

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

**IN THE MATTER OF THE PROTEST OF
ROHANA CALNAIDO
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO.'s L1784928576 and L1324071232**

No. 14-8

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on February 3, 2014 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Dr. Rohana Calnaido (“Taxpayer”) appeared, represented by Attorney Thomas Smidt II, whom also appeared. Staff Attorney Aaron Rodriguez appeared representing the State of New Mexico, Taxation and Revenue Department (“Department”). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits #1-34 and Department Exhibits A-C, and Z were admitted into the record, as described more thoroughly in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On June 13, 2012, the Department assessed Taxpayer \$4,722.96 in personal income tax, \$944.59 in penalty, and \$550.41 in interest for a total of \$6,217.96 for the personal income tax period ending December 31, 2008. [**Letter id. L1784928576**].
2. On July 6, 2012, Taxpayer protested the Department’s assessment of 2008 personal income tax.
3. On July 20, 2012, the Department assessed Taxpayer \$3,443.00 in personal income tax, \$688.60 in penalty, and \$274.53 in interest for a total of \$4,406.13 for the personal income tax period ending December 31, 2009. [**Letter id. L1324071232; Dept. Ex. Z**].

4. On July 20, 2012, Taxpayer protested the Department's assessment of 2009 personal income tax. **[Dept. Ex. Z]**.

5. On August 8, 2013, the Department requested a hearing with the Hearings Bureau in this matter, listing only Taxpayer's protest of the assessment of personal income tax and attaching only the assessment of 2008 personal income tax under letter id. no. L17842928576. The Hearings Bureau had no information related to the assessment of 2009 personal income tax.

6. On August 13, 2013, the Hearings Bureau issued Notice of Administrative Hearing for the protest of assessment letter id. no. L17842928576, setting this matter for a protest hearing on December 16, 2013.

7. On November 19, 2013, Taxpayer moved to continue the scheduled December 16, 2013 hearing date. The Department opposed the request for continuance.

8. On November 20, 2013, the Hearings Bureau issued an Order Granting Continuance and Amended Notice of Hearing, setting this matter for hearing on February 3, 2014.

9. At the commencement of the protest hearing, the Department indicated at the beginning of the hearing that the protest also encompassed Taxpayer's protest of the assessment of 2009 personal income tax. Taxpayer's attorney indicated that Taxpayer had prepared to contest both assessments at hearing and wished to proceed under both assessments during the hearing rather than return for an additional setting. **[2-3-14 CD 0:03:31-0:05:23; 0:08:00-0:09:19]**.

10. Taxpayer was a licensed Psychiatrist during tax years 2008 and 2009 in North Carolina, Wisconsin, and Washington. **[2-3-14 CD 2:33:20-2:33:52]**.

11. Taxpayer has never applied to be a licensed Psychiatrist in New Mexico. **[2-3-14 CD 2:35:10-36]**.

12. Taxpayer has never practiced or worked for any medical facility in New Mexico. **[2-3-14 CD 1:30:20-1:31:49; 2:30:10-18; 2:32:30-45]**.

13. Taxpayer has never owned any interest in property in New Mexico. **[2-3-14 CD 0:57:18-39]**.

14. Taxpayer's partner, Dr. Michele Guindani, moved from North Carolina to New Mexico in September 2007 and at all relevant times thereafter resided in Albuquerque, NM. Because he moved during the relevant period, Dr. Guindani had two addresses in Albuquerque, an address on Eubank Blvd. and an address on Oso Grande Ct. **[Dept. Ex. B; 2-3-14 CD 0:57:12-59; 2:29:40-2:30:25]**.

15. Taxpayer stored some of his large belongings like appliances at Dr. Guindani's addresses in Albuquerque. **[2-3-14 CD 00:29:40-0:30:20]**.

16. Taxpayer visited Dr. Guindani in New Mexico a couple of weekends in 2007. **[2-3-14 CD 2:31:10-2:32:30]**.

17. Taxpayer spent non-work periods such as weekends and holidays at Dr. Guindani's addresses in Albuquerque. **[Dept. Ex. B]**.

18. In 2008, Taxpayer visited Dr. Guindani in New Mexico for at most 20-to-40-days in 2008 and 40-days in 2009. **[2-3-14 CD 2:36:08-50]**.

19. On September 8, 2007, Taxpayer applied for a New Mexico Driver's license, which remained valid for eight years through 2015. **[Taxpayer Ex. #31, p. 138 & p. 145]**.

20. In late 2007, Taxpayer worked in Houston, TX at the Houston VA Medical Center. **[Taxpayer Ex. #32, p. 60; 2-3-14 CD 1:58:50-1:59:46]**.

21. On January 1, 2008, Taxpayer moved to Seattle, WA, and remained there through March 10, 2008. [**Taxpayer Ex. #1-2**].

22. Taxpayer worked as a Psychiatrist in Seattle, WA, for the University of Washington Harborview Medical Center from January 2008 through March 2008, with an additional week in April of 2008. [**Taxpayer Ex. #32, page 59; 2-3-14 CD 1:00:05-35**].

23. On March 10, 2008, Taxpayer moved to Houston, TX. Taxpayer remained in Houston through July of 2009 [**Taxpayer Ex. #3; 2-3-14 CD 1:04:05-1:04:42**].

24. While in Houston, TX, Taxpayer worked for Medical Doctor Associates (which changed its name at some point to Crystal M, Inc.) as a contractor with Houston's VA Medical Center, where he remained through June of 2009. [**Taxpayer Ex. #4; Taxpayer Ex. #32, page 58; 2-3-14 CD 1:08:0-50**].

25. In 2008, Taxpayer did not believe he qualified to register to vote in Texas because he was residing in a hotel. Taxpayer believed his only option was to register to vote in New Mexico. [**2-3-14 CD 1:39:01-1:40:56**].

26. On September 28, 2008, Taxpayer registered to vote in Bernalillo County, NM. Taxpayer's voter registration application listed his address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. 31, page 144**].

27. On or before November 4, 2008, Taxpayer voted absentee in New Mexico in the 2008 general election. [**Taxpayer Ex. 31, page 127; 2-3-14 CD 1:42:25-1:42:34**].

28. On or about November 10, 2008, Taxpayer received a permanent employment position at the Houston VA. [**Taxpayer Ex. 32, p. 54-55; 2-3-14 CD 1:04:01-1:04:15; 1:56:30-1:57:30**].

29. On November 18, 2008, Taxpayer registered his vehicle in Texas, listing the address of a friend in Texas. [**Taxpayer Ex. #8; Taxpayer Ex. #31, p. 132; 2-3-14 CD 2:23:50-2:25:14**].

30. On December 20, 2008, Taxpayer moved into an apartment in Houston, TX on Brompton Street. [**Taxpayer Ex. #9**].

31. On March 20, 2009, using his Brompton Street apartment address, Taxpayer obtained a temporary Texas Driver's License. With this application for license, Taxpayer registered to vote in Texas. [**Taxpayer Ex. #25; Taxpayer Ex. #32, p. 50; 2-3-14 CD 1:21:01-23**].

32. Taxpayer left his Houston Apartment on June 29, 2009, listing his reason for moving out as moving to New Mexico. [**Taxpayer Ex. #10**].

33. Taxpayer worked with Interim Physicians in Raleigh, NC from late August 2009 through June 2010. [**2-3-14 CD 1:33:40-59**].

34. Beginning on August 22, 2009 through December 31, 2009 and continuing into 2010, Taxpayer rented a room at the Residence Inn in Raleigh, NC. [**Taxpayer Ex. #11-12**].

35. On November 14, 2009, Taxpayer applied for a New Mexico driver's license, listing his address as on Oso Grande Ct in Albuquerque, NM. [**Taxpayer Ex. #31, p. 140**].

36. On December 12, 2009, Taxpayer registered his vehicle in New Mexico. [**Taxpayer Ex. #26**].

37. Taxpayer's 2008 Fidelity Investments Form 1099-DIV listed his address as on Oso Grande Ct in Albuquerque, NM. [**Taxpayer Ex. #13-14**].

38. Taxpayer's 2008 Bancorp Bank Form 1098 listed his address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. #15**].

39. Taxpayer's 2008 W-2's from his employment at the University of Washington Medical Center listed his address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. #16**].
40. Taxpayer's 2008 W-2's from the VA from his work at the Houston VA Medical Center listed his address as on Oso Grande Ct in Albuquerque, NM. [**Taxpayer Ex. #17**].
41. Taxpayer's 2008 W-2's from Medical Doctor Associates, LLC, for his contract work at the Houston VA Medical Center listed his address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. #18**].
42. Taxpayer's 2008 W-2's from Crystal M, Inc., for his contract work at the Houston VA Medical Center listed his address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. #19**].
43. Taxpayer's 2008 Countrywide Bank Form 1099-INT listed his address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. #20**].
44. Taxpayer's 2008 Charles Schwab & Co., Inc. Form 1099 listed his address as on Oso Grande Ct in Albuquerque, NM. [**Taxpayer Ex. #22**].
45. Taxpayer's 2008 Schedule C, filed with the IRS, listed Taxpayer's business address as on Eubank Blvd. in Albuquerque, NM. [**Taxpayer Ex. #28**].
46. Taxpayer's 2009 Form 1040 Income Tax Return, filed with the IRS, listed his address as on Oso Grande Ct in Albuquerque, NM. [**Taxpayer Ex. #30**].
47. Taxpayer filed and paid 2009 North Carolina personal income tax. Taxpayer's 2009 North Carolina personal income tax return listed his address as on Oso Grande Ct in Albuquerque, NM. [**Taxpayer Ex. #29; 2-3-14 CD 1:34:00-09**].

48. On April 13, 2010, Taxpayer amended his 2008 IRS Individual Income Tax return. That returned listed Taxpayer's address as on Brompton St. in Houston, TX. [**Taxpayer Ex. #27**].

49. Taxpayer did not file 2008 and 2009 New Mexico personal income taxes and was assessed as a non-filer. [**2-3-14 CD 3:07:00-3:08:47; 3:12:50-3:13:34**].

50. Although Taxpayer submitted a 2008 PIT-1 New Mexico Personal Income Tax into the record, that document is undated and it is unclear when if ever it was submitted to the Department. The Brompton St. Houston address listed on Taxpayer's 2008 PIT-1 is different from the address listed on Taxpayer's 2008 IRS 1040 return, which strongly suggests that Taxpayer did not file the New Mexico 2008 PIT-1 return at the same time he filed his federal income tax return. [**Taxpayer Ex. #21; 2-3-14 CD 3:08:50-3:09:50**].

51. On June 13, 2013, the Department partially abated the assessment of 2008 personal income tax in the total amount of \$2,140.69. [**Taxpayer Ex. # 33; 2-3-14 CD 3:01:00-3:02:35**].

52. As of the date of the hearing, Taxpayer owed \$1,626.00 in 2008 personal income tax, \$325.20 in penalty, \$261.18 in interest for a total 2008 outstanding liability of \$2,212.38. As of the date of the hearing, Taxpayer owed \$3,443.00 in 2009 personal income tax, \$688.60 in penalty, \$415.33 in interest for a total 2009 outstanding liability of \$4,546.93. The combined outstanding liability totaled \$6,759.31 as of the date of hearing. [**Department Ex. C**].

DISCUSSION

The issue at protest is whether in personal income tax years 2008 and 2009, Taxpayer was a resident of New Mexico subject to state personal income tax. Taxpayer argues that he was a resident of Seattle, WA, Houston, TX, or Raleigh, NC in 2008 and 2009 because he was not

physically present in New Mexico for 185-days or more in those years and because he intended to reside at those locations outside of New Mexico in 2008 and 2009. The Department argues that Taxpayer was domiciled in New Mexico during that time, and thus Taxpayer was a resident regardless of his lack of physical presence in New Mexico during those years.

Presumption of Correctness and Burden of Proof

Under NMSA 1978, Section 7-1-17(C) (2007), the assessments issued in this case are presumed correct. Consequently, the Taxpayer has the burden to overcome the assessment of personal income tax. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

Personal Income Tax, Residency, and Domicile

Payment of New Mexico personal income tax is governed by NMSA 1978, §§ 7-2-1 to 36. Unless otherwise exempted by law, a tax is imposed “upon the net income of every” New Mexico resident. NMSA 1978, §7-2-3 (1981). The question in this protest is whether Taxpayer was a resident of New Mexico in income tax years 2008 and 2009.

NMSA 1978, § 7-2-2 (S) (2003, amended 2010) of the Income Tax Act defines the term “resident” as:

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 [7-2-1 NMSA 1978] for periods after that change of abode; (emphasis added).

Under this statute there are two possible basis of residency in New Mexico: either the person was physically present in New Mexico for 185-days *or* the person was domiciled within the state during any part of the tax year and did not change domicile to a new location by the last day of the tax year.

In this case, the evidence clearly established that Taxpayer was not physically present in New Mexico for 185-days or more in 2008 or 2009. During 2008, Taxpayer lived and worked in Seattle, WA for approximately 3.5 months, and lived and worked in Houston, TX for the remaining time. In 2009, Taxpayer lived and worked in Houston, TX for the first six months, and lived and worked in Raleigh, NC for the last four months of the year. At most, Taxpayer spent 40-days in New Mexico during any one year during the relevant period. Since Taxpayer did not meet the 185-day physical presence residency requirement, the only possible basis of residency under Section 7-2-2 (S) for income tax purposes is if Taxpayer was domiciled within New Mexico during any part of income tax year 2008 or 2009 and did not change that domicile before the last day of the taxable year.

New Mexico case law has considered the term domicile extensively. In *Murphy v. Taxation & Revenue Department*, 1980-NMSC-012, ¶7, 94 N.M. 54, the New Mexico Supreme Court found that definition of “resident” depended on a person’s domicile and intent. The *Murphy* court declared that for income tax purposes, residency is synonymous with domicile: “A New Mexico ‘resident’ is an individual domiciled in New Mexico at anytime during the taxable year who does not intentionally change his domicile by the end of the year.” *id.*

This definition of residency as synonymous with domicile was further affirmed a year later by the New Mexico Supreme Court in *Hagan, v. Hardwick*, 1981-NMSC-002, ¶10, 95 N.M. 517. In *Hagan*, the court also found that domicile “does not require physical presence but rather

physical presence in this state at some time in the past, and concurrent intention to make the state one's home." *id.*, ¶10 (internal citations omitted). As the court further explained in *Hagan*,

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, and to show the change two things are indispensable,--First, residence in the new locality; and, second, the intention to remain there.... Mere absence from a fixed home, however long continued, cannot work the change.

id., ¶11 (internal citations omitted). *See also Estate of Peck v. Chambers*, 1969-NMSC-054, ¶5-6, 80 N.M. 290.

In addition to the statute and case law, Regulation 3.3.1.9 (C) NMAC (04/28/06) addresses domicile in New Mexico. Agency regulations interpreting a statute are presumed proper and are to be given substantial weight. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498. Regulation 3.3.1.9 (C) (1) NMAC (04/28/06), 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.

Regulation 3.3.1.9 (C) (1) NMAC (04/28/06) concludes by stating that "every individual has a domicile somewhere, and each individual has only one domicile at a time."

Regulation 3.3.1.9 (C) (2) NMAC (04/28/06) 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." Under Regulation 3.3.1.9 (C) (3) NMAC (04/28/06), a person does not change their domicile if they leave the state with the intention to stay away for a limited time to perform a contract or accomplish a purpose and does not intend to remain in the new location once accomplished.

Regulation 3.3.1.9 (C) (4) NMAC (04/28/06) 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.”

To determine domicile, Regulation 3.3.1.9(C) (4) NMAC (4/28/2006) provides twelve domicile factors to consider (for brevity, these factors will be identified by their respective subparagraph letter for the remainder of the decision):

(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.

Under the legal requirements of domicile and the domicile factors, Taxpayer did not overcome the presumption of correctness that attached to the Department’s assessments. There is

not enough information, or they are not applicable, to make any clear determinations about three factors, (d), (e), or (f).

Four factors under Regulation 3.3.1.9 (C) (4) NMAC (4/28/2006) support Taxpayer's position that he was not domiciled in New Mexico in either 2008 or 2009. Under Factor (a), location of homes owned or rented, Taxpayer rented extended stay hotel rooms or apartments in Washington, Texas, and North Carolina in 2008 and 2009, while not renting or possessing any ownership interest in New Mexico property during that time. Under Factor (b), where the person spends time, Taxpayer spent a strong majority of his time working in other states in 2008 and 2009, while spending comparatively less time in New Mexico. While this factor is still overall supportive of Taxpayer's case, it is not of full weight because Taxpayer did spend time in New Mexico with his partner on weekends and holiday when not required to be working in Seattle, Houston, or Raleigh. Factor (c), employment activities, fully supports Taxpayer's argument in this matter because the evidence clearly established that Taxpayer employment always occurred outside of New Mexico in 2008 and 2009. In fact, Taxpayer never worked in any capacity in New Mexico during those years. Finally, Factor (h)—place of community and professional memberships—supports Taxpayer's position because Taxpayer was not licensed to practice medicine in New Mexico, but licensed to practice in Washington and North Carolina.

In contrast, five factors under Regulation 3.3.1.9 (C) (4) NMAC (4/28/2006) lend various levels of support to the Department's assessments of 2008 and 2009 New Mexico Personal Income Tax. Two factors are of medium weight in support of the Department's assessments. Under factor (g), location of financial transactions, there is very little evidence of Taxpayer's day-to-day financial transactions. However, all of the Taxpayer's statements of accounts and Form-1099's list his address as in Albuquerque. Factor (m), location of items possession that an

individual considers near and dear or of significant economic value, while not fully developed by either party, supports the Department's position because Taxpayer stored his large appliances—items of significant economic value—at his partner's home in Albuquerque in 2008 and 2009.

Three factors are of significant weight in favor of the Department. Under Factor (i), Taxpayer listed his address as in Albuquerque on his 2008 and 2009 federal income tax returns. Taxpayer also listed his business address as in Albuquerque on his Schedule C's. Although H&R Block prepared those tax returns, Taxpayer nevertheless had to sign those returns under penalty of perjury attesting that to the best of his knowledge, the returns were true, correct, and complete. Moreover, H&R Block would have had to rely on the information Taxpayer provided to it in preparing Taxpayer's returns. The address information Taxpayer voluntarily provided on his federal tax return is a significant factor in determining Taxpayer's domicile in those years.

Under Factor (j), Taxpayer actively registered to vote in New Mexico in 2008 and in fact voted absentee in New Mexico in the general election that year. This is particularly persuasive factor in this matter because this does not involve an instance of Taxpayer passively remaining on the voter registration rolls in New Mexico from a previous year, but of Taxpayer affirmatively filing a New Mexico voter registration and voting in 2008, a time he now claims he was not a New Mexico resident. Taxpayer testified that he did so in 2008 because he did not believe he could qualify to register in Texas; implicit in this testimony is that Taxpayer was aware he had insufficient connections with Texas to qualify as a resident there while he believed he could still qualify in New Mexico. It is true that in March of 2009, Taxpayer changed his voter registration to Texas as part of his seeking a Texas driver's license. However, Taxpayer took other actions after the 2009 change in voter registration that are inconsistent with a change of domicile from New Mexico to Texas, including obtaining a New Mexico driver's license in late 2009, filing his

federal tax returns using a New Mexico address in 2009, and listing his reason for moving out of this Houston apartment as moving to New Mexico.

Finally, under Factor (k), Taxpayer maintained a New Mexico driver's license in 2008 and 2009. While there is some countervailing evidence under this factor, mainly that Taxpayer did apply for a Texas driver's license in March of 2009, this factor still supports the Department. Taxpayer applied for an eight-year New Mexico driver's license in late 2007, and reapplied for a New Mexico driver's license in November 2009. Driver was only licensed to drive in Texas for eight months between March and November 2009, while he was licensed to drive in New Mexico for the remaining 16-months in 2008 and 2009. And rather than retaining his Texas driver's license or obtaining a North Carolina license upon relocating to Raleigh for work in late 2009, Taxpayer reestablished his New Mexico driver's license. This action is indicative of domicile under Regulation 3.3.1.9 (C) (3) NMAC (04/28/06): that Taxpayer was only going to North Carolina to complete a work contract rather than to stay there once the purpose was accomplished.

Taxpayer argued that many of the factors supporting domicile are explainable by his use of his partner's mailing address for convenience's sake. While that is generally understandable, there are three countervailing aspects that undermine the weight of that argument. First, Taxpayer could have obtained a PO Box in any city he was located. Second, when leaving his apartment in Houston in 2009, Taxpayer indicated that he was moving to New Mexico, rather than just providing his former landlord with a convenient forwarding mailing address. Third, and more importantly, Taxpayer in fact used the address of another friend in Texas to register his vehicle in Texas. Taxpayer presumably could have used that same friend's address for a whole host of other purposes before he leased his Houston apartment, including obtaining a Texas'

drivers license, registering to vote in Texas, as a mailing address for his financial statements, and as the address on his federal tax filings. Rather than using his Texas' friend's address for these other purposes, Taxpayer consistently choose to list his address in Albuquerque. This again shows that Taxpayer never intended to switch his domicile from New Mexico to Texas.

Although the Department objected to the admission of Taxpayer Exhibit #34 as undisclosed, it is admitted as a rebuttal exhibit that Taxpayer did not obtain until the day before the hearing. However, Taxpayer Exhibit #34 is of less weight than Department Exhibit B, Dr. Guidani's earlier letter to the Department, which appears to be a more genuine factual statement rather than a legal recitation of domicile. In any case, it is clear that Taxpayer spent time in New Mexico, between 20-to-40-days in each relevant year, with Dr. Guindani.

In summary, the presumption of correctness places the burden on Taxpayer to overcome the assessments. Here, Taxpayer obtained a New Mexico driver's license in late 2007 when his partner moved to New Mexico, spent time in New Mexico in 2008, stored his large appliances at his partner's home in New Mexico, used his New Mexico address on his federal tax filings, actively registered to vote, and voted in New Mexico in 2008. This evidence established that Taxpayer was domiciled in New Mexico in 2008, and Taxpayer did not present sufficient evidence to establish a change of domicile to Washington, Texas, or North Carolina in 2008 or 2009. *See Hagan*, ¶10-11. Under the totality of all the evidence, particularly the address information provided on the federal tax returns, the New Mexico voter registration in 2008, and the New Mexico driver's license applications in late 2007 and late 2009, Taxpayer was unable to overcome the assessments in this matter.

Other than as an implicit corollary of his argument that he was not a New Mexico resident subject to income tax, Taxpayer did not challenge the assessment of either interest or

penalty at hearing. The Department properly assessed interest under NMSA 1978, Section 7-1-68 (2007) because the statute's use of the word "shall" mandates imposition of interest. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). The Department properly imposed a civil negligence penalty under NMSA 1978, Section 7-1-69 (2007). *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16 (imposing a reasonable duty on all persons to ascertain the tax consequences of their actions). Consequently, Taxpayer did not overcome the Department's assessment of 2008 and 2009 personal income tax, penalty, and interest and Taxpayer's protest is denied¹.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest of the assessments of 2008 and 2009 personal income taxes, penalty, and interest, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Notice of Hearing only listed Taxpayer's protest of the assessment of 2008 personal income tax because that is the only information the Department provided in its request for hearing in this matter. However, by asserting he was prepared to proceed under both assessed years rather than return for an additional hearing, Taxpayer effectively waived any due process challenge to the Notice of Hearing's listing of only the 2008 assessment of tax.

C. By obtaining a New Mexico driver's license in late 2007 valid through the relevant period, by actively registering to vote and voting in New Mexico in 2008, and by listing his address in New Mexico on his 2008 IRS tax returns, Taxpayer was domiciled in New Mexico in 2008.

¹ Taxpayer may be eligible for income allocation and apportionment under NMSA 1978, Section 7-2-11 (2001) for his income taxable by North Carolina in 2009. To that extent, Taxpayer may be entitled to some further abatement of the 2009 assessment.

Taxpayer did not establish a change of domicile to any other state in 2008 or 2009. *See Hagen*, ¶10-11.

D. On balance, under Regulation 3.3.1.9(C) (4) NMAC (4/28/2006), more factors supported that Taxpayer was domiciled in New Mexico in 2008 and 2009.

E. Taxpayer did not overcome the presumption of correctness of the assessments under NMSA 1978, Section 7-1-17 (C) (2007).

F. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessments.

G. Taxpayer is liable for civil penalty pursuant to NMSA 1978, Section 7-1-69 (2007). *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**. As of the date of the hearing, Taxpayer owed \$1,626.00 in 2008 personal income tax, \$325.20 in penalty, \$261.18 in interest for a total 2008 outstanding liability of \$2,212.38. As of the date of the hearing, Taxpayer owed \$3,443.00 in 2009 personal income tax, \$688.60 in penalty, \$415.33 in interest for a total 2009 outstanding liability of \$4,546.93. Taxpayer may be eligible for some abatement of 2009 personal income tax under Section 7-2-11 after allocation and apportionment of the income tax paid in North Carolina that year. Otherwise, interest continues to accrue pursuant to Section 7-1-67.

DATED: March 17, 2014.

Brian VanDenzen, Esq.
Tax Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630