

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

**IN THE MATTER OF THE PROTEST OF
LONYTA VIKLUND & DAVID GALLOWAY
TO DENIAL OF REFUND ISSUED UNDER LETTER
ID NO. L2117258880, L0566983040, L0135635840, L1641700480
(Claim for Refund Inaction).**

10-4

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on December 17, 2009, before Sally Galanter, Hearing Officer. Lonyta Viklund-Galloway and David Galloway (“Taxpayers”) were represented by Barrister, Mary Heather Styles. The Taxation and Revenue Department (“Department”) was represented by Tonya Noonan Herring, Special Assistant Attorney General. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Department conducted an audit of Taxpayers for tax years 2005, 2006, 2007 and 2008.
2. On October 23, 2007, the Department issued a Notice of Assessment of Taxes and Demand for payment, Letter ID L2117258880, to Taxpayers for Personal Income Tax for the tax year 2005. (Department Exhibit Y).
3. On November 21, 2007 Taxpayers, through their British counsel and tax preparer, filed a written protest with the Department objecting to the assessment and requesting a formal hearing if the matter could not be settled informally. (Department Exhibit Z).
4. On November 28, 2007, the Department acknowledged Taxpayer’s formal protest. (Department Exhibit AA).
5. On August 21, 2007, the Department issued a Notice of Assessment of Taxes and Demand for payment, Letter ID L1245722240, to Taxpayers for Personal Income Tax for the tax year 2006. (Department Exhibit BB).
6. Taxpayers paid the taxes owed for 2006 and on February 21, 2008, through their British counsel and tax preparer, filed an application for refund. (Department Exhibit CC).

7. On May 19, 2008, Taxpayers, through their British counsel and tax preparer, filed a written demand for refund of the 2006 payment in the amount of \$3,261.00. (Department Exhibit DD).

8. On November 28, 2008, Taxpayers, through their British counsel and tax preparer, filed a formal protest based on the Department's lack of response to their application for refund. (Department Exhibit EE).

9. On December 18, 2008, the Department acknowledged Taxpayer's formal protest and request for hearing based on the Department's failure to grant or deny the claim for refund. (Department Exhibit FF).

10. On July 16, 2008, the Department issued a Notice of Assessment of Taxes and Demand for payment, Letter ID L0566983040, to Taxpayers for Personal Income Tax for the tax year 2007. (Department Exhibit GG).

11. On August 27, 2008, Taxpayers, through their British counsel and tax preparer, filed a formal written request for the Department to grant a retroactive extension to file a written protest with the Department. (Department Exhibit HH).

12. On September 5, 2008, the Department acknowledged Taxpayer's request for an extension and Taxpayer's formal protest and request for hearing. (Department Exhibit II).

13. On July 22, 2009, the Department issued a Notice of Assessment of Taxes and Demand for payment, Letter ID L0135635840, to Taxpayers for Personal Income Tax for the tax year 2008. (Department Exhibit KK).

14. On August 19, 2009, Taxpayers by signing and through their British counsel and tax preparer, filed a written protest with the Department objecting to the assessment and requesting a formal hearing if the matter could not be settled. (Department Exhibit LL).

15. On August 31, 2009, the Department through its senior auditor, acknowledged Taxpayer's formal protest and request for hearing. (Department Exhibit MM).

16. Taxpayers were married on July 5, 1998 in New Mexico.

17. At the hearing the parties stipulated that Lonyta Viklund-Galloway was and currently is a resident of New Mexico.

18. Prior to marriage David Galloway was domiciled in England and is a citizen of England (Taxpayer Exhibits 6 and 7).

19. During the audit period, David Galloway worked for cruise ship lines, primarily working for Princess Cruise Lines flagged under Bermuda, as a Senior First Officer starting in 2005 and then being promoted to his current position as Staff Captain in 2008.

20. Princess Cruise Lines is a division of Mr. Galloway's employer which is Fleet Maritime Services. Mr. Galloway is paid by Fleet Maritime Services with his pay being automatically deposited into a United Kingdom bank account in sterling pounds.

21. The tax year in England is April 6th through April 5th of the following year. British National Insurance contributions, equivalent to social security in the United States, are required of seafarers when working on British regulated ships.

22. In 2005 and 2006 Mr. Galloway did not work on British regulated ships. In 2007 and 2008 Mr. Galloway did a portion of his cruise ship work on British regulated ships. Mr. Galloway received a P60 End of year certificate indicating that he made required National Insurance contributions based on his employment on a British regulated ship, of £2663.92 in the tax year of 2007/2008 and £1332.44 in the tax year of 2008/2009. The P60 lists his address on both documents as 54 Cerro Blanco, Lamy, New Mexico USA. (Taxpayer Exhibit 12 and 13).

23. Since 2002/2003, Mr. Galloway has filed with HM Revenue & Customs Self Assessment Tax Return forms reporting no tax due to the United Kingdom. (Taxpayer Exhibit 14).

24. Mr. Galloway is a non-resident of the United Kingdom for tax purposes based on his being a seafarer, the limited number of days he spends in the United Kingdom being less than 180 days, and the fact that his sole source of income is earnings from overseas employment. (Taxpayer Exhibits 13 and 14).

25. Mr. Galloway owes no personal income tax to the United Kingdom and paid no personal income tax to the United Kingdom for tax years 2004/2005, 2005/2006 and 2006/2007. (Taxpayer Exhibits 13 and 14).

26. In 2001 Mr. Galloway applied for permanent residence status. In his residency application, Mr. Galloway listed his current street address as Alamo Dr, Santa Fe, New Mexico as of July 1998 to present, listed his place of birth as the United Kingdom, listed his email address as gallowayusa@aol.com and listed Ms. Viklund-Galloway as his wife. (Department Exhibit A).

27. On November 2, 2002, Mr. Galloway was notified by mail addressed to the Alamo Dr., Santa Fe, New Mexico address that he was granted permanent resident status in the United States. (Department Exhibit C).

28. On November 5, 2002, Mr. Galloway was mailed his permanent resident card from the US Department of Justice Immigration & Naturalization Service establishing his permanent resident status as of September 24, 2002 and noting the Alamo Dr., Santa Fe, New Mexico address. At the same time Mr. Galloway was also issued a social security number. (Department Exhibit D).

29. Mr. Galloway obtained an employment authorization card from the US Department of Justice Immigration and Naturalization Service dated August 3, 2001. (Department Exhibit B).

30. Mr. Galloway obtained a United Kingdom driver's license approximately thirty-two years ago and renewed it 2009.

31. Mr. Galloway applied for and received a New Mexico driver's license on January 30, 2002 and renewed his driver's license on April 15, 2008 using his Cerro Blanco address in Lamy, New Mexico. (Department Exhibit E).

32. Taxpayers own three vehicles all of which are registered in New Mexico. The residential address for Taxpayers is the Alamo Dr., Santa Fe address for one vehicle and the Cerro Blanco, Lamy address for the other two vehicles. (Department Exhibit F1 through F3).

33. In tax years 2003, 2004, 2005 and 2006 Taxpayers jointly filed New Mexico PIT-1 income tax returns using the Alamo Dr., Santa Fe, New Mexico address listing both taxpayers as residents of New Mexico. (Department Exhibits G, H, I, J and K).

34. The New Mexico PIT-1 tax returns for 2003 and 2004, signed by both taxpayers, lists Mr. Galloway's employment income as Senior First Officer with all employment wages allocated as New Mexico taxable income. (Department Exhibit G and H).

35. In tax year 2005, Mr. Galloway earned wages of \$85,728.00 from his job as Senior First Officer and included \$20,944.00 as attributable to New Mexico for tax purposes. (Department Exhibits I, J and N).

36. The New Mexico PIT-1 tax return for 2005 utilizing Form PIT-B lists Mr. Galloway's employment income, as Senior First Officer, as business income and therefore not taxable in New Mexico. Taxpayers filed

Form PIT-B to allocate Mr. Galloway's employment income, listed as business income, between New Mexico and non-New Mexico sources. (Department Exhibit I).

37. On July 26, 2007, taxpayers filed an amended 2005 New Mexico PIT-1 income tax return listing the Alamo Dr., Santa Fe address and modifying the portion of Mr. Galloway's income apportioned to New Mexico listing both taxpayers as residents. Taxpayers counsel prepared the amended return for taxpayers. (Department Exhibit J).

38. In tax year 2006, Mr. Galloway earned wages of \$99,397.00 from his job as Senior First Officer and included \$7,304.00 as attributable to New Mexico for tax purposes. (Department Exhibits K and O).

39. On April 10, 2007, taxpayers filed 2006 New Mexico PIT-1 income tax return listing both taxpayers as residents, listing their Alamo Dr., Santa Fe address and completing a Form PIT-B apportioning Mr. Galloway's employment income as Senior First Officer partially to New Mexico with the larger portion to non-New Mexico sources. Taxpayer's counsel prepared the return for Taxpayers. (Department Exhibit K).

40. In tax year 2007, Mr. Galloway earned wages of \$122,218.00 from his job as Senior First Officer and included \$22,241.00 as attributable to New Mexico for tax purposes. (Department Exhibits L and P).

41. On April 14, 2008, taxpayers filed 2007 New Mexico PIT-1 income tax return listing Ms. Viklund-Galloway as a resident, not completing the residency portion of the return for Mr. Galloway, listing their Cerro Blanco, Santa Fe (Lamy) address and completing a Form PIT-B apportioning Mr. Galloway's employment income as Senior First Officer partially to New Mexico with the larger portion to non-New Mexico sources. (Department Exhibit L).

42. In tax year 2008, Mr. Galloway earned wages of \$112,763.00 from his job as Staff Captain and included \$38,681.00 as attributable to New Mexico for tax purposes.

43. On April 12, 2009, taxpayers filed 2008 New Mexico PIT-1 income tax return listing Ms. Viklund-Galloway as a resident, not completing the residency portion of the return for Mr. Galloway, listing their Cerro Blanco, Santa Fe (Lamy) address and completing a Form PIT-B apportioning Mr. Galloway's employment income as Staff Captain partially to New Mexico with the larger portion to non-New Mexico sources. (Department Exhibit M).

44. For tax year 2005, taxpayers jointly filed their federal income tax return using their Alamo Dr., Santa Fe address and listing Mr. Galloway's employment income as Senior First Officer as business income.(Department Exhibit N).

45. Taxpayers filed an Amended US income tax return for 2005 as a result of a Form 1099 being issued from Princess Cruise Lines to Mr. Galloway indicating non-employee compensation of \$85,644.51 and a corrections Form 1099 being issued from Princess Cruise Lines to Mr. Galloway indicating non-employee compensation as 0.00. (Taxpayer Exhibits 1, 2 and 3).

46. For tax years 2006, 2007 and 2008, Taxpayers jointly filed their federal income tax returns using the Alamo Dr., address until moving and thereafter using the Cerro Blanco, Lamy address for each return, and listing Mr. Galloway's employment income as "other income" noting "U.K. Employment" for 2006 and "overseas earnings" for 2008. Taxpayer's counsel prepared Taxpayer's federal tax returns for 2006, 2007 and 2008. (Department Exhibits O, P, and Q).

47. All of the income in dispute for the years 2005, 2006, 2007 and 2008 is income Mr. Galloway earned as wages working in his capacity as Senior First Officer and as Staff Captain.

48. Taxpayers have had a New Mexico joint bank account with Wells Fargo throughout the time periods covered by the tax protests. In addition, Mr. Galloway has a small IRA account and a savings account in New Mexico.

49. On April 14, 2003 taxpayers made two direct payments to the Department from their joint account in New Mexico for estimated taxes for Mr. Galloway in the amounts of \$270.00 and \$1073.00. On April 14, 2008 taxpayers made a direct payment to the Department from their joint account in New Mexico for first quarter taxes for 2008 in the amount of \$274.00. Taxpayer's address on Alamo Dr., Santa Fe was noted on the 2003 checks and Taxpayer's address on Cerro Blanco, Lamy was noted on the 208 check. (Department Exhibit V).

50. Mr. Galloway chronicled the dates and times he was working, when he was in New Mexico, when he was in England or other locations for the tax years in dispute. (Taxpayer Exhibit 11).

51. During the times that Mr. Galloway is not at work on the cruise ship, the majority of the charges made on his VISA Gold credit card are for charges for New Mexico purchases for items including groceries, clothing,

dining, household, electronics, books, postage, dental work for Mr. Galloway, his work related uniforms, eye glasses for himself and moving supplies. (Department Exhibits R, S, T, and U).

52. Mr. Galloway purchased a cell phone in New Mexico having a New Mexico number and a service plan covering all fifty states. The address for the credit card bill is Crewe, England. (Department Exhibits R, S, T and U).

53. Mr. Galloway receives a pension from his employer which is managed by a United Kingdom company. The contributions are designated as either “protected” if a United Kingdom resident or “non-protected”. All of Mr. Galloway’s contributions are received as “non-protected rights”. The total contributions in the plan as of August 2, 2008 are £37508.60. (Taxpayer Exhibit 15).

54. Mr. Galloway receives life insurance as a benefit of his employment from P&O Cruises. As of July 22, 2002, Mr. Galloway named Ms. Viklund-Galloway as his sole beneficiary providing the Alamo Dr., Santa Fe address for her on September 9, 2002. (Taxpayer Exhibit 10).

55. Ms. Viklund-Galloway owned a home in Santa Fe on Alamo Dr. with her father prior to being married. The residence was placed solely in her name in 2005 or 2006. Ms. Viklund-Galloway testified that after they got married she and Mr. Galloway “lived on Alamo Dr.”

56. In 2007, Taxpayers determined to purchase a home together. Ms. Viklund-Galloway added Mr. Galloway’s name to the warranty deed of her Alamo Dr. home in December 2007, prior to it being sold to facilitate a loan on their new home being purchased on Cerro Blanco Santa Fe (Lamy), New Mexico. (Taxpayer Exhibit 5).

57. Taxpayers sold the Alamo Dr., Santa Fe property in January 2008 having bought a home jointly, valued at \$600,000.00, in Lamy, New Mexico. Taxpayers, after making a down payment from the proceeds of the Alamo Dr property completed a mortgage loan for the balance of \$350,000.00.

58. Mr. Galloway’s parents reside in the real property he purchased in England in October 2000.

59. Taxpayer is requesting a refund of 2006 taxes paid in the amount of \$3,261.00 and a determination that no further taxes are owed for 2005, 2007 and 2008.

ANALYSIS AND DISCUSSION

The issue to be determined is whether Mr. David Galloway was a resident of New Mexico for the audit years requiring that all of his employment income be attributable to New Mexico for tax purposes. Taxpayers challenge the Department's assessment of New Mexico personal income tax for the years 2005, 2007, and 2008 and the denial of a refund for 2006.

Mr. Galloway argues that he is a resident and domiciliary of the United Kingdom and therefore based on equitable principles, New Mexico personal income tax should be paid only on a portion of his employment income determined by the number of days he is physically present in New Mexico. The parties have stipulated that Ms. Viklund-Galloway was, during the tax periods in question, and remains a New Mexico resident. Therefore the determination to be made is strictly in regard to Mr. Galloway's residency in New Mexico. The Department asserts that Mr. Galloway changed his domicile when he got married to Ms. Viklund-Galloway in July 1998. In the alternative the Department claims that if he did not change his domicile to New Mexico upon marriage, he did so upon receipt of his permanent residence card in 2002 and that therefore Mr. Galloway was a full time New Mexico resident for purposes of reporting and paying state income tax in the years 2005 through 2008.

Burden of Proof. There is a statutory presumption that any assessment of tax made by the Department is correct. NMSA 1978, §7-1-17(C) (2007); *Holt v. New Mexico Department of Taxation & Revenue*, 2002 NMSC 34, ¶ 4, 133 N.M. 11, 59 P.3d 491. Regulation 3.1.6.12 NMAC (A) (2001) states:

Once a "Notice of Assessment of Taxes" has been mailed or personally delivered to a taxpayer, the statutory presumption of the correctness of the assessment will apply. The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary. Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.

Therefore, Taxpayers have the burden to overcome the assessments and the denial of refund by establishing that Mr. Galloway was a domiciliary and therefore a resident of the United Kingdom for the tax years in question.

Effect of Residency on Liability for New Mexico Income Tax. Payment of New Mexico personal income tax is governed by the Income Tax Act, NMSA 1978, Sections 7-2-1, *et seq* which imposes a personal income tax on the net income of every resident. New Mexico uses the federal income tax system as the basis for calculating state income taxes. As is evident from the Department's 2005 through 2008 Form PIT-1, New Mexico taxable income is calculated by starting with a taxpayer's federal adjusted gross income, deducting the taxpayer's federal persona exemption and itemized deductions, and making any adjustments allowed on Schedule A. The amount of tax is then drawn from the tax rate table or tax schedule.

When a taxpayer is a part-time resident and a first year resident and therefore has income that is taxable both within and without New Mexico, NMSA 1978, §7-2-11 (2001) allows the taxpayer to file Form PIT-B to allocate and apportion certain categories of income between New Mexico and non-New Mexico sources. The percentage of total income allocated or apportioned to New Mexico is then applied to the tax previously calculated to determine the tax due. However, this apportionment is allowed only when an individual has income that is taxable both within and without the state. Pursuant to NMSA 1978, §7-2-11(A)(3), New Mexico residents are required to allocate 100 percent of certain income, which includes compensation to New Mexico, regardless of that source of income. Department Regulation 3.3.11.11 (A) NMAC, states, "All compensation received while a resident of New Mexico shall be allocated to this state whether or not such compensation is earned from employment in this state." Taxpayers claim that as Mr. Galloway never changed his domicile from the United Kingdom, his income is taxable both within and without New Mexico based on the number of days Mr. Galloway actually spent in New Mexico.

In 2003 and 2004, taxpayers reported all of Mr. Galloway's employment compensation as income reportable to New Mexico. In 2005 through 2008, taxpayers apportioned Mr. Galloway's employment

compensation based on the number of days Mr. Galloway was physically present in New Mexico rather than pursuant to the laws that govern the payment of taxes in New Mexico. If a taxpayer is deemed to be a resident of New Mexico he is required to report all compensation he earned from employment, without regard to where it was earned. If he was not a resident of New Mexico he would only be obligated to report that portion of income earned in New Mexico. All of Mr. Galloway's income was earned outside of New Mexico in his capacity as an employee of a cruise ship.

Determination of Residency based on Domicile.

The law is clear about the ability of the state to impose tax on all income received by its residents including income earned other than in the resident state. More than 85 years ago, the United States Supreme Court recognized the rights of states, "to exercise the widest liberty with respect to the imposition of internal taxes" explaining that "states have full power to tax their own people..." *Shaffer v. Carter*, 252 US 37, 51 (1919). See also, *Lawrence v. State Tax Commission of Mississippi*, 286 US 276 (1932).

NMSA 1978, §7-2-3 (1981) imposes an income tax on the net income of "every resident individual". For the 2005, 2006, 2007 and 2008 tax years, NMSA 1978, §7-2-2 (S) (2003) defined the term "resident" as:

"resident" means an individual who is domiciled in this state during any part of the taxable year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during the taxable year, who, on or before the last day of the taxable year, change the individual's place of abode to a place without this state with the bond fide intention of continuing actually to abide permanently without this stat is not a resident for the purposes of the Income Tax Act for periods after that change of abode.¹

Department Regulation 3.3.1.9 (A) NMAC tracks the language of the statute stating that a full-time resident is either (1) an individual domiciled in New Mexico or an individual physically present in New Mexico for a total of one hundred eight-five days or more during the tax year. Department Regulation 3.3.1.9 (C) (1)

¹ The definition of resident was amended in 2006 modifying "his place of abode" to "the individual's place of above. This minor change does not alter the character of the definition

NMAC defines domicile as “a 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.” The regulation also states, “Every individual has a domicile somewhere, and each individual has only one domicile at a time.”²

In Murphy v. Taxation & Revenue Department, 94 N.M. 54, 55, 607 P.2d 592, 593 (1980) the 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.” In Hagan, v. Hardwick, 95 N.M. 517, 519, 624 P.2d 26, 28 (1981) the court stated, “Residence’ has been defined by this Court to be substantially synonymous with ‘domicile...and ‘domicile’ within this state does not require physical presence... but rather physical presence in the state at some time in the past, and concurrent intention to make the state one’s home.” See also Meier v. Davignon, 105 N.M. 567, 570, 734 P.2d 807, 810 (N.M.App. 1987).

The only issue of relevance is whether Mr. Galloway changed his residency when he married Ms. Viklund-Galloway, or when he obtained his permanent residency card. Regulation 3.3.1.9 (C)(2) NMAC and Estate of Peck v. Chambers, 80 N.M. 290, 292, 454 P.2d 772, 774 (1969). In Hague v. Hardwick, at 519, 28, the New Mexico Supreme Court set out the following standard for determining a change in domicile: “to effect a change from an old and established domicile to a new one, there must be... a fixed purpose to remain in the new location permanently or indefinitely. For domicile once acquired is presumed to continue until it is shown to have changed...” A change in domicile requires both physical presence in the new locality and an intention to abandon the old domicile and to make a home in the new location his permanent home. See Fenner v. Fenner, 106 NM 36, ¶21, 738 P.2d 908 (NM App. 1987).

In 2005 Regulation 3.3.1.9. (C)(2) NMAC stated,

² Regulation 3.3.1.9 (C)(1) was modified in 2006. Before this modification, the regulation stated, “a place of a true, fixed home, a permanent establishment where one intends to return after an absence and where a person has voluntarily fixed habitation of self and family with the intention of making a permanent home. Every individual has a domicile somewhere, and each individual has only one domicile at a time. This minor change does not alter the character of definition.

The following individuals are presumed to be domiciled in New Mexico:

- (a) an individual who is registered to vote in the state during a taxable year who has not subsequently registered to vote elsewhere outside this state on or before the last day of the taxable year;
- (b) an individual who holds a valid driver's license issued by the taxation and revenue department pursuant to the Motor Vehicle Code and who has not been subsequently licensed by another state on or before the last day of the taxable year or
- (c) an individual who has claimed to be a New Mexico resident for any other official purposes such as eligibility for resident tuition at state schools, colleges or universities or for hunting or fishing license.

In 2006, there was a modification of Regulation 3.3.1.9 NMAC. (C)(2) and (C)(3) were modified and (C)(4) and (C)(5) were added to the regulation. Regulation 3.3.1.9 (C) (4) NMAC explains the factors to be considered in determining domicile including an individual's declaration of intent, although noting that such is not conclusive when contradicted by "facts, circumstances and the individual's conduct." The regulation lists factors to consider in determining whether an individual is domiciled in New Mexico explaining that the list is not exclusive, nor is it in any particular order giving less or more weight dependent on the circumstances and the relative ease in obtaining certain items for tax purposes including driver's licenses, voter registration and home address.

Regulation 3.3.1.9 (C)(5) NMAC. The factors noted in Regulation 3.3.1.9 (C) (4) NMAC (2006) that were addressed on the record are as follows:

- (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 transaction with financial institutions, including the individual's most active checking account and rental of safety deposit boxes;
- (i) home address used for filing federal income tax returns;
- (k) state of driver's license or professional licenses.

Considering these factors in light of the evidence in this case, Mr. Galloway changed his place of residence to New Mexico upon marriage. Rather than continuing to reside with his parents in the home he purchased in Crewe, England, as he did before the marriage, upon marrying Ms. Viklund-Galloway, Mr. Galloway lived with his new wife at her home in Santa Fe until they jointly purchased a home together in Lamy, New Mexico. Mr. Galloway testified that although he does go to England, since his marriage he has mostly lived in New Mexico. Ms. Viklund-Galloway testified that due to Mr. Galloway's erratic work schedule he is unable to be home for any long period of time. Taxpayers acknowledge Mr. Galloway's periods of time away and at work. However, the facts, circumstances, and the individual's conduct demonstrate that Mr. Galloway resided with his new wife upon marriage at first at her home on Alamo Drive in Santa Fe and subsequently at their home in Lamy, New Mexico.

From the date of his marriage through the years relevant in this tax protest, Mr. Galloway lived and spent the majority of his non-working days in New Mexico. When not working in 2005, Mr. Galloway returned and stayed in New Mexico for 81 days while only visiting England for 21 days, with the remainder of his year spent working on different cruise ships. When not working in 2006, Mr. Galloway returned and stayed in New Mexico for 108 days while only visiting England for ten days, with the remainder of his year spent working on different cruise ships. When not working in 2007, Mr. Galloway returned and stayed in New Mexico for 115 days while only visiting England for 25 days, with the remainder of his year, with the exception of a nine day trip to Australia with his brother, spent working on different cruise ships. When not working in 2008, Mr. Galloway returned and stayed in New Mexico for 116 days while only visiting England for 14 days,

with the remainder of his year spent working on different cruise ships. The overall pattern of residence for Mr. Galloway was in Santa Fe and Lamy, New Mexico.

Also, Taxpayers own three motor vehicles that are all titled and licensed in New Mexico. Taxpayers own no motor vehicles in England. When in England, Taxpayers either borrow Mr. Galloway's mother's vehicle or rent a vehicle for travel. When not at work, the majority of credit card charges on Mr. Galloway's VISA credit card are for New Mexico purchases for living expense including groceries, clothing, dining, household items, electronics, postage, books, Mr. Galloway's dental work, his eye glasses and moving supplies when moving to the new home in Lamy.

Mr. Galloway's wages were totally earned as a result of his employment for Fleet Maritime Services as a Senior Officer and Staff Captain on the cruise ships. Mr. Galloway receives a pension through his employer which is not entitled to tax relief on because Mr. Galloway is not deemed to be a United Kingdom resident for employment purposes. Mr. Galloway has a life insurance policy as a benefit of his employment providing the Alamo Dr., Santa Fe, New Mexico address for his wife, the beneficiary.

Ms. Viklund-Galloway resided in New Mexico before and since her marriage to Mr. Galloway. Ms. Viklund-Galloway shared her Alamo Drive, Santa Fe home with Mr. Galloway until their joint purchase of their Lamy home. Mr. Galloway has two independent grown sons, ages 25 and 26: one living in Nottingham, England working as a photographer; and the other in Newcastle, England working in a civilian capacity with the police department. Mr. Galloway has no minor children.

Taxpayers share a banking account at Wells Fargo in New Mexico to which Mr. Galloway transfers funds from his account in England to facilitate payment of family expenses including the mortgage payment, living expenses and in 2003 and 2008 estimated tax payments to the state of

New Mexico. Mr. Galloway also has a small savings account and IRA with Wells Fargo in New Mexico.

Taxpayers used the Alamo Dr. Santa Fe, New Mexico address for their federal tax returns for 2005 and 2006 and used the Lamy, New Mexico address for tax years 2007 and 2008.

Additionally, taxpayers used the Alamo Dr., Santa Fe, New Mexico address for New Mexico tax returns for 2003 through 2006 and the Cerro Blanco, Santa Fe (Lamy) address for 2007 and 2008.

Mr. Galloway had maintained a driver's license in England for over thirty years. In January 2002, Mr. Galloway obtained a New Mexico driver's license and renewed the driver's license in April 2008 providing the Alamo Dr. Santa Fe address or the Cerro Blanco (Lamy) Santa Fe address. Mr. Galloway testified that he understood that in completing his application for a driver's license in New Mexico included the acknowledgement of being a resident of New Mexico.

Pursuant to Department Regulation 18.19.5.12 NMAC (A), "Applicants for a New Mexico identification card, driving permit provisional driver's license or driver's license, other than a commercial driver's license, must provide documentary proof of their identification number, identity and residency. Also, NMSA 1978, §66-5-9 (B) titled, "Motor Vehicles, Licensing of Operators and Chauffeurs; Financial Responsibility, Uninsured Motorists' Insurance; Identification Cards" states, "An application shall contain the full name, social security number or individual tax identification number, date of birth, sex and New Mexico residence address of the applicant..." Mr. Galloway provided the Santa Fe Alamo Dr. address for his initial driver's license in New Mexico and provide the Cerro Blanco (Lamy) address upon renewing his driver's license. When Mr. Galloway obtained his New Mexico driver's license by law he was required to surrender his United Kingdom driver's license. Therefore, his acceptance of a New Mexico driver's license indicates that

he should have surrendered his English driver's license leaving him only one valid driver's license in New Mexico.³

Another factor supporting that Mr. Galloway is a resident of New Mexico is Mr. Galloway's application for permanent resident status in 2001. On his application for permanent resident status, Mr. Galloway listed his residence as of July 1998 through the time of his application in approximately 2001 as Alamo Dr., Santa Fe, New Mexico, listed his place of birth as the United Kingdom and listed Ms. Viklund-Galloway as his wife. On November 2, 2002, based on the information he provided in this application, Mr. Galloway received his United States permanent resident status on September 2002. This permanent resident card was mailed to the Alamo Dr. Santa Fe, New Mexico address. Mr. Galloway also was provided an employment authorization card from the US Department of Justice Immigration and Naturalization Service dated August 3, 2001.

According to the United States Immigration Website at <http://www.usimmigration.com/greencard.html>, a Permanent Resident Card "is a person's proof of lawful permanent residency in the United States." The Internal Revenue Department's brochure titled, "Basic Tax for Green Card Holders- Understanding your U.S. Tax Obligations states, "If you have a U.S. green card, you are a lawful permanent resident of the U.S. even if you live abroad. This means you are treated as a U.S. resident for U.S. Income Tax purposes and you are subject to U.S. tax on your worldwide income from whatever source derived." Further, the Internal Revenue Service Publication 519, explains,

You are a resident for tax purposes, if you are a lawful Permanent Resident of the United States at any time (at least one day) during the calendar year. This is known as the 'green card' test. You are a Lawful Permanent Resident of the United State, at any time, if you have been given the privilege, according to the immigration laws, of residing permanently in the United States as an immigrant... You continue to have resident status, under this test, unless you voluntarily renounce and abandon this status in writing to the USCIS, or your

³ NMSA 1978, (A) (2) requires that an individual have only one valid driver's license at a time with the statute indicating that an individual is entitled to a driver's license in New Mexico only if the individual has surrendered to the division any other license previously issued to the person by New Mexico, by another state or country or has filed an affidavit with the division that the person does not possess any other license.

immigrant status is administratively terminated by the USCIS, or your immigrant status is judicially terminated by a U.S. federal court. If you meet the green card test at anytime during the calendar year, but do not meet the substantial presence test for that year, your residence starting date is the first day on which you are present in the United States as a Lawful Permanent Resident...Section 770(b)(1)(A)(i) of the Internal Revenue Code provides that an alien who is a Lawful Permanent Resident of the United States at any time during a taxable year shall be considered a resident alien for the entire tax year.

Additionally, Topic 851, of the Internal Revenue Service, titled, “ Resident and Non-Resident Aliens” states, ““if you are a resident alien, you must follow the same tax laws as U.S. Citizens. You are taxed on income from all sources, both within and without the United States. You will file Form 1040EZ or Form 1040 depending on your tax situation.”

The factors in favor of Mr. Galloway’s claim that he did not change his residency upon marriage or his obtaining a permanent residence card include his claim that he has a home in England which he stays at when he goes there and that he keeps some of belongings there. Additionally, he has a bank account in England to which his wages are automatically deposited in sterling pounds. Further, he receives a pension through his employer which is managed in England. He has had a driver’s license in the United Kingdom for over thirty years renewing it most recently in 2009. Mr. Galloway also returns to England at least once or twice a year and stays at the home he owns and where his parents reside.

While Mr. Galloway may own real estate in England, it is his parents who in fact reside at that location. Mr. Galloway only is at this real estate when he visits his parents. Mr. Galloway does have a bank account in England to which his pay is automatically deposited. However, he transfers money from that account to the joint Wells Fargo account in New Mexico so that living expenses, including the mortgage on his New Mexico residence, can be paid. Mr. Galloway does receive an English managed pension through his employment. Under English law, only residents are entitled to tax relief to pension contributions. Mr. Galloway’s pension contributions are not protected and therefore are not entitled to any tax relief. While Mr. Galloway has continued his

English driver's license privileges, under New Mexico law he was required to surrender other driver's licenses when he obtained his New Mexico driver's license, which he did not do.

Considering the factors as enumerated under Regulation 3.3.1.9 (C)(2) NMAC (2005) and 3.3.1.9.(C)(4) NMAC (2006), it is evident that Mr. Galloway is a full time resident for tax purposes in New Mexico for the tax years in questions. Mr. Galloway's home in New Mexico, whether living in the home owned by his wife on Alamo Drive in Santa Fe or living in the home they purchased together in Lamy, is his permanent home. New Mexico is the place Mr. Galloway returns to when not obligated to be on ship for work, where his vehicles are registered, and where he and his wife reside. Mr. Galloway uses his respective New Mexico addresses when filing his federal tax returns. Mr. Galloway, using his permanent residence card and his New Mexico Driver's License, obtained a cell phone in New Mexico with a New Mexico phone number. In sum, New Mexico is the center of Mr. Galloway's vital interest since his marriage. While it is a fact that his parents and adult children live in England since his marriage, Mr. Galloway has chosen to reside in New Mexico with his wife. Mr. Galloway is a full time New Mexico resident as he is an individual domiciled in New Mexico at any time during the tax years in question who does not intentionally change his domicile by the end of the year. *Murphy* at 55, 593.

While Taxpayer's counsel argued that Mr. Galloway did not chose New Mexico to live in but rather is here solely due to his wife being here, Counsel for the Department properly pointed out that Mr. Galloway did voluntarily choose New Mexico as he knew the circumstances of Ms. Viklund's life prior to deciding to marry her, that he voluntarily decided to get married, and the he voluntarily decided to live in New Mexico when not working. Further, based on Mr. Galloway's testimony, that Ms. Vikund-Galloway had the flexibility to leave New Mexico for up three-months at a time to be with him while he was not working, he could have decided to live in England.

Based on consideration of the totality of the factual evidence it was established that Mr. Galloway effected a change of domicile from England to New Mexico in 1998 and that in December of 2002 and each December thereafter through 2008, he remained a domiciliary of and therefore a full time resident of

New Mexico. A change in domicile requires both physical presence in the new locality and an intent to abandon the old domicile and to make the home in the new location his permanent home. *Fenner* at ¶ 21. Mr. Galloway had physical presence in New Mexico when not working and by facts, circumstances and Taxpayer's conduct evidenced by an intent by Mr. Galloway to abandon his domicile in England and make New Mexico his permanent home. Therefore Mr. Galloway is liable for New Mexico personal income tax on his total wages he earned as an employee of the cruise ships for the tax years 2005, 2006, 2007 and 2008. PIT-B is not appropriate to apportion his income based on the number of days he spent in New Mexico nor is there any equitable basis allowing for apportionment of Mr. Galloway's income based on the number of days he is physically present in New Mexico. Being a full time resident, his total wages are subject to New Mexico personal income tax during the tax years in question based on all wages and compensation earned from all sources. Based on this determination, there is no need to discuss the laws of England as proffered by taxpayer's counsel.

While Mr. Galloway testified that he believed he was domiciled in the United Kingdom, the facts, circumstances, his actions and conduct and the actions and conduct of Ms. Viklund-Galloway all indicate that Mr. Galloway changed his domicile to New Mexico in 1998 when he married. Every individual has a domicile somewhere, each individual has only one domicile at a time and Mr. Galloway's is New Mexico for the tax years 2005 through 2008. See Department Regulation 3.3.1.9 (C) (1) NMAC. In *Texas v. Florida*, 306 U.S. 398, 425-426 (1939), the United States Supreme Court settled a dispute regarding a decedent's domicile determining,

While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; [citation omitted] and they are of slight weight when they conflict with the fact. [citations omitted] This is the more so where, as here, decedent's declarations are shown to have been inspired by the desire to establish a nominal residence for tax purposes, different from his actual residence in fact...

Whatever floating intention Green may have had after 1911 to return to Texas and to make his home there, it is plain that it receded into the background after his mother's death and had completely vanished when he began to build up his extensive estate at Round Hills in Massachusetts...He could not elect to make his home in one

place in point of interest and attachment and for the general purposes of life, an in another, where he in fact had no residence, for the purpose of taxation.

Residence based on physical presence. Counsel for the Taxpayers argued that in order for Mr. Galloway to be determined to be a resident of New Mexico, he must have been physically present in the state for one hundred eighty-five days or more during the taxable year. As the evidence established that he never was physically present in the state for that number of days for any tax year, Taxpayers argue that Mr. Galloway was not a resident of New Mexico. Counsel argued that any reference to the terms “residence” and “domicile” being synonymous cannot be correct as that is the reason for two separate definitions. When attempting to overcome the presumption as to the correctness of New Mexico tax assessments and therefore whether Mr. Galloway is a resident of New Mexico for tax purposes, one must consider New Mexico law.

The definition of resident is an individual who is “domiciled in this state during any part of the taxable year **OR** (emphasis added) an individual who is physically present in the state for one hundred eighty-five days or more during the taxable year...” NMSA 1978, §7-2-2(S) and Regulation 3.3.1.9 (A). Neither the statute nor the regulation require that both elements be established but rather either condition is sufficient to be determined to be domiciled in New Mexico for taxation purposes. Additionally, “Domicile within this state does not require continuous physical presence, but rather, physical presence in the state at some time in the past and concurrent intention to make the state one’s home.” Meier v. Davignon, 105 Nm 567, 734 P.2d 807, ¶28 (Ct. App. 1987). While there are definitions for each word, the definition for “resident” includes “domicile” which is then also defined. Additionally, our courts have clearly expressed that for taxation purposes, the terms in New Mexico are synonymous. See Murphy v. Taxation & Revenue at P. 55 and Hagan v. Hardwick at P. 519.

Although both taxpayers testified as to Mr. Galloway living in Santa Fe, New Mexico subsequent to his marriage in 1998, clearly in 2002 when Mr. Galloway obtained his Permanent

Resident Card, he became a resident alien in the United States and a resident for tax purposes. Logically, if Mr. Galloway was a resident of the United States for tax purposes, he must be a resident of some state. The only state that Mr. Galloway spent any substantial time, the state to which he returned when not at work, the state to which he has a true, fixed home, and to which he voluntarily fixed habitation of self and family with the intention of making a permanent home and to which he is domiciled was and is New Mexico. While the evidence established that Mr. Galloway changed his domicile from England to New Mexico upon his marriage to Ms. Viklund-Galloway in 2002, Mr. Galloway was domiciled and therefore a full time resident of New Mexico for tax purposes as he was both physically present in New Mexico and through the facts, circumstances and by Mr. Galloway's actions the evidence established his intent to make New Mexico his home. He made the decision to apply for and become a permanent resident of the United States. While, at the present time, he cannot fulfill the requirements to become a citizen, such does not diminish his actual conduct to reside in New Mexico as the number of days in New Mexico is not the determining factor but rather physical presence at some time during the tax year and intent as established by the facts, circumstances and Taxpayer's conduct. The evidence established his acknowledgment to both federal and state entities that he is a permanent resident of the United States and of New Mexico. Mr. Galloway completed tax forms to both the U.S. federal and New Mexico state government providing a New Mexico residential address each time. All documentation submitted by either the Department or Taxpayer, which provides an address, provides only New Mexico addresses other than Mr. Galloway's VISA bills. Therefore from 2002 to the present Mr. Galloway is deemed to be a full time resident of New Mexico.

Double Taxation. Counsel raised an argument based on Mr. Galloway having paid state insurance (England's version of social security) claiming that such established that Mr. Galloway was a domicile of England and therefore could not be a domicile of New Mexico. Whether or not Mr.

Galloway paid state insurance to England in 2007 and 2008 based on his working on a British regulated ship does not determine whether or not he is domiciled in England or in New Mexico. Mr. Galloway testified that he cannot earn any money in the United Kingdom or he would be considered a resident there. His United Kingdom tax consultant included the Alamo Dr. Santa Fe address and the Cerro Blanco, Lamy address in notifying Mr. Galloway that he had no tax liability to the United Kingdom. The evidence established that he does not pay income tax in England. However even if he did, that fact that a person is subject to tax in one place does not mean he cannot be subject to tax in another state or country, although under specific circumstances Taxpayers could be entitled to a tax credit. When a person is a resident of one state but earns compensation for work completed at a different location, both places may have jurisdiction to tax that income. New Mexico, the same as the United States, has taken steps to ensure that its residents are not subject to double taxation by providing a credit for the amount of tax paid to the other state/country. *See* NMSA 1978, §7-2-13

Counsel argued that there is a treaty between the United States and the United Kingdom preventing a domiciliary of the United Kingdom from being doubly taxed which law would prevent Mr. Galloway from being taxed by New Mexico for his wages earned abroad. Double taxation would be an issue if Mr. Galloway was deemed to be a domiciliary of the United Kingdom for tax purposes and was therefore taxed on his income in England. Department's counsel properly noted that Mr. Galloway does not pay taxes in England because his seafarer status makes him a non-resident for tax purposes in England. While Mr. Galloway paid state insurance, equivalent to social security in the United States, in the United Kingdom in 2007 and 2008 based on his having worked on a British affiliated ship, he was not obligated to pay any income taxes in the United Kingdom. Therefore even if it were determined that he owed taxes to New Mexico while a resident of the United Kingdom, there would be no issue of double taxation.

Inability to ever become a U.S. Citizen based on physical presence requirement. Counsel argued that Mr. Galloway can never become a citizen of the United States while he is employed as a seafarer as he can never fulfill the U.S. physical presence requirement for the specified number of days. In light of this claim, Counsel further argues that only upon Taxpayer's retirement when he determines one location of residency can it be determined whether or not he is domiciled in New Mexico because only then would the Taxpayer satisfy the U.S. physical presence requirement. Counsel's argument ignores New Mexico law as to residency, domicile and the requirements as to when personal income taxes are owned on wages earned while a resident. Mr. Galloway testified that he was unsure of what he would do upon his retirement as to residence but as for the time being he would continue as he and his wife have been for the past several years although a change might occur based on the economy. While Mr. Galloway may or may not decide to retire in England or return to England to reside at some point in the future, at this time the home on Cerro Blanco (Lamy) is the home he returns to, just like Alamo Dr. in Santa Fe was the home he returned to prior to the Cerro Blanco (Lamy) residence purchase in December 2007. Whether he will decide to become a U.S. citizen is not a determining factor as to whether he is a resident for tax purposes for the tax years in question.

Claim for Refund. The issue is whether Taxpayers are entitled to a refund of personal income tax paid for tax year 2006 based on their claim that Mr. Galloway was not a resident of New Mexico during the tax years in questions and therefore not liable for income tax on the total amount of his wages earned as an employee of a cruise ship. Taxpayers timely filed a written protest based on the Department's inaction to granting or denying the claim for refund by requesting a hearing on the matter pursuant to NMSA 1978, §7-1-26 (C)(1). As Mr. Galloway was a domiciliary and therefore a full time resident of New Mexico for tax year 2006, he is not entitled to a refund of the personal income taxes he paid for that year. See Department Regulation 3.3.1.9 (C) (1) NMAC

Penalty due for failure to pay tax. NMSA 1978 Section 7-1-69 (2007) governs the imposition of a penalty for failure to pay timely taxes owed the state. Subsection A provides in pertinent part:

Except as provided in Subsection C of this section, in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there *shall be added* to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fractions of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid...(emphasis added).

Regulation 3.1.11.10 NMAC defines negligence as:

- (A) failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances
- (B) inaction by taxpayers where action is required;
- (C) inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention.

In this case, taxpayers had included all of Mr. Galloway's wages earned while working on a cruise ship for 2003 and 2004. In 2005, upon contacting counsel/tax preparer and having her complete their tax returns, taxpayers apportioned Mr. Galloway's wages based on the number of days he was physically present in New Mexico. While there was no legal precedent for such action, taxpayers relied on the advice of their counsel/tax preparer in completing their tax returns. The issue is whether these circumstances are sufficient to justify an abatement of the penalty assessed as a result of non-payment of income taxes.

NMSA 1978 Sec. 7-1-69 (B) (2003), not changed by the 2007 modification, states, "No penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." The Department's regulations require the Secretary to consider several factors in determining whether a taxpayer's failure to pay tax was negligent or in disregard of rules and regulations. Example D of Regulation 3.1.11.11 explains that negligence may not exist and/or indicate that the taxpayer was not in disregard of the rules and regulations when

- D. the taxpayer proves that the failure to pay tax or to file a return was caused by reasonable reliance on the advice of competent tax counsel or

accountant as to the taxpayer's liability after full disclosure of all relevant facts....

In this instance, taxpayers relied on the advice of counsel who also prepared their taxes. Counsel's argument as to apportionment of amount of tax due based on Mr. Galloway's days of physical presence in New Mexico is not in conformance with New Mexico law. However, counsel's advice of having Mr. Galloway pay a proportion based on physical presence and at the same time claiming that he was not a resident of New Mexico has no basis in law or fact. Department's counsel argued that the penalty was due and should be paid, based on negligence and disregard of the rules and regulations. Although counsel grossly misapplied New Mexico law, Taxpayers still relied on counsel's advice that Mr. Galloway was not a resident of New Mexico, and therefore Taxpayers believed that Mr. Galloway was not legally required to pay any tax on his wages earned outside of New Mexico. Contrary to the Department's argument, the evidence established that the disregard was not on the part of taxpayers, but on their counsel who disregarded New Mexico tax law in an unfounded belief the English law governs in New Mexico. Taxpayers, without any formal education in tax law or accounting, had no reasonable basis to dispute or reject their counsel's advice during the relevant time periods, even if now in retrospect it is apparent to experienced New Mexico tax attorneys and accountants that counsel's advice to disregard New Mexico law was misguided. The evidence established that Taxpayer's failure to pay tax was primarily attributable to Taxpayer's reasonable reliance on the advice of their counsel and tax preparer in arguing that English law should govern the payment of taxes in New Mexico rather than considering New Mexico law. Therefore, the imposition of penalty against the Taxpayers for tax years 2007 and 2008 is not warranted.

Interest Due on Unpaid Principal. NMSA 1978, §7-1-67 (2007) governs the imposition of interest on late payments of tax and provides, in pertinent part:

A. If a tax imposed is not paid on or before the day on which it becomes due, interest *shall be paid* to the state on that amount from the first day following the day on which the tax becomes due, without regard to any extension of time or installment agreement, until it is paid... (emphasis added).

NMSA 1978, Sec.7-1-67(A) (2007). The legislature's use of the word "shall" indicates that the assessment of interest is mandatory rather than discretionary. *State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). The legislature has directed the Department to assess interest whenever taxes are not timely paid. The assessment of interest is not designed to punish taxpayers, but to compensate the state for the time value of unpaid revenues. Even taxpayers who obtain a formal extension of time to pay tax are liable for interest from the original due date of the tax to the date payment is made. See NMSA 1978, § 7-1-13(E) (2007).

Interest must be assessed on tax that is due, and continues to accrue until the principal amount of tax is paid. In the acknowledgment letters from the Department to Ms. Mary-Heather Styles, counsel and tax preparer for Taxpayers, the Department notified taxpayers that interest would continue to accrue on any unpaid balances of principal. See Department Exhibits AA, II and MM. The letter also informed taxpayers that they could pay the principal to stop the accrual of interest. Taxpayers, certainly, had sufficient notice that interest would continue to accrue on any unpaid principal tax due. As the principal amount was not paid, interest on the tax is due and owing. Neither the Department nor its hearing officer has the authority to adjust interest for taxpayers. See *State ex rel. Taylor v. Johnson*, 19980NMSC-015, ¶22, 961 P.2d 768, 774-775. (The legislature, not the administrative agency declares policy and establishes primary standards to which the agency must conform).

CONCLUSIONS OF LAW

A. Taxpayers filed timely, written protests to the assessment of taxes for tax years 2005, 2007 and 2008 under Letter IDs L2117258880, L0566983040, and L0135635840 and jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayers filed a timely written protest based on the claim for refund inaction under Letter Id No. L1641700480 and jurisdiction lies over the parties and the subject matter of this protest.

C. Ms. Lonyta Viklund-Galloway is a domiciliary and therefore a resident of New Mexico during the tax years 2005, 2006, 2007 and 2008.

D. Mr. David Galloway abandoned his United Kingdom domicile in 1998 upon marriage, established a new domicile in New Mexico at that time and verified his domicile and therefore residency in New Mexico in 2002 when obtaining a permanent residence card and a New Mexico driver's license.

E. During 2005, 2006, 2007 and 2008, Mr. David Galloway was a full time resident of New Mexico as defined in the Income Tax Act and is liable for New Mexico personal income tax on the total amount of his wages earned as cruise ship personnel for these tax years.

F. Taxpayers are not entitled to a refund of personal income taxes paid in 2006 as the income was proper based on Mr. Galloway being a full time resident of New Mexico.

G. Taxpayers were not negligent in failing to timely pay income tax due on Mr. Galloway's wages during the periods at issue because of their reasonable reliance on advice of counsel and therefore the negligence penalty imposed pursuant to NMSA 1978, §7-1-69 should be abated.

H. Taxpayers failed to timely pay taxes due to the state with interest properly being assessed pursuant to NMSA 1978, §7-1-67.

For the foregoing reasons, the protest of Lonyta Viklund-Galloway and David Galloway is **GRANTED IN PART AND DENIED IN PART**: The Department is ordered to abate the penalty assessed against Taxpayers with Taxpayers remaining liable for the full amounts of the assessments and for payment of interest.

Dated: March 23, 2010.