer signed an intent to occupy indicating that he intended to make the property his principal residence and to reside there for six months or more per year.
91. On October 14, 2010, the Taxpayer submitted the loan application for the refinancing on the Camino Los Alamos address.
92. In his loan application, the Taxpayer listed three bank accounts, but did not indicate the locations of the accounts. The Taxpayer listed the real property at the Camino Los Alamos address.
93. His loan application also indicated that he intended to occupy the Camino Los Alamos address as his primary residence. The Taxpayer also signed an affidavit indicating that he intended to occupy the Camino Los Alamos address as his principal residence.
94. The loan application was done via email or internet.
95. On October 14, 2010, the loan was executed. The contract required the Taxpayer to occupy and use the Camino Los Alamos address as his principal residence for at least one year, beginning within 60 days of the execution of the loan.

96. The Department issued a letter to the Taxpayer on October 18, 2010 and indicated that no further action would be taken on the 2006 tax year.
97. On March 25, 2011, the Taxpayer filed an application for the renewal of his New Mexico driver's license. The Taxpayer provided the Camino Los Alamos address as his residence and as his mailing address.
98. On April 15, 2011, the Taxpayer was ticketed in Los Alamos County for no registration on a vehicle. The Taxpayer had a New Mexico driver's license and used the Camino Los Alamos address.
99. On April 19, 2011, the Taxpayer registered a vehicle in New Mexico and used the Camino Los Alamos address. The vehicle registered was the one for which the Taxpayer was ticketed on April 15, 2011.
100. Throughout his ownership of the Oppenheimer Los Alamos address, the Taxpayer received utility services at that residence. The utility consumption was consistent, and the utility bills were sent to the Oppenheimer Los Alamos address.
101. Throughout his ownership of the Camino Los Alamos address, the Taxpayer received utility services at that residence. The utility consumption was consistent, and the utility bills were sent to the Camino Los Alamos address.
102. The Taxpayer did not successfully change his domicile from New Mexico during the tax years.

### **DISCUSSION**

There are several issues to be decided in this protest. The primary issue is whether the Taxpayer is liable for personal income tax, penalty, and interest for the 2003, 2005, 2006, 2007,

2008, 2009, and 2010 tax years. This issue hinges upon the Taxpayer's legal residence for those tax years. The second issue is whether the Taxpayer is subject to the higher penalty for willful intent to evade or defeat a tax for the 2005, 2007, 2008, 2009, and 2010 tax years. The next issue is whether the assessments were timely and whether the protests were handled timely. The last issue is whether the Taxpayer is entitled to recovery of costs for his pursuit of the protests. Throughout this decision the 2003, 2005, 2006, 2007, 2008, 2009, and 2010 tax years shall be referred to generally as "the tax years".

The Taxpayer also made numerous arguments and objections to Ms. Friedman, both personally and professionally, and her handling of the protest. How the Department's attorney handles a protest or interacts with an individual taxpayer is not an issue for the protest. Protests are limited to disputes about assessments, the application of the Tax Administration Act, and denials of refunds or credits. *See* NMSA 1978, § 7-1-24 (A). The Taxpayer argued that the Department illegally disclosed confidential information to third parties during its investigation. The Taxpayer argued that contacting the owners of the addresses in Alaska to inquire if the Taxpayer had lived there, the length of time he lived or worked there, and the time period when he did so was an illegal disclosure of confidential information. Ex. U.

Taxpayers have the right to have their tax information kept confidential. *See* NMSA 1978, § 7-1-4.2 (H) (2003). Tax information generally refers to a person's return or return information. *See* NMSA 1978, § 7-1-8 (2009). The Department may reveal some information about taxpayers to third parties. *See* NMSA 1978, § 7-1-8.4 (E) (2009). When a third party could be subject to a subpoena, the Department may reveal a taxpayer's identity, the taxes involved, and the nature of the proceeding. *See id.*

The Department sent a letter to the owner of the Alaska addresses inquiring about the period of time that the Taxpayer lived or worked at those addresses. Ex. U. The Department did not reveal any other information about the Taxpayer, his returns, his return information, or what taxes were involved. The Department has the authority to investigate claims by taxpayers. *See* NMSA 1978, § 7-1-4 (A) (2005). The Department may contact persons other than the taxpayer in the course of its investigation. *See* 3.1.1.14 NMAC (2000). Based upon the totality of the evidence, the Department did not violate the Taxpayer's confidentiality by investigating his claim of residency at the addresses in Alaska.

**Burden of Proof.**

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessments issued to the Taxpayer are presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement of the assessments.

However, for the 2005, 2007, 2008, 2009, and 2010 tax years, the Department has the burden to prove that the greater penalty should be imposed. *See* 3.1.11.18 (B) (1) NMAC (2001) (placing the burden on the Department to prove tax evasion). *See also* NMSA 1978, § 7-1-78 (2001) (placing the burden on the Department in cases involving fraud or corruption). The penalty statute does not specifically mention the word "fraud". *See* NMSA 1978, § 7-1-69 (2007). It imposes a greater penalty for the "willful intent to evade or defeat a tax". *Id.*

Whether a person knew a tax was owed must be established by the preponderance of the

evidence. *See* 3.1.11.18 (B) (2) NMAC (2001). Whether the failure to pay the tax was willful is an objective standard. *See* 3.1.11.18 (B) (3) NMAC (2001). Fraud generally involves a willful intent to deceive. *See Black's Law Dictionary*, p. 267 (pocket edition, 1996). The common law standard for fraud requires proof by clear and convincing evidence. *See A. D. Powers v. Miller*, 1999-NMCA-080, ¶ 12, 127 N.M. 496. Therefore, the Department has the burden to prove that the Taxpayer willfully intended to evade or defeat the tax by clear and convincing evidence.

### **Residency.**

Personal income tax is imposed “upon the net income of every resident individual” in New Mexico. NMSA 1978, § 7-2-3 (1981). A person is a resident if the person “is domiciled in this state during any part of the taxable year” or is present in the state for 185 days or more during the taxable year. NMSA 1978, § 7-2-2 (S) (2010). However, a person who changes his place of abode to a location outside of New Mexico during the taxable year “with the bona fide intention” of abiding there permanently is not a resident for the period of time after that change of abode. *Id.* A person is domiciled where that person intends to return after an absence and “has voluntarily fixed habitation of self and family with the intention of making a permanent home.” 3.3.1.9 (C) (1) NMAC (2010). Everyone is deemed to be domiciled somewhere, and a person has only one domicile at a time. *See id.* Once domicile is established, it does not change until the person moves “with the bona fide intention” of making the new location his permanent home. *See* 3.3.1.9 (C) (2) NMAC (2010).

Residence is synonymous with domicile, and domicile does not require a person’s continued physical presence. *See Hagan v. Hardwick*, 1981-NMSC-002, ¶ 10, 95 N.M. 517. Domicile requires a physical presence at some time in the past with the intent to make a home there. *See id.* Once domicile is established, it is presumed to continue until it is shown to have

changed. *See id.* at ¶ 11. Several factors should be considered in determining residency. *See* 3.3.1.9 (C) (4) NMAC (2010). A person's declarations of intent are given weight, but are not conclusive. *See id.* No one factor is conclusive, and driver's licenses, voter registrations and home addresses may be given less weight given the ease with which they can be changed for tax purposes. *See id.*

The Taxpayer argued that he was not a resident of New Mexico in any of the tax years because he was not present within New Mexico for 185 days or more in any of those years. The Department conceded that there was not proof that the Taxpayer was present in the state for 185 days or more in any given tax year. The Department argued that the Taxpayer was a resident in 1994 and failed to change his domicile to a location outside of New Mexico. The Department argued that the Taxpayer continued to be a resident of New Mexico through the 2010 tax year. The Taxpayer objected to any evidence that did not directly involve the tax years. The Taxpayer also voluntarily provided information regarding years other than the tax years. The Department argued that evidence on other years was necessary to establish a pattern of conduct by the Taxpayer and would show that he remained a resident of New Mexico during the tax years. The objection was overruled.

The Taxpayer conceded that he was a resident of New Mexico in 1994. The Taxpayer also conceded that he remained a resident of New Mexico until at least 1997. The Taxpayer appears to be basing this concession on his physical presence in New Mexico during those years since the Taxpayer maintained that he has intended to be a resident of Alaska since the 1980s. The Taxpayer argued that he established his residency in Alaska by renting a room from a friend in Clam Gulch, Alaska commencing in 2003, by registering vehicles in Alaska continuously since 1985, by obtaining Alaska driver's licenses since 1986, by registering to vote in Alaska

since 1986, and by continuing to look for employment in Alaska until he was disabled in 2008. The Taxpayer argued that he was not a resident of New Mexico because he never registered to vote in New Mexico, was not licensed in New Mexico for as long as he was licensed in Alaska, and never claimed a property tax exemption in New Mexico. The Taxpayer also argued that he owned several properties in other states, that he intended for several of those other properties to be his primary residence, that he intended to make his RVs his primary residences, and that he lived outside of New Mexico in his RVs.

The Department argued that the Taxpayer never changed his domicile from New Mexico after it was established in 1994. The Department argued that the Taxpayer failed to overcome the presumption of correctness on the issue of his residency.

The Taxpayer's argument relies heavily upon his subjective intent to be a resident of Alaska. However, intent alone is not sufficient to establish residency. A person's declarations are also not sufficient to establish domicile. *See Texas v. Florida*, 306 U.S. 398, at 417 (1939). In determining a person's domicile, the Supreme Court of the United States identified several factors to be considered. *See id.* at 414. These factors include time spent in a particular place, activities conducted there, what persons and things of importance are there, intent, and evidence on other domiciles. *See id.*

The Taxpayer took some additional steps to attempt to establish himself as a resident of Alaska, such as obtaining an Alaska driver's license and registering to vote. The Taxpayer argued that he met the legal requirements for residency in Alaska. However, even in Alaska, a mere paper record is not sufficient to establish a claim for domicile. *See Suydam v. Commercial Fisheries Entry Comm'n*, 957 P.2d 318 at 323 (Sup. Ct. AK 1998). Maintaining a home elsewhere and obtaining licenses in other states is substantial evidence that a person is domiciled

outside of Alaska. *See id.* at 324. To establish residency in Alaska, a person must intend to reside in a true home there, not merely a home that is nominal or pretended. *See Ilardi v. Parker*, 914 P.2d 888 at 890 (Sup. Ct. AK 1996). The Taxpayer admitted that he has not been residing in Alaska and that he was using friends' addresses there.

The Taxpayer explained that he was really using them as mailing addresses despite his repeated entry of those addresses as his residential address. The Taxpayer argued the forms say residence and do not say domicile. Again, residence is synonymous with domicile. *See Hagan*, 1981-NMSC-002. A change of domicile requires intent, but it also requires physical presence in the new location. *See Estate of Peck v. Chambers*, 1969-NMSC-054, 80 N.M. 290. A person cannot "elect to make his home in one place...for general purposes of life, and in another, where he in fact had no residence, for the purpose of taxation." *Texas v. Florida*, 306 U.S. at 426.

It is clear from the testimony that the Taxpayer began living a fairly transient lifestyle in 1998. The Taxpayer traveled frequently for work as well as for personal reasons from 1998 through 2010. However, "[a]ll residency requirements to some degree burden those who exercise the right to travel." *Hooper v. Bernalillo County Assessor*, 1984-NMCA-027, ¶ 8, 101 N.M. 172. It is also clear that the Taxpayer spent time frequently in New Mexico. Contrary to the Taxpayer's statements, his expense reports show that he was frequently in New Mexico and even had the city of Albuquerque as a client. Ex. 10. Moreover, the Taxpayer's utility use was consistent from month to month at the Oppenheimer Los Alamos address and at the Camino Los Alamos address. The Taxpayer argued that utility use would be consistent if automatic timers and sprinklers were used, but there was no evidence presented that such things were actually used by the Taxpayer.

The Taxpayer also registered vehicles in New Mexico. The Taxpayer also obtained and kept New Mexico driver's licenses. *See Fenner v. Fenner*, 1987-NMCA-066, 106 N.M. 36 (indicating that having a physical residence, opening bank accounts, registering vehicles, and registering to vote were sufficient to demonstrate a substantial physical presence as well as an intent to make a home). The Taxpayer also consistently had sensitive and important documents mailed to him in New Mexico. *See Apodaca v. Chavez*, 1990-NMSC-028, ¶ 17, 109 N.M. 610 (noting that frequent overnight stays and using an address for important documents suggest an intent to make that place one's residence). Despite his stated intent to become a resident of Alaska in 1998, the Taxpayer never established a true home in Alaska. The Taxpayer frequently returned to New Mexico, and he maintained strong, recurring, and substantial ties to New Mexico. Based upon the totality of the evidence, the Taxpayer has failed to overcome the presumption that he was domiciled in New Mexico since 1994. *See Hagan*, 1981-NMSC-002, ¶ 11 (holding that domicile once established is presumed to continue until proven otherwise). Therefore, the Taxpayer's legal residence for the tax years was in New Mexico. Consequently, the Taxpayer has failed to overcome the presumption of correctness on the assessments.

### **Amount of Assessments.**

The Taxpayer argued that the Department improperly assessed him on his gross income rather than his federal adjusted gross income. Ms. Bristol explained that the Taxpayer was assessed based on his gross income after she adjusted it by applying the standard federal deduction. Ms. Bristol explained that the Taxpayer was being audited by the IRS for some of the same tax years in question here. The Taxpayer was claiming a number of deductions or credits when he reported his federal adjusted gross income. Ms. Bristol was not able to verify any of the deductions or credits that the Taxpayer was claiming for the tax years.

The burden is on the Taxpayer to prove that he is entitled to the exemption or deduction. *See Public Services Co. v. N.M. Taxation and Revenue Dep't.*, 2007-NMCA-050, ¶ 32, 141 N.M. 520. *See also Till v. Jones*, 1972-NMCA-046, 83 N.M. 743. The Taxpayer did not provide any evidence to show that he was entitled to the deductions or credits. The Taxpayer argued that Ms. Bristol never contacted him to ask for proof of his deductions. Ms. Bristol explained that she did not contact the Taxpayer because she concluded that it would be a waste of time to do so. Ms. Bristol explained that there were notes in the file which indicated that the Taxpayer was uncooperative and hostile. The Taxpayer denied this. Given the Taxpayer's demeanor at the hearing, I find Ms. Bristol's testimony to be credible. Moreover, the Department has the authority to determine a person's tax liability. *See NMSA 1978, § 7-1-4 (A) (2005)*.

The Department's determination is not limited to the amount that a person chooses to report as his/her federal adjusted gross income. *See Holt v. N.M. Dep't. of Taxation and Revenue*, 2002-NMSC-034, ¶ 23, 133 N.M. 11 (finding that the Department had the authority to recalculate taxable income). The Taxpayer provided no evidence to prove that his federal adjusted gross income should be in different amounts than the amounts for which he was assessed. Consequently, the Taxpayer has failed to show he was entitled to deductions or credits that he claimed and has failed to overcome the presumption that the assessments were correct.

#### **Assessment of Penalty.**

The 2003 tax year was assessed the standard penalty. A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment of the standard penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 1976-NMCA-127, 90 N.M. 16. Therefore, the standard penalty was appropriately applied to the 2003 tax year.

The Department argued that Taxpayer willfully intended to evade or defeat the New Mexico income tax during the 2005, 2007, 2008, 2009, and 2010 tax years. No penalty was assessed for the 2006 tax year. The Department argued that the Taxpayer repeatedly responded to audits by the Department by claiming to live at the Fountain Alaska address and at the Gwenn Alaska address. The Department argued that these claims were clearly done with the intent to evade the tax since the Taxpayer never lived at either of those addresses. The Department argued that the Taxpayer also filed his federal returns in 2009 and 2010 using a New Mexico address without filing New Mexico returns. The Department also argued that the Taxpayer's Alaska driver's licenses and voter registrations were fraudulently obtained since he never lived in Alaska and maintained a New Mexico driver's license at the same time. The Department argued that the Taxpayer's claim to have a rented room in Clam Gulch, Alaska was not made until recently and that this claim is spurious since the Taxpayer's expense reports show him to be frequently in New Mexico during the supposed rental periods, the Taxpayer never used the Clam Gulch Alaska address on any official documents, and the Taxpayer fraudulently altered a voter's information document to reflect the Clam Gulch Alaska address. The Department argued that the Taxpayer submitted copies of federal returns for the same tax years at one point with New Mexico addresses, and at another point with Utah addresses. The Department argued that the Taxpayer knew he was a resident of New Mexico and expressed his legal intent to be a resident of New Mexico when he signed the bank documents on the Oppenheimer and Camino Los Alamos addresses. The Department argued that the totality of the Taxpayer's conduct and statements demonstrated a clear and willful intent to evade the New Mexico income tax.

The Taxpayer argued that the Department determined that he was not a resident and owed no New Mexico income tax pursuant to audits conducted in 2003 and 2005 for tax years 1999

and 2000, respectively. The Taxpayer also argued that the Department initially took no action on the 2006 tax year when he was audited in 2010. The Taxpayer argued penalty should not apply as it was reasonable for him to rely on the Department's prior determinations. The Taxpayer argued that his reliance on the Department's actions certainly disproved any evidence of intent to evade the tax.

The Taxpayer was audited multiple times by the Department. The Taxpayer responded to the audits by claiming that he was a resident of Alaska and provided addresses and copies of his driver's license and voter registrations to the Department as proof of his residence. However, the Taxpayer was not a resident at any address in Alaska. By his own admission, the Taxpayer was merely using those addresses as mailing addresses. Therefore, the Taxpayer provided false information in response to the audits. The Taxpayer claimed to be residing at the addresses in Alaska when he knew full well that he was only using them as mailing addresses.

The Taxpayer argued that he was, nevertheless, a resident of Alaska because he intended to be a resident and because he obtained Alaska driver's licenses and registered to vote there. The Taxpayer argued that he met the legal requirements of Alaska to be a resident. Again, a paper trail does not establish residence, even in Alaska. *See Suydam v. Commercial Fisheries Entry Comm'n*, 957 P.2d 318. *See also Ilardi v. Parker*, 914 P.2d 888.

Based on the totality of the evidence, the Taxpayer willfully obtained licenses in other states without relinquishing his New Mexico license. The Taxpayer argued that he was licensed in New Mexico for very short periods of time, and that he relinquished his New Mexico driver's licenses when he obtained driver's licenses in other states, including Alaska. The Taxpayer obtained a New Mexico driver's license in June 1999. The Taxpayer then obtained a Nevada driver's license in July 1999. He should have relinquished his New Mexico driver's license at

that time. However, it is clear that he did not relinquish his license at that time since he presented a New Mexico driver's license as proof of his identity and signed under penalty of perjury that he was currently licensed in New Mexico when he renewed his New Mexico license in 2003. A month later in 2003, the Taxpayer obtained an Alaska driver's license. Again, the Taxpayer should have relinquished his New Mexico driver's license at that time. The Taxpayer also obtained an Alaska driver's license in 2007, when he should also have relinquished his New Mexico driver's license. Again, clearly, he did not so in 2003 or in 2007 since he failed to renew his New Mexico driver's license in 2011. The Taxpayer was able to obtain licenses from other states without relinquishing his New Mexico driver's license. Based on the Taxpayer's own admissions, he knew he should have relinquished his New Mexico driver's licenses.

The Taxpayer also indicated that his residential address on his voter registrations was in Alaska, but the Taxpayer was never a resident at any Alaska address during that time. The Taxpayer also willfully provided an altered, and therefore fraudulent, document at this hearing. Ex. 50-1. Ms. Fenumiai explained the differences, including font and punctuation, between Ex. 50-1 and a genuine document sent out by Alaska. Ms. Fenumiai also explained that the bar code on Ex. 50-1 indicated that the original document was sent to an address in Los Alamos, New Mexico and not to the address in Hawaii as shown on Ex. 50-1. Ms. Fenumiai researched the voting records, and the Taxpayer never provided the Clam Gulch Alaska address as his residential address and never provided the Hawaii address as his mailing address for purposes of voter registration at any time. The Taxpayer altered this document to reflect the Clam Gulch Alaska address in an attempt to bolster his claim of residency. This conduct expresses an intent to defraud the Department about his residence.

The Taxpayer claimed to be in New Mexico very infrequently and denied having any clients in New Mexico. The Taxpayer's fiancée also claimed that the Taxpayer was very infrequently in New Mexico. However, the Taxpayer's own expense reports show that he was frequently in New Mexico. Ex. 10-1, 2, 4, 16, 18, 20, 24, 31, 33, 34, 39, 42, 45, 46, 47, 58, 62, 76, 79, 86, 91, 96-99, 101, 120, 129, 131, 133, 144, 147, 153, 155, 182, 187, 192, 197, 199-202, 212, 215, 219, 234, 250, 260, 265, 267, 270, 273, 274, 294, 296, 298, 306, 309-11, 313, 315, 318, 325, and 331. It also shows that the City of Albuquerque was a client of his. Ex. 10-34, 62, and 318. There are also several instances where the Taxpayer attempted to redact parts of his expense reports by marking through them with a black marker. However, most of those attempts were unsuccessful, and the line items could still be clearly read. Many of those attempted redactions were related to travel in New Mexico and to the City of Albuquerque as a client, and some of those attempted redactions are on the same page with other expenses related to travel in New Mexico that were not crossed out. Ex. 10-15, 34, 39, 45-6, 49, 51, 53-4, 56-7, 59, 75, 77, 83-4, 91-2, 99, 101, 103, 120, 122, 157, 159, 191, 198, 203-4, 206, 210-11, 237, 246, 247, 251, 265, 267, 290, 317, 322, and 324.

The Taxpayer argued that his affidavits to the bank on the Oppenheimer Los Alamos address and on the Camino Los Alamos address should not be given any weight. The Taxpayer also argued that his sincere intent cannot be established by those documents since the bank required that they be signed in order to get the loan. The Taxpayer argued that his signature on those affidavits just proves his intent to get a loan, not his intent to make the Oppenheimer Los Alamos address or the Camino Los Alamos address his primary residence.

The Taxpayer signed affidavits of occupancy, which attested to his intent to make the address his primary residence. These affidavits are single pages, and the Taxpayer cannot claim

not to have been aware of their provisions. Ex. PP, SS, VV, and XX. Moreover, several of the Taxpayer's loan applications required the Taxpayer to mark a box indicating whether he intended for the address to be his primary residence. The Taxpayer marked the boxes indicating that he intended for the address to be his primary residence, and he signed on the same page that contained that provision. Ex. QQ, RR, TT, UU, and WW. The affidavits were signed under penalty of perjury. The Taxpayer essentially argued that he defrauded the bank and perjured himself when he signed those affidavits because he did not really intend to make the address his primary residence. The Taxpayer seeks to blithely disregard the legal ramifications of his actions. However, given the intent expressed in those loan documents, coupled with the evidence of the Taxpayer's frequent visits to and significant ties to New Mexico, there is sufficient evidence to conclude that the Taxpayer intended to reside in New Mexico and was aware of his legal status as a resident in New Mexico.

Clear and convincing evidence is more than a preponderance and must instantly tilt the scales in the affirmative. *See State v. Valdez*, 1975-NMSC-050, ¶ 20, 88 N.M. 338. The fact finder's mind must be left with an abiding conviction that the evidence is true. *See id.* Based upon the totality of the circumstances, there is clear and convincing evidence that the Taxpayer willfully intended to evade the New Mexico income tax. The Taxpayer may not claim to have reasonably relied upon the prior determinations of the Department when those determinations were based on false information provided by the Taxpayer. Moreover, the Taxpayer's repeated deceptive conduct, such as presenting fraudulently altered documents and attempting to redact evidence of his presence in and connection to New Mexico, is clear and convincing evidence of his willful intent to evade the tax.

**Timeliness.**

The Taxpayer argued that most of the assessments were not timely since they occurred in 2013. The Taxpayer argued that the assessments on the 2005, 2006, 2007, and 2008 tax years were not timely since they were not made within three years of when the tax was due.

Generally, assessments must be made within three years of the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18. However, when a taxpayer fails to file a required return, the Department has seven years to assess from the end of the calendar year in which the tax was due. *See* NMSA 1978, § 7-1-18. The Taxpayer failed to file returns with New Mexico for all of the tax years. Consequently, the assessments were timely as they were made within seven years of the tax due dates.

The Taxpayer argued that the assessment for the 2006 tax year was, nevertheless, barred by the Department's own actions. The Taxpayer argued that the Department had already decided that he was not liable when it took no action after auditing him in 2010 for the 2006 tax year. The Taxpayer argued that the Department could not later change its position and assess him for that 2006 tax year.

The Department is required to give taxpayers a notice of audit, but is not required to give a notice of resolution of the audit and does not appear to be statutorily bound to honor any such notice of resolution. *See* NMSA 1978, § 7-1-11.2 (2007). *See also* NMSA 1978, § 7-1-18. The Taxpayer's argument also touches on principles of equitable estoppel. However, hearing officers are unable to grant equitable remedies. *See AA Oilfield Service v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that an administrative agency cannot grant the equitable remedy of estoppel because that power is held exclusively by the judiciary). As the Department was not statutorily prohibited from making the assessment, the objection is

overruled. The assessment of the 2006 tax year was timely as it was made within seven years of the due date of the tax.

The Taxpayer argued that the assessment on the 2003 tax year should be abated because he filed a timely protest to that assessment, but the Department took no action on the protest until December 2013. The Taxpayer argued that the delay was unreasonable and unfair. The Taxpayer argued that the Department should not be able to collect on that assessment since it took no action on the protest for a prolonged period of time. The Department argues that there was not a deadline in which to hold the hearing.

The Taxpayer filed his protest on April 4, 2007. The Hearings Bureau first learned of this protest when the Department referred the Taxpayer's protest to the Hearings Bureau on December 23, 2013, more than six years later. The Hearings Bureau promptly set the hearing.

In 2007, there was not a strict statutory deadline or time frame within which a hearing must be held. *See* NMSA 1978, § 7-1-24 (2003). Currently, a hearing must be set within ninety days of the protest. *See* NMSA 1978, § 7-1-24.1 (2013). However, there is no statutory or regulatory authority for the Hearing Officer to dismiss a previously filed protest for unreasonable and unjustified delays. *See id.* *See also* 3.1.8.8 and 3.1.8.9 NMAC. Another taxpayer previously argued that the Department denied it the statutory right to a prompt hearing on its protest. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126, ¶ 12, 100 N.M. 632. That argument ultimately failed. *See id.* at ¶ 13 (holding that public officers' failure to timely carry out their duties is not a defense to an action by the state and that the statute does not provide a remedy for failure to set a hearing promptly). *See also Kmart Properties, Inc. v. Taxation and Revenue Dep't.*, 2006-NMCA-026, ¶ 54, 139 N.M. 177 (noting that tardiness in performing duties is not a defense to an action taken by the state). As there was

not a statutory or regulatory violation in failing to refer the Taxpayer's protest for such an extended period of time, there is no administrative remedy that can be granted.

**Assessment of Interest.**

Interest "shall be paid" on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word "shall" indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

**Awarding of costs.**

The Taxpayer moved for costs and fees associated with pursuing his protest. When a taxpayer is the prevailing party in an administrative proceeding, "the taxpayer *shall* be awarded a judgment or a settlement for reasonable administrative costs incurred in connection with an administrative proceeding". NMSA 1978, §7-1-29.1 (A) (emphasis added). To be a prevailing party, a taxpayer must substantially prevail with respect to the amount in controversy or with respect to the issues involved. *See* NMSA 1978, §7-1-29.1 (C) (1). The Taxpayer is not the prevailing party. Therefore, the Taxpayer is not entitled to costs.

**CONCLUSIONS OF LAW**

A. The Taxpayer filed timely written protests to the Notices of Assessment of 2003, 2005, 2006, 2007, 2008, 2009, and 2010 personal income taxes issued under Letter ID numbers L1321327232, L0330070480, L1614874064, L0421194192, L1672247760, L1263204816, and

L1583610320, respectively, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was a legal resident of New Mexico in 1994. The Taxpayer remained a legal resident of New Mexico during the tax years as he failed to prove that he changed his residence. *See Hagan v. Hardwick*, 1981-NMSC-002.

C. The Taxpayer did not file New Mexico tax returns during the tax years. Therefore, the Department had seven years from the end of year in which the taxes were due to assess. The assessments were made timely. *See NMSA 1978, § 7-1-18.*

D. There is no administrative remedy for the Department's unreasonable delay in referring the protest of the 2003 tax year's assessment for hearing. *See Ranchers-Tufco Limestone Project Joint Venture v. Revenue Div.*, 1983-NMCA-126.

E. The Taxpayer failed to overcome the presumption of correctness on the assessments. *See NMSA 1978, § 7-1-17.*

F. There was clear and convincing evidence that the Taxpayer willfully intended to evade the New Mexico income tax during the tax years. Therefore, the Taxpayer was properly assessed for penalty and interest.

G. The Taxpayer is not the prevailing party. Consequently, the Taxpayer is not entitled to costs. *See NMSA 1978, § 7-1-29.1.*

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

DATED: December 15, 2014.

*Dee Dee Hoxie*  
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DEE DEE HOXIE  
Hearing Officer

Taxation & Revenue Department  
Post Office Box 630  
Santa Fe, NM 87504-0630