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

IN THE MATTER OF THE PROTEST OF
WILLIAM AND JANE KELLERMAN **No. 11-27**
TO ASSESSMENT ISSUED UNDER LETTER
ID NOs. L0067704896, L0809486400, L0336140352, and L0808144960

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on May 26, 2011, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Peter Breen, attorney for the Department. Mr. Thomas Dillon and Mr. Barry Wilson appeared and testified as witnesses for the Department. Mr. William and Jane Kellerman, nėe Jane Hamlin, ("Taxpayers") appeared at the appointed time and were represented by counsel, Thomas Smidt, II. The Department introduced Exhibits #B, C, D, E, F, H, I, J, L, M, O, P, R, S, T, U, V, W, and X. Taxpayers introduced Exhibits #1-33, and submitted W-2s for 2003-2006. The W-2s were submitted after the conclusion of the hearing. All Exhibits were admitted into the record. The W-2s are admitted into the record post hearing. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 16, 2009, the Department assessed Taxpayers in the principal amount of $7,122.00 in personal income tax, $1,424.40 in penalty and $4,669.56 in interest for tax year 2003.

2. On December 16, 2009, the Department assessed Taxpayers in the principal amount of $5,957.00 in personal income tax, $1,191.40 in penalty and $3,014.26 in interest for tax year 2004.

3. On December 16, 2009, the Department assessed Taxpayers in the principal amount of $5,414.00 in personal income tax, $1,082.80 in penalty and $1,924.86 in interest for tax year 2005.

4. On December 16, 2009, the Department assessed Taxpayers in the principal amount of $6,288.00 in personal income tax, $1,257.60 in penalty and $1,297.17 in interest for tax year 2006.

5. On January 12, 2010, Taxpayers filed protests to the assessments.

6. On January 13, 2010, the Department acknowledged the protests.

7. The Department requested a hearing in this matter on August 5, 2010.

8. On September 17, 2010, the Hearings Bureau mailed a Notice of Administrative Hearing in this matter setting the hearing for May 24, 2011.

9. The matter was reset by the Hearings Bureau to May 26, 2011.

10. In 1973, William Kellerman's ("Kellerman") parents moved to reside permanently in New Mexico. Kellerman was in college at the time. Kellerman would often visit them in New Mexico. Kellerman's mother still resides in New Mexico.

11. Kellerman was a New Mexico resident prior to 1996. He raised his family in New Mexico. Kellerman now considers himself a New Mexico resident.

12. Jane Kellerman has always been a New Mexico resident.

13. Kellerman is a retired airline pilot. He was a pilot for 29 years or from January 1980 through September 2008.

14. Kellerman flew on both domestic and international routes. He would often fly from Albuquerque, New Mexico to Dallas/Ft. Worth, Texas.

15. In 1996, Kellerman and his then wife, Elizabeth Brown Kellerman, divorced in Albuquerque.

16. On February 8, 2003, Taxpayers were married in Albuquerque, New Mexico. Exhibit #1.

17. Kellerman surrendered his New Mexico driver's license in December 1993. Exhibit #10.

18. During the tax years in question (2003-2006), Kellerman had a Texas driver's license with an address of 1200 Harwell Drive #1914, Arlington, Texas 76011. Exhibit #2.

19. On January 16, 1994 through December 31, 1995, Kellerman registered to vote in Texas. Exhibit #5. On January 2000 through December 31, 2001 Kellerman was registered to vote in Texas. Exhibit #6. On January 2006 through December 31, 2007, Kellerman was registered to vote in Texas. Exhibit #7.

20. Sometime in 1996, Kellerman decided to change his residency to Texas because his flight schedule always had him flying through the Dallas/Ft. Worth area. During that time period he intended to change his domicile to the state of Texas. Kellerman had a good faith belief based on 1996 New Mexico Personal Income Tax filing instructions that a crew member of an airline company is not required to report his income to New Mexico unless withholding tax had been deducted from his salary. Exhibit# 33.

21. When Kellerman intended to change his domicile to the state of Texas, he rented a condominium located at 1200 Harwell Drive #1914, Arlington, Texas 76011.

22. Sometime in 1996, Kellerman became a ¼ owner of the condominium located at 1200 Harwell Drive #1914, Arlington, Texas 76011. He shared ownership of the condominium with other pilots who flew for American Airlines, Inc. The condominium had two bedrooms, but four beds. It was approximately 960 square feet. In 1996, Kellerman's s ownership interest in the condominium was valued at $5,000.00. Exhibit M.

23. On June 20, 1996, Kellerman notified the federal Department of Transportation that his address was 1200 Harwell Drive #1914, Arlington, Texas 76011. Exhibit #8.

24. In 1997, Kellerman purchased a home on Palo Alto Street in Albuquerque, New Mexico. Exhibit C. That same year, Kellerman moved into the home with Jane Kellerman.

25. On January 18, 2006, Taxpayers registered a vehicle in Texas. Exhibit #3, page 1.

26. Kellerman's pilot licenses for 2007 and 2008 indicate that his address was 1200 Harwell Drive #1914, Arlington, Texas 76011. Exhibit #9, page 1.

27. In tax years 2003-2006, Taxpayers filed their income tax returns listing their home address as 1200 Harwell Drive #1914, Arlington, Texas 76011. Exhibits #11-14.

28. For tax years 2003-2006, on Taxpayers' New Mexico personal income tax returns, Kellerman was listed as a nonresident and Jane Kellerman was listed as a resident.

29. The Notice of Assessment was mailed to Taxpayers at 1200 Harwell Drive #1914, Arlington, Texas 76011. Exhibit #15.

30. Kellerman reviewed his pay statements, his wife's calendars and flight records to determine how many days he was in New Mexico. Exhibits #16-31. He prepared calendars with notations like "fly" indicating what days he was flying outside of New Mexico and "ABQ," which means Kellerman was flying in or out of New Mexico. Exhibits #16, 20, 24 and 28.

31. Taxpayers were allowed to present evidence into the record after the hearing indicating how many nights Kellerman spent in Texas. Taxpayers assert that the number of nights, Kellerman spent in Texas was:

2003-20 nights
2004-15 nights
2005-12 nights
2006- 22 nights.

32. In 2003, Kellerman was physically present in New Mexico for 184 days. Exhibits #16-19; (audio file 1:22-1:25).

33. In 2004, Kellerman was physically present in New Mexico for 171 days. Exhibits #20-23; (audio file 38:03-38:14).

34. In 2005, Kellerman was physically present in New Mexico for 181-184 days. Exhibits #24-27; (audio file 1:03-1:05).

35. In 2006, Kellerman was physically present in New Mexico for 169 days. Kellerman was required to testify at a trial in New Mexico and spent an additional 14 days in New Mexico. Exhibits #28-31; (audio file 1:12-1:20).

36. The home telephone number listed on Kellerman's pilot schedule is an Albuquerque, New Mexico telephone number. Exhibit #21. This is the telephone number American Airlines, Inc. would use to contact Kellerman if the Airlines needed to contact Kellerman regarding his flight schedule.

37. Jane Kellerman paid the couple's bills in Albuquerque, New Mexico.

38. During the tax years at issue, Kellerman conducted his day-to-day affairs almost exclusively in Albuquerque, New Mexico. He went to the dry cleaners in Albuquerque. He went

grocery shopping in Albuquerque. All of his personal belongings were physically located in Albuquerque. Kellerman's family and friends were all located in Albuquerque, New Mexico.

39. On the days and nights Kellerman was physically present in Texas; he ate dinner out at Restaurants.

DISCUSSION

At issue in this matter is whether Kellerman was a resident of New Mexico from 2003 through 2006. Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1, *et seq*. Unless otherwise exempted by law, a tax is imposed "upon the net income of every" New Mexico resident. NMSA 1978, §7-2-3 (1981).

Burden of Proof. Any assessment of tax made by the Department is presumed to be correct. NMSA 1978, § 7-1-17(C); *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491.

Determination of Residency. Section 7-2-2(S) of the Income Tax Act defined the term "resident" as follows:[1]

> "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 [7-2-1 1978] for periods after that change of abode.

NMSA 1978, Section 7-2-2(S) (2003). For the years at issue, residency is synonymous with domicile determined by the intent of the taxpayer ***or*** by counting the number of days the taxpayer

[1] Effective for 2003 and subsequent tax years, § 7-2-2 was amended to expand the definition of residency to include persons who are physically present in New Mexico for 185 days or more during the taxable year. Laws 2003, ch. 275, § 1.

is physical present in New Mexico. In New Mexico, if a taxpayer is physically present 185 or more days, then the taxpayer is considered to be domiciled in New Mexico. If a taxpayer does not meet the 185 physical presence requirement, then the taxpayer's intent becomes relevant. 3.3.1.9(A)(B)(1)(2) (NMAC).

Subsection B of Regulation 3.3.1.9(C)(1) NMAC defines "domicile" as "a place of a true, fixed home, a permanent establishment where one intends to return after an absence and where a person has voluntarily fixed habitation of self and family with the intention of making a permanent home." Subsection C(2) of the regulation establishes a presumption that if an individual who is registered to vote in New Mexico or holds a valid New Mexico driver's license, and has not subsequently registered to vote or obtained a driver's license in any other state, is domiciled in New Mexico. This presumption is rebuttable.

While this regulation was not in effect during some of the tax years in question, it is helpful in analyzing what factors should be considered in determining domicile. Regulation §3.3.1.9(C)(4) NMAC (4/29/2005) provides twelve domicile factors to consider:

> (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;

(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.

The New Mexico Supreme Court has held that a "resident" for purposes of New Mexico personal income tax 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. See, *Murphy v. Taxation and Revenue Department*, 94 N.M. 54, 55, 607 P.2d 592, 593 (1980). 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…."

Texas uses the same basic criteria as New Mexico in determining a person's intent to be domiciled. In Texas, the essential elements of domicile are an actual residence and the intent to make it one's permanent home. "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." *Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951). In *Snyder*, the court

provided that a person can have many residences but only one domicile. *Snyder* at ¶13. 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.

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). It should be noted that in Texas there is no physical presence test and the period of time a person resides is irrelevant to the inquiry of domicile. *Fernandez v. Bustmante*, 305 S.W.3d 333 (Tex. 2010).

Application of the Law of Domicile to the Facts of this Case. Based on the laws of both New Mexico and Texas, there is a presumption that once established, a taxpayer's domicile can be changed if the taxpayer shows that he had an actual residency in another state coupled with the concurrent intent to abandon his present domicile. In this case, the issue is whether Kellerman established actual residency in Texas with the intent to abandon New Mexico and make Texas his permanent home. This, of course, is overlaid in the alternative with the physical presence requirement in New Mexico that if a taxpayer resides within New Mexico for more than 185 days or more, then the person is domiciled in New Mexico.

The only part of the test described above that Kellerman meets is the requirement that he can show actual residency in Texas during the tax years in question. Kellerman was registered to vote in Texas in 1994 and appeared to continue to vote in Texas as late as 2007. Exhibits #5, 6, 7. Kellerman had a driver's license from Texas. Exhibit #2. Kellerman also registered at least one

vehicle in Texas. Exhibit #3. There is no dispute that Kellerman rented and then owned a condominium in Arlington, Texas sometime around 1996. He eventually became a part owner in a condominium which was no more than 960 square feet with two bedrooms. He shared ownership of the condominium with other pilots. Exhibit #B. Kellerman also notified the federal Department of Transportation that he lived in Texas. Exhibit #8. Kellerman established his residency in Texas.

However, there is insufficient evidence that Kellerman ever ***intended*** to abandon New Mexico as his domicile and make toTexas his permanent home state. Kellerman's marriage to Jane Hamlin occurred in New Mexico. Exhibit #1. When he obtained a divorce in 1996, he almost immediately purchased a house so that he and Jane Hamlin could live together. The house was located in Albuquerque, New Mexico. His personal belongings were all in Albuquerque, New Mexico. During the relevant time period, Kellerman conducted his day to day affairs in Albuquerque, New Mexico. His family and friends lived in Albuquerque, New Mexico. He primarily shopped at supermarkets in Albuquerque, New Mexico. Kellerman paid his bills in Albuquerque, New Mexico. If there was a change in his flight schedule, the Airlines contacted Kellerman at his home in Albuquerque, New Mexico. On each flight schedule provided by Taxpayers, the home telephone number is listed as the Albuquerque, New Mexico number. Exhibits #17, 21, 25 and 29.

In reviewing the deeds and property submitted by the Department, Kellerman's Albuquerque address is listed as his primary residence. Exhibits #C, D, E, H, I, and J. (Exhibits #O and C appear to be the same exhibit.) He had a mortgage that listed his Albuquerque home as a primary residence. Exhibits# C, D, H, I and J. The Deed of Trust for the Arlington property indicates that the condominium is intended as a second home. Exhibit #B.

For each year, there is more than sufficient evidence to support the Department's position that Kellerman's intent was not to abandon New Mexico as his home state and that it was Kellerman's intent to be a resident and domiciled in New Mexico for purposes of reporting personal income tax. In terms of analyzing the physical presence requirement, Kellerman spent close to the 185 days required to establish domicile in New Mexico. The number of days spent in New Mexico also helped to determine and establish Kellerman's intent to be domiciled in New Mexico. 3.3.1.9(C)(4) NMAC (4/29/2005). Physical presence may be considered to establish residency in New Mexico.

Other factors which support that Kellerman was domiciled in New Mexico were the actual number of nights he spent in Texas. In fact, he spent very few nights sleeping in his Texas condominium. In 2003, he spent 20 nights in Arlington, Texas. In 2004, he spent 15 nights in Arlington, Texas. In 2005, he spent 12 nights and in 2006, he spent 22 nights in Arlington, Texas. While Kellerman flew threw Texas, this evidence does not support that he actually had a physical presence in the state of Texas.

The evidence establishes that Kellerman's occupation as an airline pilot lent itself to an itinerant lifestyle traveling to faraway places. There is no doubt that Kellerman traveled through Dallas/Ft. Worth and there were times that he spent the night in his condominium that he shared with the other pilots. But, the overwhelming evidence is that while Kellerman flew to interesting exotic places and he flew in and out of the Texas airports, both his intent to make New Mexico his permanent residency and his actual physical presence in New Mexico all establish that he was a New Mexico resident during the time period in question. An important piece of information is the telephone number used by the Airlines to contact Kellerman. The deeds and property documents

submitted by the Department speak very clearly to the conclusion that Kellerman's primary residence was his Albuquerque, New Mexico home.

In conclusion, even though Kellerman registered a vehicle in the state of Texas and even though he was registered to vote in the state of Texas, he did not prove that he had an intent to make Texas his permanent residence. Taxpayer also failed to prove that he lived in outside of New Mexico in the state of Texas for 185 days or more.

Assessment of Penalty.

The Department assessed 20% penalty on the principal amount of tax owed. When a taxpayer fails to pay taxes due to the state as a result of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007) requires that

> there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid. (*italics* added for emphasis)

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional.

Regulation §3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

In this case, due to his erroneous belief that he was a Texas resident, Kellerman did not pay the appropriate New Mexico personal income taxes when due. Kellerman testified that while

he had a certified public accountant file his income tax returns, he never had a conversation with the certified public accountant as to whether he was a New Mexico resident. While certainly not an intentional error or omission, erroneous belief, inadvertent error or inattention meets the legal definition of "civil negligence" under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989). Taxpayer did not present sufficient evidence under Regulation §3.1.11.11 NMAC (1/15/01) to demonstrate nonnegligence. Penalty was correctly imposed in this case.

Computation of Penalty.

The Department imposed a civil penalty of 20% under NMSA 1978, § 7-1-69 (2008) rather than under NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007), in effect prior to January 1, 2008. Since Taxpayers protested the imposition of any penalty, and because the Taxpayer's Bill of Rights requires that an assessment not be "incorrect, erroneous, or illegal," the accuracy of the computation of total penalty amount assessed is an issue for consideration in this protest. NMSA 1978, Section 7-1-4.2 (2003). Even when a Taxpayer is liable for civil negligence penalty, as in this case, a Taxpayer is not required to pay a miscalculated or incorrect amount of penalty. *See id.*

The question about which of the civil negligence penalty provisions is applicable to penalty amounts resulting from unpaid tax liabilities predating the effective date of the amended penalty provision is currently subject to numerous appeals before the Court of Appeals. Eventually, this issue will become moot since either there will be no more of these cases because it has been three years since the effective date of the amended penalty statute or because the Court of Appeals will have had reached a decision on one of the appeals. But until such time as the Court of Appeals makes a decision, the issue must still be analyzed for the record.

The only modification in the statute from NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007), in effect prior to January 1, 2008, versus NMSA 1978, § 7-1-69 (2008), effective January 1, 2008, is an increase of maximum possible penalty not exceed amount of 20% from the previous 10% maximum limit. Under both the previous version and the amended version of the penalty provision, the Department was to apply two percent per month penalty from the time the tax was due and not paid until the penalty reached its statutorily prescribed "not to exceed" limit of either 10% under the previous version (which effectively means a five-month period of time from the time the tax was due but not paid) or 20% under the amended version (which effectively means a ten-month period of time from the time the tax was due but not paid). Under both the previous and amended versions of the penalty provision, although factually a tax principal may remain due and not paid, the legislature prohibits the Department from imposing any additional penalty beyond the "not to exceed" limit.

The question of dispute is whether the Department is impermissibly retroactively applying the amended penalty provision to increase a previously reached "not to exceed" limit of 10% by an additional 10% under the amended penalty provision without clear legislative intent allowing it to do so. As the New Mexico Court of Appeals recently indicated, "a statute or regulation is considered **retroactive if it**…**affixes new disabilities to past transactions**." *Wood v. State Educ. Ret. Bd.*, 2010 N.M. App. LEXIS 134 (N.M. Ct. App. Nov. 10, 2010), citing *Coleman v. United Eng'rs & Constructors, Inc.*, 118 N.M. 47, 52, 878 P.2d 996, 1001 (1994), [bold for emphasis].

In this case, the tax years at issue are prior to the change in law. Under the old penalty statute in effect at the time of the Taxpayer's failure to file and pay tax when due, the Department may only impose 10% penalty to the principal amount of tax owed or 2% per month for five

months. After the maximum amount is reached, no further civil penalty may be imposed even though the tax still remained due and unpaid after that date because the penalty had reached its "not to exceed" limit. The amended penalty provision affixes an additional amount of 10% against a transaction that both predates the effective date of the amended penalty provision and had already reached the former "not to exceed" statutory limit for imposition of penalty.

A statute may only be applied retroactively if there is a clear, unambiguous legislative intent to do so. *See Psomas v. Psomas*, 99 N.M. 606, 609, 661 P.2d 884, 887 (1982). Absent such clear intent for a retroactive application, a statute only applies prospectively. *See id*. The Department has never presented any evidence, nor does the plain language of the statute contain any evidence, that the legislature intended NMSA 1978 Section 7-1-69 (2007) to apply retroactively to obligations that originated before the January 1, 2008 effective date of that revision. Given the legislature's silence on the question of retroactivity of NMSA 1978 Section 7-1-69 (2007), case law suggests that the amended statute should only apply prospectively. *See Psomas*; *See also N.M. Elec. Serv. Co. v. Jones*, 80 N.M. 791, 793, 461 P.2d 924, 926 (Ct. Appl. 1969) ("where an ambiguity or doubt exists as to the meaning or applicability of a tax statute, it should be construed most strongly against the taxing authority and in favor of those taxed"). Moreover, in a case closely on point, the New Mexico Supreme Court has also found that the Department may not retroactively apply a modified penalty regulation against a taxpayer for an obligation that predates the effective date of the modified regulation. *See Kewanee Industries, Inc. v. Reese*, 114 N.M. 784, 845 P.2d 1238 (1993).

Nothing in the plain language of the amended penalty provision, NMSA 1978, Section 7-1-69 (2008) indicates that the Department may re-open an exhausted penalty calculation once that penalty has met its "not to exceed" condition. As mentioned before, without clear evidence of

legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the outstanding tax due for tax years 2003-2006 was subject to a penalty "not to exceed" 10% pursuant to NMSA 1978, Section 7-1-69 (2003) because that was the provision in effect at the time the tax was due and the "not to exceed" condition had been met before the effective date of the amended penalty provision. *See Kewanee Industries, Inc.*; *See also Psomas*; *See also N.M. Elec. Serv. Co.* While the Department was required to impose civil penalty in this instance, that civil penalty should not exceed 10% pursuant to NMSA 1978, Section 7-1-69 (2003). The assessment of penalty shall be reduced by 10%.

CONCLUSIONS OF LAW

1. Taxpayers filed timely written protests of the Notice of Assessment for 2003- 2006 for personal income taxes, penalty, and interest issued under Letter No. # L0067704896, L0809486400, L0336140352, and L0808144960 and jurisdiction lies over the parties and the subject matter of this protest.

2. Taxpayers failed to prove by a preponderance of the evidence that William Kellerman was a resident or was domiciled in Texas during the tax years at issue.

3. William Kellerman was a resident or was domiciled in New Mexico for the tax years at issue.

4. The amount of civil penalty added to the principal tax should not have exceed ten percent as provided in §7-1-69(A)(1)(2003, prior to amendments through 2007) and any amounts assessed in excess of the ten percent (10%) should be abated.

For the foregoing reasons, the Taxpayer's protest **IS GRANTED IN PART AND DENIED IN PART.**

DATED: October 26, 2011

Monica Ontiveros
Hearing Officer
Taxation & Revenue Department
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