

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

**IN THE MATTER OF THE PROTEST OF  
MEKKO MILLER & ELAINE SUAZO,  
TO ASSESSMENTS ISSUED UNDER  
ID NOS. L1256836736, L1123391872, L0249464192**

**No. 10-01**

**DECISION AND ORDER**

A formal hearing on the above-referenced protest was held October 29, 2009, before Brian VanDenzen, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Patrick E. Preston, Special Assistant Attorney General. Mekko Miller and Elaine Suazo-Miller ("Taxpayers") appeared. Mr. Miller is an attorney, and he represented Taxpayers. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayers were married in September, 2004.
2. In tax-years 2004, 2005, and 2006, Taxpayers jointly filed federal income tax returns using an Albuquerque address.
3. Taxpayers believed and claimed that they were entitled to the exemption from payment of New Mexico State Income Taxes for the tax years 2004, 2005, and 2006 under NMSA 1978, §7-2-5.5 (1995), which exempts "earnings by Indians, their Indian spouses and Indian dependants on Indian lands" ("Exemption").
4. At the hearing, Taxpayers conceded that Mrs. Elaine Suazo-Miller was not entitled to the Exemption in tax years 2004, 2005, and 2006 because she was living in Albuquerque on an area not contained within Indian land.

5. Mr. Mekko Miller is an enrolled member of the Pueblo of Tesuque, as shown by Taxpayer #4.
6. In tax year 2004, Mr. Miller was employed by the Pueblo of Tesuque as Legal Counsel.
7. In tax year 2004, Mr. Miller had wages, tips, and other compensation totaling \$70,919.92, as shown on Mr. Miller's W2 form on Taxpayer #3.
8. In tax year 2004, no New Mexico State Personal Income Tax was withheld from Mr. Miller, as shown by Taxpayer #3.
9. There is no evidence on the record that Mr. Miller had any money withheld or made any direct payment of New Mexico State Personal Income Tax for the tax year of 2004.
10. Mr. Miller was unable to provide his W2 forms for the tax year of 2005.
11. Mr. Miller nevertheless remained employed in tax year 2005 with the Pueblo of Tesuque as Legal Counsel.
12. There is no evidence on the record that Mr. Miller had any New Mexico State Personal Income Tax withheld or made any direct payment of New Mexico State Personal Income Tax for the tax year of 2005.
13. In 2006, then-Governor of the Pueblo of Tesuque Gil Vigil wrote a letter to tax auditor Mike Wilson of the New Mexico Taxation and Revenue Department indicating that in 2005 Mr. Miller was an enrolled member of the Pueblo of Tesuque, domiciled within the exterior boundaries of the Pueblo of Tesuque, and employed by the Pueblo of Tesuque, as shown by Taxpayer #5.
14. In tax year 2006, Mr. Miller had wages, tips, and other compensation totaling \$81,526.40, as shown on Mr. Miller's W2 form on Taxpayer #9.

15. In tax year 2006, no New Mexico State Personal Income Tax was withheld from Mr. Miller, as shown by Taxpayer #3.
16. There is no evidence on the record that Mr. Miller had money withheld or made any direct payment of New Mexico State Personal Income Tax for the tax year of 2006.
17. Mr. Miller has title in real estate located within the exterior boundaries of the Pueblo of Tesuque, as shown by Taxpayer #6.
18. The address of Mr. Miller's real property is Rt. 42 Box 55-T, Santa Fe, NM 87506.
19. Mr. Miller's real property in Tesuque was given to him by his grandparents in accord with Tesuque Pueblo tradition in 1990.
20. Mr. Miller did not know the square footage of his home on that real property.
21. Mr. Miller's home on that real property is four bedrooms and two bathrooms.
22. Mr. Miller testified that at all relevant times during the years of 2004, 2005, 2006 he resided primarily at his real property at Rt. 42 Box 55-T, Santa Fe, NM 87506.
23. Mr. Miller testified that he maintains all his most important valuables, including his ceremonial garb, at his home within the boundaries of the Pueblo of Tesuque.
24. Mr. Miller is registered to vote with an address of 55 Tesuque Pueblo, Santa Fe, NM 87506, as shown by Taxpayer #7.
25. Mr. Miller voted within the exterior boundary of the Pueblo of Tesuque three times in 2004, as shown by Taxpayer #7.
26. Mr. Miller voted within the exterior boundary of the Pueblo of Tesuque one time in 2005, as shown by Taxpayer #7.
27. Mr. Miller voted within the exterior boundary of the Pueblo of Tesuque two times in 2006, as shown by Taxpayer #7.

28. Taxpayers rented an apartment in the City of Albuquerque during the years of 2004, 2005, and 2006.
29. Taxpayers' apartment in Albuquerque is not within the boundaries of a federally recognized Indian Land.
30. Taxpayers do not know the square footage of their apartment.
31. Taxpayers' apartment had two-bedrooms and two-baths.
32. Taxpayers testified they obtained the apartment in Albuquerque as a matter of convenience so that Mrs. Suazo-Miller could attend the University of New Mexico and work in and around Albuquerque.
33. At all relevant times in 2004, 2005, and 2006, Mrs. Suazo-Miller resided at the rental apartment in Albuquerque.
34. In 2004, Mr. Miller maintained two-to-three days worth of clothes, a bike, a television, and a laptop computer at the Albuquerque apartment.
35. Mr. Miller testified that he lived at his home on Tesuque Pueblo during the week, and then spent weekends in 2004 at the Albuquerque apartment with his wife.
36. In 2005, Taxpayers separated due to marital problems.
37. Taxpayers reconciled their marriage in 2008.
38. During the period of separation beginning in 2005, Mr. Miller testified that he no longer spent his weekends at the Albuquerque apartment.
39. During the relevant time of 2004, 2005, 2006, Taxpayers registered their automobiles at the address of the apartment in Albuquerque.

40. Taxpayers testified that the car dealer where the vehicles were purchased used the Albuquerque apartment's address as a matter of convenience because rural addresses are difficult to describe.
41. Taxpayers have a young child who attends school at the Indian School in Santa Fe.
42. When not attending school in Santa Fe, the child lived at the Albuquerque apartment with the child's natural mother Mrs. Suazo-Miller.
43. Mr. Miller banks with Del Norte Credit Union headquartered in Santa Fe.
44. On May 7, 2008, Governor of the Pueblo of Tesuque Robert Mora Sr. wrote a letter to Mr. Mekko Miller at Rt. 42 Box 55-T, Santa Fe, NM 87506, as shown by Department B.
45. In that letter, Governor Mora informed Mr. Miller that it appeared Mr. Miller was subject to state income tax withholdings for the current calendar year of 2008 and previous calendar years because he was not residing at Rt. 42 Box 55-T, Santa Fe, NM 87506.
46. Governor Mora required that Mr. Miller submit documentation by May 21, 2008 to substantiate Mr. Miller's address on pueblo land.
47. Taxpayers never complied with Governor Mora's request for substantiation of residency.
48. On July 16, 2008, Governor Mora wrote a letter to Secretary Rick Homans of the New Mexico Taxation and Revenue Department, as shown by Department A.
49. In that letter, Governor Mora informed Secretary Homans that Mr. Mekko Miller had potentially misused the Exemption under NMSA 1978, §7-2-5.5 (1995) by claiming that exemption while "apparently residing in Albuquerque, NM." See Department A.
50. In that letter, Governor Mora also informed Secretary Homans that Mr. Miller failed to comply with Tesuque Pueblo's request for documentation to substantiate his claim of residency within the boundaries of Tesuque Pueblo.

51. Secretary Homans routed the executive correspondence from Governor Mora to the Audit and Compliance Division of the Taxation and Revenue Department.
52. On July 30, 2008, Audit and Compliance Director Phillip Salazar wrote a letter to Governor Mora acknowledging receipt of Governor Mora's July 16, 2008 letter.
53. On October 19, 2007, the Department issued a Notice of Assessment, Letter ID. #L1256836736, to Taxpayers for Personal Income Tax for the tax year of 2004.
54. On August 13, 2008, the Department issued a Notice of Assessment, Letter ID. #L1123391872, to Taxpayers for Personal Income Tax for the tax year of 2005.
55. On October 21, 2008, the Department issued a Notice of Assessment, Letter ID. #L0249464192, to Taxpayers for Personal Income Tax for the tax year of 2006.
56. Taxpayers timely filed a protest to each respective assessment.
57. On October 2, 2009, Mr. Miller received his 401(k) retirement account statement at the address of Rt. 42 Box 55-T, Santa Fe, NM 87506, as shown by Taxpayer #8.

### **DISCUSSION**

Taxpayers challenge the Department's assessments of New Mexico personal income tax for the tax years of 2004, 2005, 2006 based on their contention that they were entitled to claim an exemption in each of those respective years pursuant to the Exemption, NMSA 1978, §7-2-5.5 (1995). During the hearing, Taxpayers conceded that Mrs. Suazo-Miller was not entitled to the Exemption under NMSA 1978, §7-2-5.5 (1995) in 2004, 2005, or 2006. In light of the abandonment of the Taxpayers' claim that Mrs. Suazo-Miller was entitled to the Exemption, all income attributable to Mrs. Suazo-Miller for tax years 2004, 2005, and 2006 is subject to New Mexico Personal Income Tax. Consequently, this discussion section will focus entirely on the

question of whether the Taxpayers demonstrated that Mr. Miller was entitled to the Exemption under NMSA 1978, §7-2-5.5 (1995) in tax years 2004, 2005, and 2006.

### **I. Presumption of Correctness and Burden of Proof.**

Under NMSA 1978, §7-1-17(C) (2007), all three assessments issued in this case for the respective tax years of 2004, 2005, and 2006 are presumed to be correct. Consequently, the Taxpayers have the burden to overcome the assessments by demonstrating that Mr. Miller was entitled to the Exemption from personal income tax in each respective year.

### **II. Personal Income Tax and the Exemption.**

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).

Under NMSA 1978, §7-2-5.5 (1995), “Exemption; earnings by Indians, their Indian spouses and Indian dependants on Indian lands,”

Income earned by a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, his spouse or dependent, who is a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, is exempt from state income tax if the income is earned from work performed within and the member, spouse or dependent lives within the boundaries of the Indian member's or the spouse's reservation or pueblo grant or within the boundaries of lands held in trust by the United States for the benefit of the member or spouse or his nation, tribe, band or pueblo, subject to restriction against alienation imposed by the United States.

If Taxpayers can demonstrate that Mr. Miller was entitled to the Exemption in tax years 2004, 2005, and 2006, then income attributable to Mr. Miller in those respective years would not be

subject to New Mexico personal income tax. As mentioned, since Mrs. Suazo-Miller conceded that she did not live on Indian Land during the relevant time period, that exemption does not apply to income attributable to Mrs. Suazo-Miller in tax years 2004, 2005, and 2006.

### **III. Three Requirements for the Application of the Exemption.**

NMSA 1978, §7-2-5.5 (1995) has three mandatory elements before the Exemption can apply to otherwise taxable net income.

#### *(A) First Element of the Exemption.*

First, there must be earned income by a member of a New Mexico federally recognized Indian nation. See id. There is no dispute in this matter that Mr. Miller earned income in each of the respective tax years of 2004, 2005, and 2006. Taxpayers presented uncontroverted evidence that Mr. Miller is an enrolled member of the Pueblo of Tesuque. The Department does not dispute either Mr. Miller's enrollment as a member of Tesuque Pueblo or that Tesuque Pueblo is a New Mexico Federally recognized Indian nation. Consequently, Taxpayers have established that Mr. Miller earned income as a member of a New Mexico federally recognized Indian nation.

#### *(B) Second Element of the Exemption.*

The second condition of the Exemption is that the earned income derives from work performed within the boundaries of the Indian member's or spouses' land. See id. Again, the Department does not dispute that Mr. Miller earned income in tax years 2004, 2005, and 2006 from his employment as Tesuque Pueblo counsel. But there is still an issue as whether Mr. Miller's employment constituted "work performed within" Tesuque Pueblo. The statute does not specify what is meant by "work performed within." The department's own regulation seems to



limit the scope of the Exemption to income derived “from property or activities on the tribal territories”. See 3.3.4.12(C) NMAC (5/15/2001).

Neither the Taxpayers nor the Department addressed whether working as an attorney for Tesuque Pueblo necessarily constitutes “work performed within” the Tribal boundaries. The work of an attorney is hardly limited to a specifically defined property or activities performed exclusively within one narrowly defined geographical boundary. Other than asserting Mr. Miller’s position of employment, the Taxpayers made no effort to describe or document the nature of Mr. Miller’s work as counsel for Tesuque Pueblo. Mr. Miller may have in fact only handled internal legal matters entirely within the boundaries of the Tesuque Pueblo. But it is also as likely that Mr. Miller performed numerous legal activities on behalf of Tesuque Pueblo outside of the boundaries of the Tesuque Pueblo, such as litigation in state and federal courts, state and federal regulatory work, negotiation of contracts with state agencies, federal agencies, and non-tribal businesses, and other activities beyond the borders of the Tesuque Pueblo.

Since the statute is silent on the definition of “work performed within”, it’s difficult to determine whether the legislature intended that the Exemption apply only when all the work is performed within the Tribal boundaries, most of the work is performed within the tribal boundaries, or just some portion of the work is performed within the tribal boundaries. The regulation at least recognizes that there are varying degrees of “work performed within” by stating that if only “a negligible portion of the income derives from property or activities on the tribal territory... the entire amount is net income” subject to New Mexico personal income tax. id. The regulation also limits its application by expressly recognizing federal law’s prohibition on state personal income taxes on tribal members from income derived from within tribal territory. See id.

Looking to federal law for a clearer definition of “worked performed within”, the seminal federal case on the prohibition of state personal income taxes on tribal members from income derived from within tribal territory is McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1972). In McClanahan, the United States Supreme Court held that Arizona could not impose a state personal income tax on a tribal member whose income “derived wholly from reservation resources.” id. at 179. Since there is no clear State standard to analyze the term “work performed within”, and the regulation recognizes the limitations imposed by federal law, the standard articulated by McClanahan that the income must be “derived wholly from reservation resources” is controlling in determining when a tribal member’s income is exempt from state income tax.

Applying that federal standard to this case, it is clear that Mr. Miller’s income derived wholly from reservation resources. Mr. Miller was employed exclusively by Tesuque Pueblo as legal counsel during the tax years of 2004, 2005, 2006. Even if the nature of his profession required him to perform some portion of his work outside of the boundaries of Tesuque Pueblo, his income was paid directly and wholly from Tesuque Pueblo resources. Consequently, Taxpayers have established the second statutory requirement that Mr. Miller’s earned income derives from work performed within the boundaries of the Indian member’s or spouses’ Indian land.

*(C) Third Requirement of the Exemption.*

The third requirement under NMSA 1978, §7-2-5.5 (1995) is that the “member, spouse or dependent” claiming the Exemption “lives within the boundaries” of the applicable tribal land. The Taxpayers argue that Mr. Miller lived “within the boundaries” during tax years 2004, 2005, and 2006. The Department challenges the Taxpayer’s assertion.

Again, neither the statute nor the regulation interpreting the statute provide a definition, standard, or test to determine what is meant to “live within the boundaries” of tribal land. Taxpayers argue for the application of Regulation 3.3.1.7 NMAC (4/29/2005), which addresses residency and defines factors to determine domicile, to determine whether Mr. Miller “lived within the boundaries” of tribal land during the tax years of 2004, 2005, and 2006. Although not explicitly stated, the Department did not contest the Taxpayers’ position that the residency and the application of the domicile factors listed by regulation is the appropriate method to determine whether Mr. Miller “lived within” Tesuque Pueblo during the relevant time frame.

(i) “Lived Within”, Residency, and Domicile.

NMSA 1978, § 7-2-2 (S) (2007) 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;

Regulation mirrors this statutory definition almost exactly by stating that a resident is either an individual who is domiciled in New Mexico or an individual who is physically present in New Mexico for a total of 185-days or more during the tax year. See §3.3.1.9(A) NMAC (4/29/2005). As defined for income tax purposes, residency is synonymous with domicile. See Murphy v. Taxation and Revenue Department, 94 N.M. 54, 55, 607 P.2d 592, 593 (1980) (a New Mexico "resident" is an individual domiciled in New Mexico at any time during the taxable year who does not intentionally change his domicile by the end of the year).

Regulation §3.3.1.9 NMAC (4/29/2005) 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. Every individual has a domicile somewhere, and each individual has only one domicile at a time.

(ii) Relevant Domicile Factors.

The regulation establishes a non-exclusive list of factors to consider when determining an individual's domicile for tax purposes. See Regulation §3.3.1.9(C)(4) NMAC. Not all of the articulated factors were addressed on the record, and consequently, will not be addressed as part of this decision. Under Regulation §3.3.1.9(C)(4) NMAC, the most pertinent factors to the case at hand are:

(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;

...

(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.

**(IV) Applying the Relevant Domicile Factors, Taxpayers Fail to Satisfy Third Condition of the Exemption.**

Of the ten listed relevant factors, five support the Taxpayers' claim, and five support the Department's claim. Since there is overlap between the facts supporting the numerous factors, this section will largely just identify the factors and then discuss the facts as they relate to those listed factors. While each side has an equal number of factors to support their respective positions on residency, Taxpayers fail to present sufficient compelling evidence to rebut the presumption of correctness.

Factor (a), (c), (h), (j), and (m) support the Taxpayers' claim. The evidence is clear that Mr. Miller owned real property on Tesuque Pueblo at all relevant times. The house on Mr. Miller's real property is a four bedroom home with two bathrooms, which makes the home bigger than the rented two bedroom, two bathroom apartment in Albuquerque. Mr. Miller testified that he was present in this home during the work week during the tax years of 2004, 2005, and 2006. Mr. Miller maintained all his most precious possessions, including ceremonial garb, at his home in Tesuque. Tesuque Pueblo was also the location of his strongest community affiliation and membership: his enrollment as a tribal member. Mr. Miller attended Tesuque Pueblo traditional ceremonies during this period of time. During the relevant period of time, Mr. Miller was employed directly by the Pueblo of Tesuque as legal counsel. Mr. Miller's sole office was located in the Tesuque Pueblo government office, where he was required to work. Mr. Miller was not allowed to maintain any other clients while employed by the Pueblo of Tesuque.

Mr. Miller was registered to vote at his address at the Pueblo of Tesuque. Mr. Miller voted numerous times at Tesuque Pueblo in 2004, 2005, and 2006.

Domicile factors (b), (d), (i), (g) and (k) undermine the Taxpayer's claim and support the Department's position. Taxpayers were renting an apartment in Albuquerque at all relevant times, beginning in 2003. The evidence is uncontroverted that Mrs. Suazo-Miller resided on a full time basis at the Albuquerque Apartments at all relevant times. Although the apartment may have been rented as a matter of convenience, the evidence is clear that at least in 2004, the Albuquerque apartment was the family gathering place when the demands of work and school did not dictate otherwise. When not working, Mr. Miller was present at the Albuquerque apartment on weekends during tax year 2004. Mr. Miller maintained two to three days worth of clothes, a bike, a television, and a laptop computer at the Albuquerque apartment. When not in school in Santa Fe, the child lived at the Albuquerque apartment with Mrs. Suazo-Miller. Before the period of separation, Mr. Miller, Mrs. Suazo-Miller, and the child would spend their free time together at the Albuquerque apartment. Where a person and a family spend their free time, unabated by the demands of work and school, is a strong indicator of where that person and that family believe they reside.

Taxpayers' vehicles were also registered at the address of the Albuquerque apartment. Taxpayers argue that this was simply done as a matter of convenience because the city address is much easier to specify than their rural address in Tesuque. Taxpayers' convenience explanation is not persuasive. In a State with such vast swaths of rural land, people who reside in rural areas routinely buy and register their cars using rural addresses. A car dealership certainly would not and does not decline business because a potential buyer insists on the registration being filed using a more inconvenient rural address. Taxpayers were free to insist that the car dealership file

the registration paperwork listing their Tesuque address. Since the Taxpayers were claiming an Exemption to the payment of any State income tax that depended on residency, one would expect Taxpayers to absolutely insist that the registration paperwork reflect their true address regardless of any inconvenience. However, despite the high financial stakes implicated by the claim of the Exemption, the Taxpayers apparently did not insist that the car dealership use the Tesuque address.

Significantly, Mrs. Suazo-Miller and Mr. Miller jointly filed Federal income tax returns in 2004, 2005, and 2006 using the address of the Albuquerque apartment. Taxpayers voluntarily chose to use the Albuquerque address when filing their Federal income tax returns. Taxpayers self-reported their address of residence as Albuquerque, not Tesuque. The location in Albuquerque where the Taxpayers self-reported their address under penalty of perjury with the Federal government goes a long way in determining where the Taxpayers believed they resided during tax years 2004, 2005, and 2006.

Critically, Taxpayers presented little evidence related to financial transactions, which is domicile factor (g). Evidence of financial transactions is perhaps the most neutral and objective factor of where a person is residing in any given period of time. Extent and regularity of use of financial accounts, receipts of banking at specific locations, check writing history, credit card receipts indicating location of purchases, and payment of utility bills all draw a fairly accurate and objective picture of where an individual is living.

The only two financial transactions evidence presented in this case are of little relevance to tax-years 2004, 2005, and 2006. Taxpayers presented a year 2009 401K financial statement that Mr. Miller received at his address on Tesuque Pueblo. No statements were presented for the tax-years 2004, 2005, 2006. Mr. Miller also testified that he banked at Del Norte Credit Union,

which does not currently have any branches in Albuquerque. However, in era of online banking, debit cards, ATM-deposits, and credit union service consortiums, the fact that there are currently no branches in Albuquerque does not necessarily mean that Mr. Miller was unable to conduct banking activities anywhere but at a Del Norte Credit Union in tax years 2004, 2005, and 2006.

In light of the Taxpayers' burden to overcome the presumption of correctness, the absence of much more detailed evidence about this financial transactions domicile factor is a significant flaw in Taxpayers' claim the Mr. Miller resided on Tesuque Pueblo in 2004, 2005, and 2006. Particularly disturbing is a lack of detail about financial transactions such as receipts (which could easily show a pattern of Mr. Miller's location during the relevant time periods), cancelled checks, utility bills during that time period that could easily support the Taxpayer's claim that he spent most of his time on Tesuque Pueblo. Considering how thorough and knowledgeable that Mr. Miller (an attorney) otherwise was, the lack of these fine details seems less like simple neglect to present them during the hearing and more like a fundamental problem that those records either don't exist or were not introduced because the records simply don't support the Taxpayers' claim.

The Department also presented rebuttal evidence that reduces the weight of perhaps the Taxpayers' best evidence of residency within Tesuque Pueblo, the 2006 letter of then-Governor Vigil indicating that Mr. Miller resided within the boundaries of Tesuque Pueblo and qualified for the Exemption, Taxpayer #5. However, the Department presented two letters from Governor Mora relevant to this case. In Department #B, Governor Mora wrote a letter on May 7, 2008, to Mr. Miller to inform him that it appeared he was subject to state income tax withholdings for the current calendar year of 2008 and previous calendar years because he was not residing at Rt. 42 Box 55-T, Santa Fe, NM 87506. In that letter, Governor Mora asked that Mr. Miller submit



documentation by May 21, 2008 to substantiate Mr. Miller's address on Pueblo Land.

Significantly, Taxpayers never complied with Governor Mora's request for substantiation of residency. Given the potential financial stakes of not qualifying for the complete personal income tax exemption, a reasonable Taxpayer (let alone a licensed attorney) would attempt to document and substantiate their claim for the exemption at every opportunity. Considering that Governor Mora gave Mr. Miller an opportunity to respond to the lack of residency allegation before taking any further action, the absence of any response given the Taxpayers' stakes lends credibility to Governor Mora's accusation.

When Governor Mora did not receive a response from Mr. Miller, he sent a letter on July 16, 2008, to Secretary Rick Homans of the New Mexico Taxation and Revenue Department, as shown by Department #A. In that letter, Governor Mora informed Secretary Homans that Mr. Mekko Miller had potentially misused the Exemption under NMSA 1978, §7-2-5.5 (1995) by claiming that exemption while "apparently residing in Albuquerque, NM." See Department #A. Governor Mora further informed Secretary Homans that Mr. Miller failed to comply with Tesuque Pueblo's request for documentation to substantiate his claim of residency within the boundaries of Tesuque Pueblo. Taxpayers suggest that it was inappropriate for the Department to act on Governor Mora's letter. However, upon receipt of such letter and allegation from the Governor of Tesuque Pueblo, the Department had little choice but to give Governor Mora's letter its due weight and take the reasonable action of looking into the matter further.

The Taxpayers claims that Governor Mora's letter was vindictive and simply part of contentious employment litigation. While vindictiveness may have played some factor in Governor Mora's decision to send the letter to the Department, the evidence on that point is not fully developed. Taxpayers hinted at some potential litigation regarding his employment, but did

not go into any details with specificity. Although the Taxpayers were initially surprised by Governor Mora's letter, that is not the fault of the Department. Taxpayers could have requested all the materials that the Department was relying upon as part of pre-hearing interrogatories. However, Taxpayers did not avail themselves of that discovery process. Moreover, after the initial surprise, the record was reopened during closing arguments so that the Taxpayers could produce any further evidence about their claim of vindictiveness. Even upon reopening the record, the Taxpayer failed to provide any substantive evidence of actual litigation about the employment relationship, such as the name of the court where the case has been filed, the stage of litigation, complaints filed, etc. Without more evidence of an ongoing, personal dispute between Mr. Miller and Governor Mora, the record does not substantiate the claim of vindictiveness by Governor Mora. In the balancing of evidence, the letter of Governor Vigil (Taxpayer #5) still carries more weight than the letters of Governor Mora because it was generated at a time closer to the time period relevant in this case. But the letter of Governor Mora significantly reduces the initially compelling nature of Taxpayer #5.

In light of the Taxpayers' filing of Federal Income taxes using the Albuquerque address, the vehicle registrations using the Albuquerque address, and the lack of fine detail about financial transactions, the Taxpayers fails to establish the third requirement of the Exemption for tax years 2004, 2005, and 2006. Consequently, the Taxpayers fail to overcome the presumption of correctness for the assessments for each respective tax year and is obligated to pay State income tax, penalty, and interest for each respective year.

## **V. The Taxpayer Bill of Rights.**

Taxpayers argue that the Department violated the Taxpayer's Bill of Rights under NMSA 1976, §7-1-4.2(D) (2003) to a timely and expeditious audit. Taxpayers claim that the three-year period that elapsed from the start of this matter in 2006 until the hearing in 2009 is not "expeditious" under any definition of that word. Closely related to this argument is the Taxpayers' argument that they were not allowed a meaningful hearing. When asked to explain further what they meant by this, Taxpayers argued that the Department waited for the accumulation of multiple assessments before proceeding to a hearing rather than addressing each individual issue in a more timely manner. Taxpayers never proposed any specific remedy for these alleged violations, nor cited any legal authority that specifies a remedy.

Rather than creating a list of new substantive rights, the Taxpayer Bill of Rights passed in 2003 largely restates what is already contained in the various tax statutes in one convenient location. While there are some new provisions, the section that Taxpayers refers to deals with the notice and timeliness requirements of an audit articulated by NMSA 1978, §7-1-11.2 (2007). There is no evidence whatsoever on this record that the Department failed to comply with any of the audit notice and timeliness requirements under NMSA 1978, §7-1-11.2 (2007). To the extent the Taxpayers argument conflates the terms "audit" and "assessment", the assessments issued in this case all fell within the three-year statute of limitations for an assessment of unpaid taxes. See NMSA 1976, §7-1-19 (2000).

Moreover, the length of time in this case between the Department's assessments for tax years 2004, 2005, and 2006 and the hearing is not out of the ordinary compared to other cases heard in this Hearing Bureau. While the length of time and accumulation of three separate assessments certainly may have inconvenienced the Taxpayer, it did not violate any statute,

regulation, or substantive right. Consequently, without a violation of statute, regulation, or substantive right, there is no remedy available to address the Taxpayer's claim of inconvenience under the Taxpayer Bill of Rights.

## **VI. Application of Penalty.**

On all three assessments issued in this matter, the Department seeks to impose a penalty of up to 20% under NMSA 1978, Section 7-1-69 (2008). However, at the time the taxes were due but not paid for tax years 2004, 2005, and 2006, the applicable penalty statute capped the maximum penalty at 10%. See NMSA 1978, Section 7-1-69 (2003). The penalty provision related to the due but unpaid taxes in each of the three respective assessments had been exhausted at the 10% cap before both the January 1, 2008 effective date of NMSA 1978, Section 7-1-69 (2008) and the issuing of the respective assessments. Without evidence of legislative intent for retroactive application of NMSA 1978, Section 7-1-69 (2008), the due but unpaid taxes in this case for tax years 2004, 2005, and 2006 were subject to the 10% penalty cap pursuant to NMSA 1978, Section 7-1-69 (2003). See Kewanee Industries, Inc. v. Reese, 114 N.M. 784, 845 P.2d 1238 (1993), where the New Mexico Supreme Court declined to retroactively apply a modified penalty regulation enacted after the applicable tax year.

## **CONCLUSIONS OF LAW**

1. Taxpayers filed timely a written protest to the Notice of Assessment of 2004, 2005, and 2006 personal income taxes issued under respective Letter ID numbers L1256836736, L1123391872, L0249464192, and jurisdiction lies over the parties and the subject matter of this protest.

2. Since Taxpayers abandoned all claims to the Exemption for Mrs. Suazo-Miller during the hearing, all income attributable to Mrs. Suazo-Miller in tax years 2004, 2005, and 2006 is subject to New Mexico Personal Income Tax.

3. Taxpayers failed to demonstrate that Mr. Miller resided within the boundaries of Tesuque Pueblo in 2004, 2005, and 2006, as required in order to claim the applicable Exemption.

4. Taxpayers are required to report and pay their 2004, 2005, and 2006 income to New Mexico.

5. The assessments issued by the Department, as adjusted pursuant to Department #D, Department #E, and Department #F, correctly (at least as of the time of the hearing) calculate the amount of personal income tax, and interest that Taxpayers owe to New Mexico for tax year 2004, 2005, and 2006.

6. Assessment of penalty is capped at a total of 10%, as all the penalty on the due but unpaid tax was exhausted at the 10% cap under NMSA 1978, Section 7-1-69 (2003) before the January 1, 2008 effective date of the 20% revision under NMSA 1978, Section 7-1-69 (2008) and before the issuing of the respective assessments.

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

DATED: February 9, 2010. ian VanDenzen