

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

**IN THE MATTER OF THE PROTEST OF
PAUL C. BUNCH, ID NO.
NOTICE OF ASSESSMENT OF TAXES
ISSUED UNDER LETTER ID L0357793792**

No. 03-18

DECISION AND ORDER

A formal hearing on the above-referenced protest was held September 3, 2003, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Bridget A. Jacober, Special Assistant Attorney General. Paul Bunch represented himself. Following the hearing, the record was held open until September 10, 2003 to give the parties time to submit additional information. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Paul and Lo Ree Bunch moved to New Mexico in 1983 and purchased a house in Los Alamos, New Mexico.
2. The Bunches registered to vote in New Mexico, registered their vehicles in New Mexico, and acquired New Mexico drivers' licenses.
3. In 1988, the Bunches moved to a house they built at 5 Karen Circle in Los Alamos, New Mexico, which they still own and live in today.
4. Paul Bunch worked in Los Alamos until he retired in 1992.
5. Lo Ree Bunch worked in Los Alamos until she retired in 1997, after which she continued to work part-time through 1999.
6. Beginning in 1988, the Bunches acquired several single family houses in Texas, which they maintained as rental property.

7. The Bunches also had business interests in the states of Kansas, California, and Washington.
8. During 1993 and 1994, Mr. Bunch spent several months at his brother's home in Houston, Texas. Mrs. Bunch, who was still employed full time, remained at the couple's home in Los Alamos.
9. In 1996, Mr. Bunch spent three months living in one of his rental houses, located at 11515 Loyola Drive in Cypress, Texas, during which he worked on getting the house ready for a new tenant.
10. In September 1996, Mr. Bunch registered to vote in Texas, using the address of his rental property on Loyola Drive. The alternate address shown on his Texas voter registration is 5 Karen Circle, Los Alamos, New Mexico.
11. From 1988 to the present, Mr. Bunch has maintained his mailing address and telephone number at 5 Karen Circle in Los Alamos, New Mexico.
12. Mr. Bunch never established a Texas mailing address or telephone number.
13. Mr. Bunch held a New Mexico driver's license until 2000, when he obtained a driver's license from the state of Kansas. Mr. Bunch has never held a Texas driver's license and has never registered any of his vehicles in Texas.
14. Although Mr. Bunch made frequent trips to Texas to check on his rental properties, the rest of the year he continued to reside with his wife at their home in Los Alamos, New Mexico.
15. After Lo Ree Bunch retired from full-time work in 1997, the Bunches took regular trips in their RV. After each of these trips, they returned to their home in Los Alamos.
16. During 1999, the Bunches made several trips to Texas to work on their rental properties. Each trip was between one and three weeks in duration.

17. The Bunches took a minimal amount of tools, clothing, bedding, and furniture to use while staying at their rental properties. At the end of their stay, the Bunches brought these items back with them to New Mexico.

18. Mrs. Bunch never registered to vote in Texas, nor did she obtain a Texas driver's license.

19. Mrs. Bunch resisted Mr. Bunch's suggestion that they move to Texas, indicating that she wished to remain in Los Alamos, which is close to their children, who live in Santa Fe, New Mexico.

20. Due to his wife's unwillingness to relocate, Mr. Bunch acknowledges that he is currently a resident of New Mexico.

21. The Bunches did not file a timely New Mexico personal income tax return (Form PIT-1) for tax year 1999.

22. After being contacted by the Department in early 2003, Mr. Bunch prepared and filed a 1999 New Mexico PIT-1, checking the "nonresident" box for both himself and his wife.

23. Although Mr. Bunch filed his 1999 federal income tax return using his New Mexico address, he filed his 1999 New Mexico income tax return using the address of one of his rental properties in Texas.

24. Mr. Bunch filed Form PIT-B to allocate his 1999 income between New Mexico and other states. The only income Mr. Bunch allocated to New Mexico was the \$1,268 of wages Mrs. Bunch earned from her employment in Los Alamos.

25. The Department adjusted the Bunches' 1999 PIT-1 to allocate all of their income to New Mexico, based on the Department's position that the Bunches were New Mexico residents during 1999.

26. On February 13, 2003, the Department issued a Notice of Assessment of Taxes to Paul and Lo Ree Bunch under Letter ID L0357793792, assessing them \$5,547.00 of personal income tax, \$554.70 of penalty and \$2,344.77 of interest for tax year 1999.

27. On March 4, 2003, Mr. Bunch filed a written protest to the assessment. Lo Ree Bunch did not sign the protest or appear at the administrative hearing held to consider the protest.

DISCUSSION

Paul Bunch challenges the Department's assessment of New Mexico personal income tax based on his contention that he and his wife were residents of Texas in 1999. As an alternative argument, Mr. Bunch maintains that even if he were a New Mexico resident in 1999, he is entitled to exclude from tax certain income from non-New Mexico sources. The Department asserts that the Bunches have been New Mexico residents since 1983, that they were New Mexico residents in 1999, and that tax was properly imposed on that basis. The Department acknowledges that Mr. Bunch is entitled to a partial abatement of the assessment, as discussed in more detail in the last section of this decision.

Effect of Residency on Liability for New Mexico Income Tax. Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1, *et seq.* New Mexico is among the majority of states that use the federal income tax system as the basis for calculating state income taxes. As reflected on the Department's 1999 Form PIT-1, New Mexico taxable income is calculated by starting with the taxpayer's federal adjusted gross income, deducting the taxpayer's federal personal exemption and itemized deductions, and making certain adjustments reflected on Form PIT-ADJ. The amount of tax is then drawn from the tax rate table or tax schedule.

When a taxpayer has income that is taxable both within and without New Mexico, NMSA 1978, § 7-2-11 allows the taxpayer to file Form PIT-B to allocate and apportion certain categories of

income between New Mexico and non-New Mexico sources. The percentage of total income allocated or apportioned to New Mexico is then applied to the tax previously calculated to determine the tax due. New Mexico residents must allocate 100 percent of certain categories of income to New Mexico, regardless of the source of that income. *See*, NMSA 1978, § 7-2-11 and Regulations 3.3.11.11 through 3.3.11.14, NMAC. In this case, the only 1999 income allocated to New Mexico on the Bunches' Form PIT-B was the \$1,268.00 of wages Mrs. Bunch earned from her employment in Los Alamos, New Mexico. If the Bunches were Texas residents during 1999, their income was reported correctly. If they were New Mexico residents, however, they were required to allocate all interest, dividends, retirement, and passive investment income to New Mexico, resulting in additional tax due.

Determination of Residency Based on Domicile. NMSA 1978, § 7-2-2 of the Income Tax Act defines the term "resident" as follows:

"resident" means an individual who is domiciled in this state during any part of the taxable year; but any individual who, on or before the last day of the taxable year, changed his 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.

As defined for income tax purposes, residency is synonymous with domicile. *See, Murphy v. Taxation and Revenue Department*, 94 N.M. 54, 55, 607 P.2d 592, 593 (1980) (a New Mexico "resident" is an individual domiciled in New Mexico at any time during the taxable year who does not intentionally change his domicile by the end of the year). Regulation 3.3.1.9 NMAC defines "domicile" as "a place of a true, fixed home and a permanent establishment to which one intends to return when absent and where a person has voluntarily fixed habitation of self and family with the intention of making a permanent home." 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, quoting from *Shilkret v. Helvering*, 138 F.2d 925, 927 (D.C. Cir.1943):

[T]o 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, and to show the change two things are indispensable,--"First, residence in the new locality; and, second, the intention to remain there...."

Texas uses the same basic criteria as New Mexico in determining a person's domicile. In Texas, the essential elements of domicile are an actual residence and the intent to make it one's permanent home. *Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951). "Home" is defined to mean a person's "true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Id.* See also, *Texas v. Florida*, 306 U.S. 398, 424 (1939) (residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile). In *Pecos v. N.T. Ry. Co. v. Thompson*, 167 S.W. 801, 803 (Tex. 1914), the Texas Supreme Court defined domicile in the following terms:

"Residence" means living in a particular locality, but "domicile" means living in that locality with the intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile.

As the cases makes clear, domicile is not determined by intention alone. The intent to make a place one's home must be concurrent with "bodily presence as an inhabitant." See also, *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999) (a permanent residence in Texas requires a home and fixed place of habitation to which a person intends to return when away).

Application of the Law of Domicile to the Facts. Based on the laws of both New Mexico and Texas, there is a presumption that the Bunches' domicile in New Mexico, first established in 1983, continued through the years that they maintained their home in Los Alamos, New Mexico. In order to overcome this presumption, Mr. Bunch must show that, sometime prior to December 31, 1999, he and his wife had an actual residence in Texas coupled with the concurrent intent to abandon their domicile in New Mexico and make the Texas residence their permanent home.

Domicile of Lo Ree Bunch. There is no evidence to support a finding that Lo Ree Bunch abandoned her New Mexico domicile and become a Texas resident. To the contrary, Mr. Bunch testified that his wife strongly resisted his suggestion that they relocate to Texas. While Mr. Bunch maintains that he established his residence in Texas when he registered to vote there in 1996, he acknowledged that Mrs. Bunch did not register to vote in Texas. During 1996, she was still employed full time in Los Alamos, New Mexico, and was residing in the couple's home at 5 Karen Circle, where she still resides today. Mrs. Bunch did not join in her husband's protest to the Department's assessment of personal income tax for 1999, nor did she attend the hearing on Mr. Bunch's protest.

Domicile of Paul Bunch. The only evidence supporting Paul Bunch's claim that he was a resident of Texas in 1999 is the fact that he registered to vote in Texas in 1996 and made frequent trips to Texas to maintain his numerous rental properties. During the administrative hearing, Mr. Bunch testified that his change in voter registration was based on his reading of the instructions to New Mexico's 1995 personal income tax return and his belief that this action was sufficient to change his residence for purposes of paying New Mexico income tax. It is perfectly legitimate for a person to change his domicile in order to avoid payment of taxes that would otherwise be due to his current state of residence. In order to effect the change, however, intent must be coupled with

concurrent action. As the United States Supreme Court stated in *Texas v. Florida*, 306 U.S. 398, 425 (1939):

While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; [citations omitted] and they are of slight weight when they conflict with the fact. [citations omitted] This is the more so where, as here, decedent's declarations are shown to have been inspired by the desire to establish a nominal residence for tax purposes, different from his actual residence in fact....

The Court further noted that a person “could not elect to make his home in one place in point of interest and attachment and for the general purposes of life, and in another, where he in fact had no residence, for the purpose of taxation.” *Id.* at 426. In this case, Mr. Bunch’s desire to obtain a more favorable tax climate by moving to Texas was never coupled with the actions necessary to abandon his domicile in New Mexico and establish a new domicile in Texas. This conclusion is supported by the following facts:

From 1988 to the present, Mr. Bunch has lived with his wife in the house they own at 5 Karen Circle in Los Alamos, New Mexico, and has always returned to this home after business and vacation trips.

From 1988 to the present, Mr. Bunch has maintained his mailing address and telephone number at 5 Karen Circle in Los Alamos, New Mexico. He has never used a Texas mailing address or telephone number.

Mr. Bunch listed the address of one of his rental properties on his 1996 Texas voter registration, even though he never intended to use this house as his permanent residence and subsequently rented the property to a new tenant.

When Mr. Bunch registered to vote in Texas in 1996, his wife was still working and living full time in Los Alamos, New Mexico. Mrs. Bunch never registered to vote in Texas.

Mr. Bunch used the address of one of his Texas rental properties when he filed his 1999 New Mexico income tax return, but used his New Mexico address when he filed his 1999 federal income tax return.

Although the Bunches made frequent trips to Texas during 1999, each of these trips was only one to three weeks in duration.

The tools, clothing, bedding, and other items the Bunches took with them on their trips to Texas were only used in Texas for the short time they were working on their various rental properties. These items were then brought back to New Mexico.

Mr. Bunch's vehicles are all registered in New Mexico. He has never registered any vehicles in Texas.

Mr. Bunch held a New Mexico driver's license until 2000, when he obtained a driver's license from the state of Kansas. He has never held a Texas driver's license.

It is clear from the evidence that Mr. Bunch never changed his domicile to the state of Texas and has, since 1983, been a New Mexico resident. If Mr. Bunch wishes to avoid the responsibilities that attach to the privilege of residing in this state, he must take affirmative action to abandon his home in New Mexico and establish a permanent residence in the state of Texas.

Calculation of Tax Due. Mr. Bunch filed Form PIT-B to allocate his 1999 income between New Mexico and other states. Except for the \$1,268 of wages Mrs. Bunch earned from her employment in Los Alamos, Mr. Bunch did not allocate any of the couple's income to New Mexico. The Department adjusted the Bunches' return to allocate all of their 1999 income to New Mexico. At the administrative hearing, Mr. Bunch argued that even if he were a New Mexico resident in 1999, he is entitled to exclude income from non-New Mexico sources from the tax base. Specifically, Mr. Bunch argued that his rental income from out-of-state property and his capital gain

from a Washington partnership should not be treated as New Mexico income. He also questioned whether he had been given credit for the \$1,000 capital gain deduction allowed under NMSA 1978, § 7-2-34, and the payment made when he filed his 1999 PIT-1 in February 2003.

After reviewing Mr. Bunch's testimony and the additional information he provided during the period the record was left open after the hearing, the Department agreed that Mr. Bunch is entitled to a partial abatement of the assessment. On September 10, 2003, the Department submitted a letter setting out the following adjustments: \$41,420 of income from rental property located out-of-state and \$1,653 of capital gain from a Washington partnership have been removed from New Mexico income; the taxpayers have been given credit for the \$1,000 capital gain deduction and for the \$86.40 they paid in February 2003. With these adjustments, the amount of the current assessment is as follows: \$3,403.60 tax principal; \$349.00 penalty; and \$1,772.89 interest, calculated through September 9, 2003. Pursuant to NMSA 1978, § 7-1-67, interest continues to accrue at the rate of .041% per day.

CONCLUSIONS OF LAW

1. Paul Bunch filed a timely, written protest to the Notice of Assessment of 1999 personal income tax issued under Letter ID L0357793792, and jurisdiction lies over the parties and the subject matter of this protest.
2. Paul and Lo Ree Bunch were residents of New Mexico during all of 1999 and were required to report their 1999 income to New Mexico on that basis.
3. The assessment issued by the Department, as adjusted pursuant to the Department's letter dated September 10, 2003, correctly calculates the amount of personal income tax, penalty, and interest the Bunches owe to New Mexico for tax year 1999.

For the foregoing reasons, the taxpayer's protest is denied.

DATED September 11, 2003.