

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

**IN THE MATTER OF THE PROTEST OF  
JAMES R. HELLERMAN,  
TO THE ASSESSMENTS ISSUED UNDER  
LETTER ID NOS. L0372209616, L1007292368, and L1445951440**

**No. 16-51**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held on August 26, 2016 before Hearing Officer Dee Dee Hoxie. Hearing Officer Chris Romero was also present. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Ms. Veronica Galewaler, Auditor, also appeared on behalf of the Department. Mr. James Hellerman (Taxpayer) appeared for the hearing with his attorneys, Mr. Joseph Walsh and Mr. Kurt Sommer. The Hearing Officer took notice of all documents in the administrative file. Several exhibits were admitted by both parties during the hearing. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The parties were given until September 30, 2016 to file their proposed findings of fact and conclusions of law. Both parties filed timely briefs. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On February 3, 2015, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2011 tax year. The assessment was for \$3,706.00 tax, \$741.20 penalty, and \$309.26 interest. [L0372209616]

2. On February 3, 2015, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2012 tax year. The assessment was for \$12,345.00 tax, \$2,469.00 penalty, and \$662.57 interest. [L1007292368]
3. On February 3, 2015, the Department assessed the Taxpayer for personal income tax, penalty, and interest for the 2013 tax year. The assessment was for \$13,328.00 tax, \$2,665.60 penalty, and \$315.49 interest. [L1445951440]
4. On February 11, 2015, the Taxpayer filed a formal protest letter.
5. On April 3, 2015, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
6. On April 7, 2015, the Hearings Office issued a notice of hearing.
7. A telephonic scheduling hearing was conducted on May 1, 2015. The hearing was held within 90 days of the protest.
8. A scheduling order and notice of hearing was issued on May 4, 2015.
9. On June 2, 2015, the Taxpayer withdrew the protest as to the 2011 tax year.
10. On December 14, 2015, the Taxpayer requested a continuance of the hearing.
11. On December 18, 2015, the request was granted and amended notice was issued.
12. The Taxpayer admitted that he and his wife were residents of New Mexico from 2000 until 2008.
13. The Taxpayer and his wife opened a joint bank account at a local New Mexico bank in 2002. The Taxpayer also had a safety deposit box at the New Mexico bank.
14. The Taxpayer renewed his New Mexico driver's license in 2003. The Taxpayer's license was valid until 2010.

15. The Taxpayer and his wife jointly purchased a home in Lamy, New Mexico in 2005 (the Lamy address).
16. The Taxpayer and his wife carried homeowner's insurance on the Lamy address.
17. The Taxpayer's relationship with his wife became strained after she was arrested.
18. The Taxpayer and his wife decided not to divorce because they had been through divorce before and did not wish to incur the acrimony and expense.
19. The Taxpayer and his wife also chose not to legally separate.
20. The Taxpayer and his wife agreed that they would live separately but remain married.
21. During the audit process, the Taxpayer advised the Department initially that he had moved to Tennessee in 2007, and later amended his statement to 2008.
22. The Taxpayer and his wife jointly purchased a second home in Crossville, Tennessee in 2008 (the TN address). The mortgage indicated that it was a second home.
23. The Taxpayer renovated the TN address to his specifications and for his convenience, without taking his wife's opinions into account.
24. The Taxpayer and his wife purchased goods together to furnish the TN address in 2009.
25. The Taxpayer took numerous items of personal value to him to the TN address, including his African art collection.
26. The Taxpayer intended to live at the TN address, while his wife continued to live at the Lamy address.
27. In 2008, the Taxpayer executed a last will and testament that indicated that he was a resident of Tennessee. The will listed his wife as his sole heir, with a specific exclusion of his children. The will was also signed, executed, and witnessed in New Mexico.
28. In 2009, the Taxpayer obtained a Tennessee driver's license.

29. The Taxpayer continued to register his vehicles in New Mexico until late 2013.
30. The Taxpayer did not register to vote in Tennessee, nor was there evidence that he was registered to vote in New Mexico.
31. The Taxpayer joined a golf club in Tennessee.
32. The Taxpayer went to the eye doctor and to the dentist in Georgia.
33. The Taxpayer's children were adults and did not reside in New Mexico during the tax years.
34. Throughout 2012 and 2013 (the tax years), the Taxpayer worked abroad doing health and economic development projects in Tanzania.
35. For several years, the Taxpayer was living and working full-time in Tanzania or other foreign countries.
36. The Taxpayer was rarely within the United States. However, when he did visit the United States, most of his time was spent in New Mexico with his wife. His wife also visited him in Tanzania.
37. The Taxpayer became accustomed to using cash for most of his transactions. The Taxpayer also routinely used online bill pay and scheduled automatic payments through his credit cards.
38. During the tax years, the Taxpayer leased an apartment, bought a car, and obtained a driver's license in Tanzania.
39. During the tax years, the Taxpayer was not present in New Mexico or in the United States for more than 185 days.
40. In July 2012, the Taxpayer's wife died.

41. During the tax years, the majority of the Taxpayer's mail was being sent to the Lamy address. Because he routinely used online payments and billing, the Taxpayer did not feel the need to change his address right away.
42. The Taxpayer's wife collected their mail, and a neighbor collected the mail after his wife's death.
43. During the tax years, the Taxpayer filed his federal taxes using the TN address. In 2012, the Taxpayer's filing status was married filing jointly. In 2013, the Taxpayer's filing status was single.
44. The Taxpayer had a number of issues to deal with in New Mexico following his wife's death, including disposing of her pets and selling the Lamy address. There were also still several art pieces, furniture, and other items housed at the Lamy address.
45. After his wife's death, the Taxpayer increased the insurance coverage on the house, goods, and art at the Lamy address.
46. The Taxpayer listed the Lamy address for sale, but due to a depressed market and the necessity of repairs, the home did not sell until late 2014.
47. After his wife's death, the Taxpayer continued to travel to New Mexico to deal with the estate and the sale of the home at the Lamy address.
48. For several months after his wife's death, the Taxpayer continued to house vehicles in New Mexico, paid for long-term storage of at least one vehicle at the Albuquerque airport, and renewed the vehicles' registrations in New Mexico in early 2013.

### **DISCUSSION**

The issue to be decided is whether the Taxpayer is liable for personal income tax, penalty, and interest for the 2012 and 2013 tax years. The Taxpayer conceded by withdrawal

that he was liable for the 2011 tax year. The determination hinges on whether the Taxpayer was a resident of New Mexico during the tax years.

The Taxpayer argues that he intended to establish Tennessee as his home by moving there in 2008 and engaging in substantial home renovations to suit his lifestyle. The Taxpayer argues that he intended to remain and reside in Tennessee. The Taxpayer argues that most of the regulatory factors on residence do not support a finding that he was a resident of New Mexico.

The Department argues that the Taxpayer's intent to move to Tennessee is not sufficient to establish a change of his residence. The Department argues that the Taxpayer was an admitted resident of New Mexico for several years. The Department argues that the Taxpayer continued to spend the majority of his time in New Mexico when he was not working abroad. The Department argues that the Taxpayer continued to treat New Mexico as his residence in a number of ways, including his vehicle registrations and having his important documents mailed to the Lamy address.

### **Burden of Proof.**

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled to an abatement.

### **Exhibits.**

The parties both failed to comply with the scheduling order regarding how exhibits were to be identified and paginated. Therefore, references to exhibits will be by letter or number without page numbers referenced.

The Taxpayer objected to several of the Department's exhibits for hearsay and lack of proper foundation. The Department pointed out that most of the Taxpayer's exhibits would suffer from the same lack of foundation, but argued that there was sufficient evidence for their admission based on the testimony and the relaxed rules governing the administrative hearing. The objection is overruled. The rules of evidence and the rules of civil procedure do not apply to these hearings. *See* NMSA 1978, § 7-1B-6 (D) (2015). "The hearing officer may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt, to rule on the admissibility of evidence." *Id.* The Department explained how the documents were requested and received, and there was no evidence of any irregularities in the procedures. The legal residuum rule requires that an administrative decision be supported by some evidence that would be admissible at a jury trial. *See Tallman v. Arkansas Best Freight*, 1988-NMCA-091, 108 N.M. 124. *See also Armijo v. State*, 1987-NMCA-052, 105 N.M. 771. *See also Bransford v. State*, 1998-NMCA-077, 125 N.M. 285.

As an example, the Department pointed out that there was very little water usage at the TN address during the tax years and asserted that this supported their finding that the Taxpayer was not really a resident at the TN address. The Taxpayer argued that without an employee of the water company those documents could not be properly authenticated or understood. However, the Taxpayer then conceded that there was very little water usage at the TN address, but asserted the position that the Taxpayer was living abroad during the tax years while maintaining the TN address as his home, which accounts for the low usage. There does not seem to be any real dispute as to

the truth or accuracy of the exhibits; rather, the dispute is how to interpret the information contained therein. The Taxpayer's testimony touched on all of the issues related to the exhibits, which is sufficient evidence to satisfy the legal residuum rule. The objections are overruled. The exhibits are admitted.

A review of the exhibits, particularly those involving financial transactions, revealed a number of transactions that appear, necessarily, to be made in person, such as deposits signed by the Taxpayer with less cash received, purchases at gas stations, for hotel lodging, and at stores with locations noted. A number of transactions also seem to be automatic payments, such as to the energy company, for subscriptions, and for clubs. A number of transactions also seem to be online purchases as the suffix ".com" is attached. Other transactions are not easy to determine if the purchase was made in person or online, such as to the post office, for airline tickets, and to travel agencies. *See generally* Ex. 28 thru 48, 56 thru 60, and 65 thru 88. Ex. LL.

The Taxpayer was the sole person on the account for one credit card. *See* Ex. 28 thru 48 and 56 thru 60. The Taxpayer admitted that his was the only name on the account and that he was the only one in possession of a credit card for that account. After the Department asked questions about purchases that would have to be made in person, such as gas, the Taxpayer changed his testimony to say that maybe his wife had a copy of his card and was using it while he was gone. The Taxpayer and his wife were both on the account for the other credit card, and the bills were divided to show purchases made with his card and with her card separately. *See* Ex. 65 thru 88. The Taxpayer and his wife had a joint bank account, and the statements did not separately state if purchases were made with different debit cards, but did include copies of checks and deposits with signatures. *See* Ex. LL. Based upon the evidence presented, all of the transactions on the credit card solely in the Taxpayer's name, the transactions on the credit card separately stated under the



Taxpayer's name, and the transactions on the joint account that show the Taxpayer's signature are all attributed to the Taxpayer. All of the transactions on the credit card separately stated under the wife's name, all of the debit card purchases on the joint account, and all of the transactions on the joint account that bear the wife's signature are attributed to the wife.

**Residency.**

Personal income tax is imposed “upon the net income of every resident individual” in New Mexico. NMSA 1978, § 7-2-3 (1981). A person is a resident if the person “is domiciled in this state during any part of the taxable year” or is present in the state for 185 days or more during the taxable year. NMSA 1978, § 7-2-2 (S) (2010). However, a person who changes his place of abode to a location outside of New Mexico during the taxable year “with the bona fide intention” of abiding there permanently is not a resident for the period of time after that change of abode. *Id.* A person is domiciled where that person intends to return after an absence and “has voluntarily fixed habitation of self and family with the intention of making a permanent home.” 3.3.1.9 (C) (1) NMAC (2010). Everyone is deemed to be domiciled somewhere, and a person has only one domicile at a time. *See id.* Once domicile is established, it does not change until the person moves “with the bona fide intention” of making the new location his permanent home. *See* 3.3.1.9 (C) (2) NMAC (2010). There is not a change of domicile if a person's “intent is to stay away only for a limited time, no matter how long”. *See* 3.3.1.9 (C) (3) NMAC (2010).

Residence is synonymous with domicile, and domicile does not require a person's continued physical presence. *See Hagan v. Hardwick*, 1981-NMSC-002, ¶ 10, 95 N.M. 517. Domicile requires a physical presence at some time in the past with the intent to make a home there. *See id.* Once domicile is established, it is presumed to continue until it is shown to have changed. *See id.* at ¶ 11. Several factors should be considered in determining residency. *See*

3.3.1.9 (C) (4) NMAC (2010). A person's declarations are not sufficient to establish domicile. *See Texas v. Florida*, 306 U.S. 398, at 417 (1939). In determining a person's domicile, the Supreme Court of the United States identified several factors to be considered. *See id.* at 414. These factors include time spent in a particular place, activities conducted there, what persons and things of importance are there, intent, and evidence on other domiciles. *See id.*

The regulation uses similar criteria. *See* 3.3.1.9 (C) (4) NMAC. The first factor used to determine domicile is "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". 3.3.1.9 (C) (4) (a) NMAC. The Taxpayer's home with his wife was at the Lamy address, and the home was worth approximately one million dollars at one time. The Taxpayer's other home was at the TN address, and the home was worth approximately \$300,000 after renovations. The Taxpayer also rented an apartment in Tanzania where he lived while he was working abroad. The home at the Lamy address served, undisputedly, as the Taxpayer's residence with his wife until 2008. The Lamy address continued to house his wife, furnishings, and some art collections. The Taxpayer admitted that the Lamy address was where he had most of his mail sent, even after his wife's death. The Taxpayer also admitted that most of the time he flew into and out of Albuquerque, which is relatively close to the Lamy address, and eventually set up long-term airport parking for his vehicle in Albuquerque. The Taxpayer kept his African art at the TN address and has repeatedly asserted his intent to make it his residence. The value and use of the Lamy address support the Department's finding that the Taxpayer was a New Mexico resident.

The second factor is

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[.] 3.3.1.9  
(C) (4) (b) NMAC.

The Taxpayer was employed and lived abroad. The vast majority of each of the tax years was spent outside of the United States. It appears that the Taxpayer spent at least approximately 47 days in New Mexico in 2012 based on what appear to be in-person transactions or purchases. *See* Ex. LL; Ex. 29 thru 31; Ex. 34; Ex. 56 thru 58; Ex. 60; Ex. 70 thru 72; Ex. 74; and Ex. 77. It appears that the Taxpayer spent at least approximately four days in Tennessee in 2012 based on what appear to be in-person purchases. *See* Ex. 34; Ex. 37; and Ex. 74. It appears that the Taxpayer spent at least approximately 13 days in New Mexico in 2013 based on what appear to be in-person transactions or purchases. *See* Ex. LL; Ex. 80 thru 82; and Ex. 86. It appears that the Taxpayer spent at least approximately six days in Tennessee in 2013 based on what appear to be in-person purchases. *See* Ex. 46; Ex. 82; and Ex. 86 thru 87. The Taxpayer's testimony provided no specific information on dates he was in New Mexico or Tennessee, merely his intent to make Tennessee his home and his admissions to returning frequently to New Mexico to see his wife or deal with her estate. The Taxpayer continued to register his vehicles in New Mexico through 2013. The Taxpayer had an eye doctor and dentist in Georgia, which is much closer to Tennessee. The Taxpayer also traveled to other locations throughout the tax years, such as to see his girlfriend in Georgia after his wife's death and to Maryland. The Taxpayer seems to have spent significantly more time in New Mexico during the tax years than in Tennessee. A change of domicile requires intent, but it also requires physical presence in the new location. *See Estate of Peck v. Chambers*, 1969-NMSC-054, 80 N.M. 290. A person cannot "elect to make his home in one place...for general purposes of life, and in another, where he in fact had no residence, for the purpose of taxation." *Texas v. Florida*, 306 U.S. at 426. Moreover, a lack of physical

presence in the location can undermine a person's expressed intention to change domicile. *See Severns v. New Mexico Taxation and Revenue Dep't*, No. 31,817, mem. op. at ¶ 12 (NMCA April 1, 2013) (non-precedential). Therefore, this factor supports the Department's finding that the Taxpayer was a resident of New Mexico.

The third factor is the individual's employment and its location. *See* 3.3.1.9 (C) (4) (c) NMAC. It was undisputed that the Taxpayer's employment was abroad and did not involve activities in New Mexico nor in Tennessee. This factor does not support a finding of residence in New Mexico nor in Tennessee.

The fourth factor is "home of place of abode of the individual's spouse, children, and dependent parents, and where minor children attend school". 3.3.1.9 (C) (4) (d) NMAC. It was undisputed that the Taxpayer's wife resided in New Mexico until her death. The Taxpayer's children were adults and did not live in New Mexico or in Tennessee. Although the Taxpayer maintains that he was separated from his wife, the Taxpayer remained married to her, did not file for a legal separation, and continued to file his taxes as married filing jointly until after her death. This factor supports the Department's finding that the Taxpayer was a resident of New Mexico.

The fifth factor is the location of residence in prior years. *See* 3.3.1.9 (C) (4) (e) NMAC. It was undisputed that the Taxpayer was a resident of New Mexico for several years prior to 2008. The Department also argues that the Taxpayer has paid New Mexico personal income tax for several years after 2008 and points out that the Taxpayer withdrew his protest as to the 2011 tax year. When a person concedes liability as a resident for previous tax years in dispute, residency is presumed to continue until proven otherwise. *See Severns* at ¶ 13. This factor supports the Department's finding that the Taxpayer was a resident of New Mexico.

The sixth factor is “ownership of real property other than residences”. 3.3.1.9 (C) (4) (f) NMAC. There was no evidence that the Taxpayer owned any real property other than the residences at the Lamy address and the TN address. This factor does not support a finding of residence in New Mexico nor in Tennessee.

The seventh factor is the “location of transactions with financial institutions, including the individual’s most active checking account and rental of safety deposit boxes”. 3.3.1.9 (C) (4) (g) NMAC. There was very little evidence presented on this issue. There was evidence that the Taxpayer and his wife financed the TN address with a bank in Tennessee. *See* Ex. GG. The Taxpayer had a joint checking account with his wife at a New Mexico bank and also paid for a safety deposit box there. *See* Ex. LL. The transactions with the New Mexico bank also show that the Taxpayer had a joint account with his wife at a bank in Washington, D.C. *See* Ex. LL. The New Mexico account was obviously not the one that the Taxpayer was using the majority of the time since it had basically no transactions for several months after his wife’s death. *See* Ex. LL. However, given the lack of evidence, this factor supports the Department’s finding that the Taxpayer was a resident of New Mexico.

The eighth factor is the location of club memberships and community affiliations. *See* 3.3.1.9 (C) (4) (h) NMAC. The Taxpayer was a member of a golf club in Tennessee, although he admitted that he was rarely able to make use of the membership. Nevertheless, this factor supports the Taxpayer’s assertion that he is a resident of Tennessee.

The ninth factor is the address used to file federal tax returns. *See* 3.3.1.9 (C) (4) (i) NMAC. The Taxpayer used the TN address to file his federal tax returns for 2012 and 2013. Therefore, this factor supports the Taxpayer’s assertion that he is a resident of Tennessee.

The tenth factor is where one is registered to vote. *See* 3.3.1.9 (C) (4) (j) NMAC. There was no evidence that the Taxpayer was registered to vote in New Mexico or in Tennessee. Therefore, this factor does not support a finding of residence in New Mexico nor in Tennessee.

The eleventh factor is where one has a driver's license or professional license. *See* 3.3.1.9 (C) (4) (k) NMAC. The Taxpayer had a New Mexico driver's license, which was issued in 2003 when he was admittedly a New Mexico resident. That driver's license remained valid through 2010. The Taxpayer never notified MVD that he intended to change his residence to the TN address and did not surrender his New Mexico driver's license. However, the Taxpayer obtained a Tennessee driver's license in 2009. This factor slightly supports the Taxpayer's assertion that he was a resident of Tennessee.

The twelfth factor is residence for purposes of tuition, hunting licenses, and other official purposes. *See* 3.3.1.9 (C) (4) (l) NMAC. There was no evidence presented on this factor. Therefore, this factor does not support a finding of residence in New Mexico nor in Tennessee.

The final factor is where items of personal, sentimental value are located. *See* 3.3.1.9 (C) (4) (m) NMAC. The Taxpayer is an art collector. The Taxpayer admitted that some art remained in New Mexico, but the pieces that he holds in highest esteem are his African art collections, which he took to Tennessee. The Taxpayer's wife had pets in New Mexico, but the Taxpayer did not value them and promptly gave them away after his wife's death. Based upon the totality of the evidence, this factor supports the Taxpayer's assertion that he was a resident of Tennessee.

Four factors weigh neutrally, four factors weigh in favor of the Taxpayer, and five factors weigh in favor of the Department. A person's declarations of intent are given weight, but are not conclusive. *See* 3.3.1.9 (C) (4) NMAC. No one factor is conclusive, and driver's licenses, voter

registrations and home addresses may be given less weight given the ease with which they can be changed for tax purposes. *See id.* The most significant factors seem to be the ones that deal with where and how a person spends the majority of their leisure time. *See id.* The Taxpayer's intent to reside in Tennessee was clear. However, the Taxpayer's testimony was vague on when, where, and how he spent his time when he was back in the United States. When challenged to explain inconsistencies in his timelines, the Taxpayer changed his testimony, could not recall, or indicated that his wife was responsible for the appearance of his presence in New Mexico. Based upon the totality of the evidence, the Taxpayer failed to overcome the presumption of correctness.

#### **Assessment of Penalty.**

Penalty “shall be added to the amount assessed” when a tax is not paid on time due to negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word “shall” indicates that the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Assessments of penalty are presumed to be correct and it is a taxpayer's burden to show that the assessment was not correct. *See* 3.1.11.8 NMAC (2001). *See* NMSA 1978, § 7-1-17. *See also El Centro*, 1989-NMCA-070. Negligence includes inadvertence. *See* 3.1.11.10 (C) (2001). Under the statute and regulations, an honest mistake is tantamount to inadvertence, and is subject to penalty. *See id.* Therefore, penalty was properly assessed.

#### **Assessment of Interest.**

Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n.*,

2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the tax was not paid when it was due, interest was properly assessed.

**Matters not at issue.**

The Department argued that it had the right to reject the Taxpayer's reported adjusted gross income and that the Taxpayer's federal returns were inaccurate as to the length of his presence in the United States during the tax years. *See Holt v. N.M. Dep't. of Taxation and Revenue*, 2002-NMSC-034, ¶ 23, 133 N.M. 11 (finding that the Department had the authority to recalculate taxable income). The Taxpayer did not protest the amounts of the assessments. The Taxpayer's protest was based solely on his status as a New Mexico resident. Therefore, the Department's recalculation of taxable income was not at issue, and the Department's arguments on this issue are moot.

**Prevailing party.**

The Taxpayer moved for costs and fees associated with pursuing his protest. When a taxpayer is the prevailing party in an administrative proceeding, "the taxpayer *shall* be awarded a judgment or a settlement for reasonable administrative costs incurred in connection with an administrative proceeding". NMSA 1978, §7-1-29.1 (A) (emphasis added). To be a prevailing party, a taxpayer must substantially prevail with respect to the amount in controversy or with respect to the issues involved. *See* NMSA 1978, §7-1-29.1 (C) (1). The Taxpayer is not the prevailing party. Therefore, the Taxpayer is not entitled to costs.

**CONCLUSIONS OF LAW**



A. The Taxpayer filed a timely written protest to the assessments issued under Letter ID numbers L0372209616, L1007292368, and L1445951440, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer was a legal resident of New Mexico for several years prior to 2008. The Taxpayer remained a legal resident of New Mexico during the tax years because he failed to establish that he changed his residence. *See Hagan v. Hardwick*, 1981-NMSC-002, ¶ 11. *See* 3.3.1.9 (C) (4) NMAC. *See Texas v. Florida*, 306 U.S. 398.

C. The Taxpayer failed to prove that he was not negligent; therefore, penalty was properly assessed. *See* NMSA 1978, § 7-1-69.

D. The tax was not paid when it was due, so interest was properly assessed. *See* NMSA 1978, § 7-1-67.

E. The Taxpayer failed to overcome the presumption of correctness. *See* NMSA 1978, § 7-1-17.

F. The Taxpayer is not the prevailing party and is not entitled to an award of costs and fees. *See* NMSA 1978, §7-1-29.1.

For the foregoing reasons, the Taxpayer's protest **is DENIED**.

DATED: October 26, 2016.

*Dee Dee Hoxie*  
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DEE DEE HOXIE  
Hearing Officer  
Administrative Hearings Office  
Post Office Box 6400  
Santa Fe, NM 87502

## NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal **with the New Mexico Court of Appeals** within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.