

**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
SERGIO MARTINEZ
TO RETURN ADJUSTMENT NOTICE ISSUED UNDER LETTER
ID NO. L1277162032**

No. 16-39

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on June 24, 2016 before David Buchanan, Esq., Hearing Officer Supervisor, in Santa Fe. Sergio Martinez (“Taxpayer”) appeared for the hearing and represented himself. Taxpayer testified on his own behalf at the hearing. Staff Attorney Marek Grabowski appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Sonya Varela appeared and testified as a witness for the Department. Taxpayer Exhibits #1-7 were admitted into the record. Department Exhibits A-D were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Prior to September 28, 2014, Taxpayer resided and had his domicile in New Mexico. Taxpayer’s address was 1905 Smith Ave, Las Cruces, New Mexico. Taxpayer’s parents live at that address.
2. On September 28, 2014, Taxpayer moved to Odessa, Texas to pursue his career in media.
3. Taxpayer moved in with his sister, Erica Fernandez, and her husband at 9828 S. Burma Avenue, Odessa, Texas 79766.

4. Taxpayer pays rent to his sister and pays one third of the utilities as well as the cable bill.
5. Taxpayer never signed a lease with his sister or her husband.
6. Taxpayer has most of his mail sent to his parent's house in Las Cruces, New Mexico due to issues with the postal service delivering mail to the address in Odessa, Texas.
7. Taxpayer has some mail sent to his sister's house in Odessa, Texas.
8. Taxpayer currently works for two different companies in Texas. Taxpayer works at the front desk of a Holiday Inn Express & Suites hotel in Midland, Texas. Taxpayer also works as a morning show producer for KMID Local 2 News for Nexstar Broadcasting in Odessa, Texas. Taxpayer has worked at both of those jobs since October 2014.
9. Taxpayer's employers have the Las Cruces address on file as his mailing address of record because that was what he provided when he started working for them immediately after moving to Texas from New Mexico in September 2014.
10. Taxpayer has his pay direct deposited to his bank account.
11. Taxpayer has a bank account with First National Bank Texas/First Convenience Bank. Taxpayer opened that account at a branch location in Odessa, Texas. The address for that account is the Las Cruces address. Taxpayer closed his account at his former bank in Las Cruces.
12. Taxpayer had New Mexico Personal Income Tax withheld from the pay he earned in Texas in 2014 because his address on file with his employer was the Las Cruces address. Taxpayer did not file a protest regarding his 2014 New Mexico Personal Income Tax.
13. Taxpayer had New Mexico personal income taxes withheld from his pay from Nexstar Broadcasting Inc. in 2015 for that same reason.

14. All of Taxpayer's 2015 income was for work performed in Texas. Taxpayer did not work or earn any income in New Mexico.

15. Taxpayer receives his W-2s directly from his employers rather than through the mail.

16. Taxpayer renewed his New Mexico driver's license on July 2, 2014 prior to moving to Texas utilizing the Las Cruces address. Taxpayer has not obtained a Texas driver's license. Taxpayer stated that he cannot get a Texas driver's license because he cannot provide any proof of a Texas address. Taxpayer does not have any bills in his name at the address in Odessa, Texas because he lives with his sister. He also does not have a lease with his sister to show that he lives at that address in Odessa.

17. Taxpayer is registered to vote in New Mexico with the Las Cruces address, but has not voted in an election since 2012. Taxpayer does not know how to apply to register to vote in Texas because he cannot provide any proof of a Texas address.

18. Taxpayer's purchased a Hyundai from a dealership in Odessa, Texas on January 8, 2015. Taxpayer registered that vehicle in New Mexico because he could not provide any proof of a Texas address.

19. Taxpayer obtained Texas liability insurance for the Hyundai from an insurance agent located in Odessa, Texas. The insurance card indicated Taxpayer's Las Cruces address.

20. Taxpayer's Hyundai was totaled in an accident on July 27, 2015. Taxpayer purchased a Toyota at that time. Taxpayer registered that vehicle in New Mexico.

21. Taxpayer visits his family in New Mexico for a weekend once every two or three months. Taxpayer spent approximately 12 to 15 days in New Mexico in 2015.

22. Taxpayer testified that if he lost his current employment, he would not return to New Mexico, but would obtain new employment in Texas.

23. Taxpayer filed a December 31, 2015 Personal Income Tax return with New Mexico to obtain a refund of state income taxes withheld from his pay.

24. On February 26, 2016, under letter id. no. L277162032, the Department issued a Return Adjustment Notice indicating that adjustments were made to Taxpayers December 31, 2015 Personal Income Tax return.

25. On April 7, 2016, Taxpayer protested the Department's refund denial.

26. On April 12, 2016, the Department's protest office acknowledged receipt of a valid protest for a refund denial in the amount of \$871.00.

27. On May 13, 2016, the Department filed a request for hearing in this matter with the Administrative Hearings Office.

28. On May 17, 2016, the Administrative Hearings Office sent Notice of Administrative Hearing, scheduling this matter for a merits hearing on June 24, 2016, within 90-days of the Department's acknowledgment of receipt of a valid protest.

DISCUSSION

Taxpayer challenges the Department's assessment of New Mexico personal income tax for the 2015 tax year based on his contention that since September 28, 2014, he has been a resident of Texas. The Department asserts that although the Taxpayer was living in Texas during the relevant time period, he did not abandon his New Mexico domicile and was a New Mexico resident for personal income tax purposes.

Presumption of Correctness and Burden of Proof

Although no assessment was issued in this case, and thus the typical presumption of correctness found under NMSA 1978, § 7-1-17 (C) (2007) does not apply, Taxpayer nevertheless carries the burden in the protest proceeding under Regulation 3.1.8.10 NMAC (8/30/2001) and must establish entitlement to the claimed refund.

Determination of Residency Based on Domicile

Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1, *et seq.* Unless otherwise exempted by law, NMSA 1978, § 7-2-3 (1981) imposes an income tax on the net income of “every resident individual.” NMSA 1978, § 7-2-2 (S) (2014) defines the term “resident” as follows:

“resident” means an individual who is domiciled in this state during any part of the taxable year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during the taxable year, who, on or before the last day of the taxable year, changed the individual’s place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a resident for the purposes of the Income Tax Act for periods after that change of abode.

Regulation 3.3.1.9 (A) NMAC (12/15/2010) defines a full-year resident as either an individual who is domiciled in New Mexico during all of the taxable year or an individual who is physically present in New Mexico for a total of 185-days or more during the tax year regardless of domicile.

Regulation 3.3.1.9 (C)(1) NMAC (4/29/05) 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.”

Three other provisions of Regulation 3.3.1.9 NMAC (12/15/10) are important in determining the issue at protest. First, Regulation 3.3.1.9(C)(2) NMAC (12/15/10) makes clear that once domicile is established, in order to establish a change of domicile the person must move to a “new location with the bona fide intention of making that location his or her permanent home.” Second, Regulation 3.3.1.9(C)(4) NMAC (12/15/10) 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. In particular, the department will consider the following factors in determining whether an individual is domiciled in New Mexico (the list is not intended to be exclusive and is in no particular order):

(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;
- (l) resident or nonresident status for purposes of tuition at state schools, colleges and universities, fishing and hunting licenses, and other official purposes; and
- (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."

Finally, Regulation 3.3.1.9(C)(5) NMAC (12/15/10) states that the "department shall evaluate questions regarding domicile on a case-by-case basis. No one of the factors considered by the department shall be conclusive with respect to an individual's domicile. Factors such as the state of driver's license, place of voter registration and home address may be given less weight, depending on the circumstances, because they are relatively easy to change for tax purposes."

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. *Estate of Peck v. Chambers*, 80 N.M. 290, 292, 454 P.2d 772, 774 (1969). In *Hagan v. Hardwick*, 95 N.M. 517, 519, 624 P.2d 26, 28 (1981), the New Mexico Supreme Court set out the following standard for determining a change in domicile: "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...."

Application of the Law of Domicile to the Facts of this Case

The evidence established that the Taxpayer was not present in New Mexico for 185 days or more in 2015. The Hearing Officer must therefore determine whether Taxpayer established

that he changed his place of abode to Texas with the bona fide intention of continuing to live in Texas and not in New Mexico. In order to make that determination, the Hearing Officer must examine the domicile factors set forth in Regulation §3.3.1.9(C)(4):

(a) The Taxpayer moved to Odessa, Texas from New Mexico at the end of September 2014.

The Taxpayer lives in a house with his sister and brother-in-law and pays them rent. The Taxpayer pays a portion of the utility bills that are in their names along with the cable bill. This factor weighs in favor of Taxpayer's position that he is domiciled in Texas.

(b) The Taxpayer lives in Texas full time where he works at two different jobs. The Taxpayer returns to New Mexico every few months to visit his parents for the span of a weekend. This factor weighs in favor of Taxpayer's position that he is domiciled in Texas.

(c) The Taxpayer earns his living by working as a front desk clerk at a hotel and as a producer at a television station. Both of those jobs are in Texas. All of the Taxpayer's work is done in Texas. This factor weighs in favor of Taxpayer's position that he is domiciled in Texas.

(d) The Taxpayer does not have a spouse, children or dependent parents. This factor does not weigh in favor of the Taxpayer's position that he is domiciled in Texas or the Department's position that Taxpayer is domiciled in New Mexico.

(e) The Taxpayer used to reside in New Mexico. This factor weighs in favor of the Department's position that Taxpayer is domiciled in New Mexico.

(f) There was no evidence present to show that Taxpayer owns any real property. This factor does not weigh in favor of the Taxpayer's position that he is

- domiciled in Texas or the Department's position that Taxpayer is domiciled in New Mexico.
- (g) The Taxpayer has an account with a bank in Texas and closed his old account in New Mexico. This factor weighs in favor of Taxpayer's position that he is domiciled in Texas.
 - (h) There was no evidence to show that Taxpayer has any community affiliations in either Texas or New Mexico. This factor does not weigh in favor of the Taxpayer's position that he is domiciled in Texas or the Department's position that Taxpayer is domiciled in New Mexico.
 - (i) The Taxpayer's used the New Mexico address for filing his federal income tax returns. This factor weighs in favor of the Department's position that Taxpayer is domiciled in New Mexico.
 - (j) The Taxpayer is registered to vote in New Mexico. This factor weighs in favor of the Department's position that Taxpayer is domiciled in New Mexico.
 - (k) The Taxpayer holds a New Mexico driver's license and registered his vehicles in New Mexico. This factor weighs in favor of the Department's position that Taxpayer is domiciled in New Mexico.
 - (l) There was no evidence to show the Taxpayer' resident or nonresident status for purposes of tuition at state schools, colleges and universities, fishing and hunting licenses, and other official purposes in either New Mexico or Texas. This factor does not weigh in favor of the Taxpayer's position that he is domiciled in Texas or the Department's position that Taxpayer is domiciled in New Mexico

(m) The items or possessions that Taxpayer considers "near and dear" to his or her heart are located in Texas. This factor weighs in favor of Taxpayer's position that he is domiciled in Texas.

The Hearing Officer was persuaded that Taxpayer moved to Texas to work in the field of broadcast television. Taxpayer clearly and credibly testified at the hearing that he does not intend to return to New Mexico. However, Taxpayer maintained several connections to New Mexico after he moved to Texas: Taxpayer utilized his parent's New Mexico address as his address of record; Taxpayer kept his New Mexico driver's license; Taxpayer continued to be registered to vote in New Mexico; and Taxpayer registered his vehicles in New Mexico.

Taxpayer's explanations for his remaining ties to New Mexico were reasonable. Taxpayer explained that he was unable to get a Texas driver's license because he did not have any documents such as a lease or a utility bill showing his Texas address. Taxpayer explained that he did not have any utility bills in his name because it was his sister's and brother-in-law's house and the bills were in their names. It was reasonable for the Taxpayer to live with his sister and brother-in-law given unusually high rents in the area and because they are family. It was also not unusual that Taxpayer did not sign a lease or rental agreement with his sister or brother-in-law because they are family. Without a lease or rental agreement and utility bills in his name showing the Texas address, Taxpayer was unable to obtain a Texas driver's license and therefore could not register to vote or register his vehicles in Texas. Finally, it was also reasonable for the Taxpayer to have most of his mail sent to his parent's address in New Mexico due to issues with delivery by the postal service at the address in Texas. The Department even noted issues with the delivery of mail to the address in Texas.

The Hearing Officer was persuaded that Taxpayer's remaining ties to New Mexico are due to the fact that Taxpayer's parents reside in New Mexico and the convenience of using their mailing

address as an official address rather than any intent on the part of Taxpayer to actually return to New Mexico to reside. To avoid any future issues or questions regarding his residency, Taxpayer should consider utilizing his Texas address as his official mailing address and take the steps necessary to obtain a Texas driver's license, to register his vehicle in Texas and to register to vote in New Mexico. The Hearing Officer was persuaded that Taxpayer met his burden and established that he changed his domicile to the state of Texas in September 2014. Taxpayer is no longer a New Mexico resident and he is entitled to a refund of 2015 Personal Income Tax that was paid to New Mexico.

CONCLUSIONS OF LAW

A. On April 7, 2016, the Taxpayer filed a timely, written protest to the Return Adjustment Notice under letter id. no. L277162032 and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer abandoned his New Mexico domicile in September 2014 and established a new domicile in Texas.

C. During 2015, Taxpayer was a resident of Texas as defined in the Income Tax Act and was not liable for New Mexico personal income tax for that year.

For the foregoing reasons, the Taxpayers' protest IS GRANTED. The Department shall refund any 2015 Personal Income Tax paid by Taxpayer.

DATED: July 27, 2016.

David Buchanan

David Buchanan
Hearing Officer Supervisor
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may be preparing the record proper.