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

IN THE MATTER OF THE PROTEST OF
FRANK A. WAGENER AND CAROL L. WAGENER **No. 06-02**
TO NOTICE OF ASSESSMENT OF TAXES
ISSUED UNDER LETTER ID NO. L0859085824

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on January 19, 2006, before Margaret B. Alcock, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Susanne Roubidoux, Special Assistant Attorney General. Frank Wagener, the taxpayer, represented himself. Based on the evidence and arguments in the record, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Frank and Carol Wagener were residents of New Mexico prior to 2003.

2. During calendar year 2003, the Wageners lived in New Mexico from January 1st through October 3rd.

3. On October 4, 2003, the Wageners moved to the State of Washington; on October 7, 2003, Mr. Wagener started a new job with a company in Washington.

4. Between October 7, 2003 and December 31, 2003, Mr. Wagener received wages, bonuses, and moving subsidies from his new employer in Washington. The Wageners also earned a small amount of taxable interest and dividends during this three-month period.

5. When the Taxpayers filed their 2003 personal income tax return (PIT-1) with New Mexico, they excluded the income they received during the three months they were living in Washington from the New Mexico income listed on Form PIT-B (Allocation and Apportionment Schedule) to their PIT-1.

6. On June 9, 2004, the Department assessed the Taxpayers for $1,363.00 of additional personal income tax, plus penalty and interest, on the income the Taxpayers excluded from New Mexico income on their 2003 PIT-B.

7. On June 16, 2004, the Wageners filed a written protest to the assessment.

8. On June 18, 2004, an employee with the Department's Farmington district office informed Mr. Wagener that he and his wife had been released from the assessment and owed no further taxes to New Mexico. This was later confirmed by the Department's protest office.

9. The Department's Personal Income Tax Unit subsequently conducted a further review of the Wageners' 2003 income tax return. The revenue agent conducting the review determined that the assessment had been released in error and that additional tax was due on the wage, interest, and dividend income the Wageners earned in Washington between October and December 2003.

10. On July 14, 2004, the revenue agent sent the Wageners a letter notifying them of her conclusions and enclosing a Statement of Account showing the amount currently due.

11. On July 21, 2004, the Department issued a new assessment under Letter ID L0859085824 reassessing the Wageners for $1,363.00 of 2003 personal income tax, plus penalty of $109.04 and interest of $54.20.

12. On July 24, 2004, before receiving the second assessment, the Wageners filed a written protest to the Statement of Account that was enclosed with the Department's July 14, 2004 letter, noting in the protest that they had not received a current assessment.

13. A copy of the July 21, 2004 assessment was subsequently faxed to Mr. Wagener and his July 24, 2004 protest of the Statement of Account was converted to a protest of that assessment.

14. The Department abated the $109.04 of penalty assessed against the Wageners.

15. At the administrative hearing, the Department stated that it would abate the interest that accrued during the period between the abatement of the first assessment in June 2004 and the issuance of the second assessment in July 2004.

DISCUSSION

The issue to be determined is whether the Wageners are liable for New Mexico personal income tax on the wages, interest, and dividends they earned after leaving New Mexico and moving to Washington in October 2003. NMSA 1978, § 7-1-17(C) states that any assessment of taxes made by the Department is presumed to be correct. *See also, Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491. Accordingly, it is the Wageners' burden to come forward with evidence and legal argument to establish that they are entitled to an abatement of the assessment, in full or in part.

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. 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. Pursuant to § 7-2-11(A), New Mexico residents are required to allocate

100 percent of certain categories of income—including wages, interest, and dividends—to New Mexico, regardless of the source of that income. *See also*, Department Regulation 3.3.11.11 NMAC.

Prior to the 2003 tax year, NMSA 1978, § 7-2-2 of the Income Tax Act defined residency solely in terms of domicile, and provided that "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." In 2003, the New Mexico Legislature amended § 7-2-2 and expanded the definition of residency as follows:

> S. "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 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 ***for periods after that change of abode***; (Emphasis added to reflect 2003 amendment).

Laws 2003, ch. 275, § 1. Pursuant to § 7 of the bill, the amended definition of resident applies to 2003 and subsequent tax years.

Among states that impose an income tax, defining residency based on the duration of a taxpayer's physical presence in the state, as well as on the taxpayer's domicile, is quite common. *Note, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation*, 91 Colum. L. Rev. 119 (1991). A survey conducted in 1991 concluded that New Mexico was one of only three states to limit its definition of a resident to domiciliaries. *Id*. at n. 19. Far from being an aberration, the 2003 Legislature's expansion of the meaning of "resident" in § 7-2-2 brings New Mexico's income tax scheme closer to that employed by other states.

In this case, the Wageners were physically present in New Mexico from January 1 through October 3, 2003. Because they were present in the state for more than 185 days during the 2003 tax year, the Wageners qualified as residents for purposes of New Mexico's personal income tax and were required to allocate all of their 2003 wage, interest, and dividend income to New Mexico. Although Mr. Wagener believes that he should not be required to pay tax on income he earned after establishing a new domicile in Washington, he was unable to provide any legal authority to support his position. The state courts that have addressed this issue have consistently upheld state taxation of nondomiciliaries based on a finding of statutory residency. *See, Schibuk v. N.Y. State Tax Appeals Tribunal*, 733 N.Y.S.2d 801 (2001), *appeal denied*, 778 N.E.2d 551 (2002) (New York was entitled to tax income of statutory residents who established a new domicile in Vermont prior to the end of the tax year); *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125 (N.Y.), *cert. denied*, 525 U.S. 931 (1998) (New York's taxation of statutory residents taxed on the same income by their state of domicile was not unconstitutional, even though New York did not allow a credit for taxes paid to the other state); *Stelzner v. Commissioner of Revenue*, 621 N.W.2d 736 (Minn.), *cert. denied*, 534 U.S. 825 (2001) (application of Minnesota's nondomiciliary resident statute did not implicate the commerce clause); *Luther v. Commissioner of Revenue*, 588 N.W.2d 502 (Minn.), *cert. denied*, 528 U.S. 821 (1999); (Minnesota's taxation of worldwide income of nondomiciliary resident did not violate due process or commerce clauses); *Gwin v. Department of Revenue*, 5 OTR 40 (Oregon Tax Ct. 1972) (neither the federal nor the state constitution prevented Oregon from taxing nondomiciliaries). *Cf., Huckaby v. New York State Div. of Tax Appeals*, 829 N.E.2d 276, 284-285 (N.Y. 2005), *cert. denied*, 126 S.Ct. 546 (2005) and *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 848 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004) (upholding the constitutionality of New

York's taxation of income paid by New York employers for work the taxpayers performed outside the state).

In New Mexico, the potential for double taxation of taxpayers who are treated as residents of more than one state is mitigated by the provisions of NMSA 1978, § 7-2-13, which provides as follows:

> When a resident individual is liable to another state for tax upon income derived from sources outside this state but also included in net income under the Income Tax Act as income allocated or apportioned to New Mexico pursuant to Section 7-2-11 NMSA 1978, the individual, upon filing with the secretary satisfactory evidence of the payment of the tax to the other state, shall receive a credit against the tax due this state in the amount of tax paid to the other state with respect to income that is required to be either allocated or apportioned to New Mexico….

Based on this provision, Mr. Wagener's income from his Washington employer is subject to tax only once. If the State of Washington taxed this income, the Wageners would be entitled to a credit against the tax New Mexico imposed on the same income. Because Washington does not have an income tax, however, the credit is not applicable, and tax on the full amount of the Wageners' income is due to New Mexico.

At the administrative hearing, Mr. Wagener argued that it is unfair for New Mexico to limit its credit to the payment of other state income taxes. Although Washington does not have an income tax, Mr. Wagener contends that the state's overall tax burden is equal to or higher than New Mexico's. For this reason, he believes he should be able to offset New Mexico's tax on his Washington income with the higher sales taxes, gasoline taxes, and government fees he pays to Washington. There is a certain logic to this argument. Nonetheless, the fact remains that the New Mexico Legislature has not chosen to extend the credit provided in § 7-2-13 to taxes or fees unrelated to income tax, and it is not within the power of the Department or its hearing officer to override the Legislature's decision. In *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 ¶ 022,

961 P.2d 768, 774-775, the New Mexico Supreme Court made the following statement concerning the power of administrative agencies:

> Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature....

As currently written, New Mexico's tax laws require individuals who are physically present in the state for more than 185 days to report their income as residents and to allocate 100 percent of their wage, interest, and dividend income to New Mexico. There is no question that the Wageners meet the statutory definition of residents for the 2003 tax year. That being the case, there is no legal basis for abating the additional New Mexico income tax assessed by the Department.

CONCLUSIONS OF LAW

A. The Wageners filed a timely, written protest to the assessment of personal income tax issued under Letter ID L0859085824, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Department's July 21, 2004 assessment was issued within the time limits provided for assessments of tax in NMSA 1978, § 7-1-18(A).

C. The Wageners met the statutory definition of residents for the 2003 tax year and were required to allocate all of their wage, interest, and dividend income to New Mexico, including income earned while they were domiciled in the State of Washington.

For the foregoing reasons, the Wageners' protest IS DENIED, except with respect to the interest that accrued between the Department's abatement of its June 9, 2004 assessment and the issuance of its July 21, 2004 assessment, which the Department has agreed to abate.

DATED January 23, 2006.