

1 and D were excluded from the evidentiary record but retained as part of the record of the
2 hearing. The reason for their exclusion is detailed in the Order on Taxpayer Objections to
3 Late-Filed Exhibits entered on August 5, 2020.

4 The primary issue presented for consideration was whether Ms. Pauly was a New
5 Mexico resident under the Income Tax Act in 2013 and 2014. Finding that Ms. Pauly was a
6 New Mexico resident, the Hearing Officer determines that her out-of-state employment
7 income is compensation taxable in New Mexico. Therefore, Taxpayer's protest should be
8 denied. IT IS DECIDED AND ORDERED AS FOLLOWS:

9 **FINDINGS OF FACT**

10 *Procedural History*

11 1. On August 27, 2019 under Letter ID No. L0787717296, the Department
12 assessed Taxpayer personal income tax in the amount of \$3,442.00, penalty in the amount
13 of \$688.40, and interest in the amount of \$704.87, for the tax periods from January 1,
14 2013 through December 31, 2014. [Administrative File]

15 2. The protest arises from personal income tax for years 2013 and 2014
16 involving income earned by Ms. Pauly from employment in Virginia. [Direct
17 Examination of Ms. Tapia]

18 3. By correspondence dated October 7, 2019, Ms. Barbara Campbell on
19 behalf of Taxpayer submitted a formal protest of the assessment. Enclosed with the
20 protest were a variety of documents including (1) Tax Information Authorization; (2)
21 Virginia Individual Tax Returns for tax years 2013 and 2014; (3) E-ZPass statement
22 summarizing transactions in 2013 and 2014; and (4) Resident Ledger Summary Report
23 for January 2011 through February 2015. [Administrative File]

1 4. The Department acknowledged receipt of Taxpayer’s protest on October 18, 2019
2 under Letter ID L2061066928. [Administrative File]

3 5. On April 14, 2020, the Department filed a Hearing Request with the
4 Administrative Hearings Office which requested that a merits hearing be set in the Taxpayer’s
5 protest. The Hearing Request with all attachments was identified as Taxpayer Ex. 1 for purpose
6 of identification. [Administrative File]

7 6. The Department’s Hearing Request included the New Mexico Taxation and
8 Revenue Department’s Answer to Protest. [Administrative File]

9 7. On April 16, 2020, the Administrative Hearings Office issued a Notice of
10 Administrative Hearing setting a hearing on the merits for July 1, 2020, a date within 90 days of
11 the receipt of the protest. [Administrative File]

12 8. On June 25, 2020, the Administrative Hearings Office entered an Amended
13 Notice of Administrative Hearing which converted the previously scheduled in-person hearing
14 into a remote videoconference hearing due to the public health emergency presented by COVID-
15 19 and in accordance with Standing Order 20-02 of the Chief Hearing Officer. [Administrative
16 File]

17 9. On July 9, 2020, Taxpayer submitted late-filed exhibits comprised of Taxpayer’s
18 Virginia Individual Tax Returns for tax years 2011 – 2014, a Virginia Part-Year Residence
19 Income Tax Return for 2015, and an Oregon Individual Income Tax Return for Part-year
20 Residents for 2015. All exhibits were previously admitted into the evidentiary record as late filed
21 exhibits without objection from the Department. [The exhibits submitted on July 9, 2020
22 identified by the Hearing Officer as Taxpayer Ex. 2] [Administrative File]

23 10. On July 28, 2020, the Department submitted late filed exhibits consisting of: (1) a

1 recapitulation of outstanding alleged liability admitted as Department Ex. A; (2) New
2 Mexico Driver's License Information admitted as Department Ex. B; (3) New Mexico
3 automobile registration and title history, not admitted, but identified as Department Ex.
4 C; (4) property tax information, not admitted, but identified as Department Ex. D; and (5)
5 voter registration information and history admitted as Department Ex. E. [Administrative
6 File]

7 11. On August 5, 2020, Taxpayer filed objections to the Department's late-
8 filed exhibits. [Administrative File]

9 12. On August 5, 2020, the Department filed its Response to Objections to
10 Late-Filed Exhibits. [Administrative File]

11 13. On August 5, 2020, the Administrative Hearings Office entered an Order
12 on Taxpayer Objections to Late-Filed Exhibits. [Administrative File]

13 *Background*

14 14. Donald Pauly and Rosalie Pauly, also known as Rosalie Drake, are
15 married. They married around 1982 in Phoenix, Arizona. [Direct Examination of Ms.
16 Pauly; Cross Examination of Ms. Pauly]

17 15. Ms. Pauly has been employed and maintains a career in the management
18 of broadcast entities, such as television and radio stations. [Direct Examination of Ms.
19 Pauly]

20 16. Due to the limited number of employment opportunities and the finite
21 number of markets in which to seek those opportunities, it is not uncommon for someone
22 such as Ms. Pauly to relocate several times over the course of a career in order to pursue
23 opportunities in her field. [Direct Examination of Ms. Pauly]

1 proceeded to live and work there full time. [Direct Examination of Ms. Pauly]

2 23. Ms. Pauly also became active in the community explaining that in her
3 position of employment, it was critical to establish herself within the community served
4 by her television station, explaining that community involvement and outreach was
5 looked upon favorably by the Federal Communications Commission under which her
6 employer conducted business. [Direct Examination of Ms. Pauly]

7 24. Ms. Pauly served on the Board of Directors for the American Red Cross,
8 hosted weekly prayer breakfasts, hosted monthly industry breakfasts, and participated in
9 community outreach events. [Direct Examination of Ms. Pauly]

10 25. Ms. Pauly maintained an automobile in Virginia, admitting that the vehicle
11 was registered in New Mexico as a matter of convenience. The vehicle was owned or
12 leased by Mr. and Ms. Pauly. [Direct Examination of Ms. Pauly; Cross Examination of
13 Ms. Pauly]

14 26. While living and working in Virginia, Ms. Pauly maintained an E-ZPass
15 account for travel over toll roads in the area. The transactions document hundreds of trips
16 in and around Richmond, Virginia in 2013 and 2014. [Direct Examination of Ms. Pauly;
17 Taxpayer Ex. 1]

18 27. Ms. Pauly eventually left Virginia in 2015 for another position in the State
19 of Oregon. She then returned to New Mexico for a short duration of time from 2016 to
20 2017, before again relocating to Lubbock, Texas in approximately 2017. As of the date of
21 the hearing, Ms. Pauly had been residing in Lubbock, Texas for approximately three
22 years. [Cross Examination of Ms. Pauly]

23 28. Ms. Pauly's income in 2013 – 2014 (the relevant tax years) derived from

1 her employment in Virginia. Ms. Pauly filed Virginia tax returns in all years from 2011 to 2015.
2 [Direct Examination of Ms. Pauly; Taxpayer Ex. 1]

3 29. During all relevant periods of time, Ms. Pauly relied on the services of a tax
4 professional residing in the State of Oregon who prepared: (1) federal tax returns; (2) Virginia
5 tax returns; and (3) New Mexico tax returns. [Direct Examination of Ms. Pauly]

6 30. All tax returns filed in the relevant years provided Ms. Pauly's New Mexico
7 address. [Direct Examination of Ms. Pauly; Cross Examination of Ms. Pauly; Taxpayer Ex. 1]

8 31. Mr. and Ms. Pauly purchased their current residence in New Mexico in or around
9 2010 in Albuquerque. Mr. Pauly resides fulltime at the home in New Mexico while Ms. Pauly
10 has continued to reside out of state where she finds employment in her field. [Cross Examination
11 of Ms. Pauly]

12 32. The Pauly home in New Mexico has three bedrooms and landscaping. [Cross
13 Examination of Ms. Pauly]

14 33. Ms. Pauly has been continuously registered to vote in New Mexico since
15 approximately 2009 or 2010, although her voting records suggest voting activity as early as
16 2004. [Cross Examination of Ms. Pauly; Direct Examination of Ms. Tapia; Department Ex. E]

17 34. Ms. Pauly's voting records indicated that she participated in early voting in New
18 Mexico in November 2004, 2012, 2016, 2018 and voted absentee in February of 2019. Ms.
19 Pauly's voting activity in 2012 occurred during the period of time she was living and working in
20 Virginia (2010 – 2015). [Department Ex. E]

21 35. Mr. and Ms. Pauly's automobile registrations have been continuously maintained
22 in New Mexico since approximately 2010. [Cross Examination of Ms. Pauly]

23 36. During all times relevant to the protest, Ms. Pauly maintained a New Mexico

1 driver's license. [Direct Examination of Ms. Pauly]

2 37. With concern for her driver's license, it was convenient for Ms. Pauly that
3 her spouse receive renewal notices at the New Mexico address, which helped Ms. Pauly
4 stay abreast of renewal notices because managing a television station leaves little time for
5 other activities. Consequently, Ms. Pauly relies heavily on Mr. Pauly for many tasks.

6 [Cross Examination of Ms. Pauly]

7 38. Ms. Pauly's licensing history indicates she received a New Mexico REAL
8 ID on November 9, 2017. [Department Ex. B]

9 39. Alma Tapia is a protest auditor employed by the Department and is
10 familiar with the circumstances giving rise to Taxpayer's protest. [Direct Examination of
11 Ms. Tapia]

12 40. Ms. Tapia determined in her review of the protest that Ms. Pauly has
13 maintained a New Mexico Driver's License since 2009. [Direct Examination of Ms.
14 Tapia]

15 41. Ms. Tapia determined that Mr. Pauly and Ms. Pauly continued to maintain
16 automobile registrations in New Mexico as of the date of the hearing. [Direct
17 Examination of Ms. Tapia]

18 42. Ms. Tapia verified that Ms. Pauly maintained her voter registration in New
19 Mexico. [Direct Examination of Ms. Tapia]

20 43. New Mexico has been used on all of Mr. and Ms. Pauly's federal tax
21 returns since 2001. [Cross Examination of Ms. Pauly]

22 44. Ms. Pauly gave no consideration to the address used on federal tax returns,
23 but merely accepted the returns as they were presented by Mr. and Ms. Pauly's tax

1 preparer. [Re-Direct Examination of Ms. Pauly]

2 **DISCUSSION**

3 The solitary issue to be determined is whether Ms. Pauly was a resident of New Mexico in
4 2013 and 2014 therefore requiring that she report and pay income tax on compensation from
5 employment earned in Virginia.

6 Ms. Pauly asserts that for all relevant periods of time, she was a resident and domiciliary of
7 Virginia, and for that reason, her Virginia income is not taxable to New Mexico. The testimony
8 established that Mr. Pauly during all the years relevant to the protest was, and continues to be, a
9 New Mexico resident. Therefore the determination to be made is strictly in regard to Ms. Pauly's
10 residence.

11 The Department asserts that Ms. Pauly, despite her employment in Virginia, continued to be
12 domiciled in New Mexico despite her stated intentions to the contrary.

13 **Burden of Proof.**

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

21 **Personal Income Tax.**

22 New Mexico imposes a personal income tax upon the net income of every resident. *See*
23 NMSA 1978, Section 7-2-3 (1981). New Mexico's adjusted gross income is based on the

1 person's federal adjusted gross income. *See* NMSA 1978, Section 7-2-2 (2014). However, "the
2 Department has the authority to examine information or evidence in order to determine or
3 establish an individual's tax liability. *See Holt v. New Mexico Dept. of Taxation & Revenue,*
4 2002-NMSC-034, ¶ 25, 133 N.M. 11, 20, 59 P.3d 491, 500.

5 Generally speaking, New Mexico taxable income is calculated by starting with a taxpayer's
6 federal adjusted gross income, deducting the taxpayer's federal personal exemption and itemized
7 deductions, and making any adjustments allowed on Schedule A. The amount of tax is then drawn
8 from the tax rate table or tax schedule.

9 When a taxpayer is a part-time resident and a first-year resident and therefore has income
10 that is taxable both within and without New Mexico, NMSA 1978, Section 7-2-11 (2016) allows the
11 taxpayer to allocate and apportion certain categories of income between New Mexico and non-New
12 Mexico sources. The percentage of total income allocated or apportioned to New Mexico is then
13 applied to the tax previously calculated to determine the tax due. However, this apportionment is
14 allowed only when an individual has income that is taxable both within and without the state.

15 Pursuant to NMSA 1978, Section 7-2-11 (A) (3), "compensation ... of a resident taxpayer
16 shall be allocated to this state." The statute's use of the word "shall" makes the allocation of
17 resident income to New Mexico mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation*
18 *Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates that
19 a provision is mandatory absent clear indication to the contrary).

20 Department Regulation 3.3.11.11 (A) NMAC, states, "All compensation received while a
21 resident of New Mexico shall be allocated to this state whether or not such compensation is earned
22 from employment in this state."

1 Taxpayer claims that Ms. Pauly was not a resident or domiciled in New Mexico while she
2 lived and worked in Virginia, and for that reason, none of the income derived from Ms. Pauly's
3 employment in Virginia should be taxable in New Mexico.

4 **Determination of Residency based on Domicile.**

5 The law is clear about the ability of the state to impose tax on income received by its
6 residents, including income earned from employment outside the resident state. In 1919, the United
7 States Supreme Court recognized the rights of states "to exercise the widest liberty with respect to
8 the imposition of internal taxes" explaining that "states have full power to tax their own people..."
9 *See Shaffer v. Carter*, 252 US 37, 51 (1919); *See also Lawrence v. State Tax Commission of*
10 *Mississippi*, 286 US 276 (1932).

11 It is under that principle that NMSA 1978, Section 7-2-3 (1981) imposes an income tax on
12 the net income of "every resident individual." In tax years 2013 and 2014, NMSA 1978, Section 7-
13 2-2 (S) (2003) defined the term "resident" as:

14 "resident" means an individual who is domiciled in this state during
15 any part of the taxable year or an individual who is physically present
16 in this state for one hundred eighty-five days or more during the
17 taxable year; but any individual, other than someone who was
18 physically present in the state for one hundred eighty-five days or
19 more during the taxable year, who, on or before the last day of the
20 taxable year, changed the individual's place of abode to a place
21 without this state with the bona fide intention of continuing actually
22 to abide permanently without this state is not a resident for the
23 purposes of the Income Tax Act for periods after that change of
24 abode[.]

25 Department Regulation 3.3.1.9 (A) NMAC goes on to state that a full-time resident is either
26 (1) an individual domiciled in New Mexico or an individual physically present in New Mexico for a
27 total of one hundred eighty-five days or more during the tax year. Department Regulation 3.3.1.9
28 (C) (1) NMAC defines domicile as "a place where an individual has a true, fixed home, is a
29 permanent establishment to which the individual intends to return after an absence, and is where the

1 individual has voluntarily fixed habitation of self and family with the intention of making a
2 permanent home.” The regulation also states, “Every individual has a domicile somewhere, and
3 each individual has only one domicile at a time.”

4 In *Murphy v. Taxation & Revenue Dept.*, 1980-NMSC-012, ¶ 7, 94 N.M. 54, 55, 607 P.2d
5 592, 593, the court declared that for income tax purposes, residency is synonymous with domicile:
6 “A New Mexico ‘resident’ is an individual domiciled in New Mexico at any time during the taxable
7 year who does not intentionally change his domicile by the end of the year.” In *Hagan v. Hardwick*,
8 1981-NMSC-002, ¶ 10, 95 N.M. 517, 518, 624 P.2d 26, 27, the court explained that “residence” as
9 viewed by the court is synonymous with “domicile” which does not require physical presence.
10 Instead, the court explained, it is a “physical presence in the state at some time in the past, and
11 concurrent intention to make the state one’s home.” See also *Meier v. Davignon*, 1987-NMCA-030,
12 ¶ 11, 105 N.M. 567, 570, 734 P.2d 807, 810.

13 Thus, the issue is whether Ms. Pauly changed her residency when she relocated to Virginia,
14 while her spouse remained in New Mexico since “domicile does not change until the individual
15 moves to a new location with the bona fide intention of making that location his or her permanent
16 home.” See Regulation 3.3.1.9 (C)(2) NMAC; See *In re Peck’s Estate*, 1969-NMSC-054, ¶ 6, 80
17 N.M. 290, 292, 454 P.2d 772, 774.

18 In *Hagan v. Hardwick*, the New Mexico Supreme Court set out the following standard for
19 determining a change in domicile: “to effect a change from an old and established domicile to a new
20 one, there must be... a fixed purpose to remain in the new location permanently or indefinitely. For
21 domicile once acquired is presumed to continue until it is shown to have changed...” A change in
22 domicile requires both physical presence in the new locality and an intention to abandon the old

1 domicile and to make a home in the new location her permanent home. *See also Fenner v. Fenner*,
2 1987-NMCA-066, ¶ 8, 106 N.M. 36, 37, 738 P.2d 908, 910.

3 In 2010, the Department identified a number of factors for consideration in evaluating the
4 place of a person's domicile. Regulation 3.3.1.9 (C) (4) NMAC states:

5 To determine domicile, the department shall give due weight to an
6 individual's declaration of intent. However, those declarations shall
7 not be conclusive where they are contradicted by facts,
8 circumstances and the individual's conduct. In particular, the
9 department will consider the following factors in determining
10 whether an individual is domiciled in New Mexico (the list is not
11 intended to be exclusive and is in no particular order):

12 (a) homes or places of abode owned or rented (for the individual's
13 use) by the individual, their location, size and value; and how they
14 are used by the individual;

15 (b) where the individual spends time during the tax year and how that
16 time is spent; e.g., whether the individual is retired or is actively
17 involved in a business, and whether the individual travels and the
18 reasons for traveling, and where the individual spends time when not
19 required to be at a location for employment or business reasons, and
20 the overall pattern of residence of the individual;

21 (c) employment, including how the individual earns a living, the
22 location of the individual's place of employment, whether the
23 individual owns a business, extent of involvement in business or
24 profession and location of the business or professional office, and the
25 proportion of in-state to out-of-state business activities;

26 (d) home or place of abode of the individual's spouse, children and
27 dependent parents, and where minor children attend school;

28 (e) location of domicile in prior years;

29 (f) ownership of real property other than residences;

30 (g) location of transactions with financial institutions, including the
31 individual's most active checking account and rental of safety
32 deposit boxes;

33 (h) place of community affiliations, such as club and professional
34 and social organization memberships;

35 (i) home address used for filing federal income tax returns;

1 (j) place where individual is registered to vote;

2 (k) state of driver's license or professional licenses;

3 (l) resident or nonresident status for purposes of tuition at state
4 schools, colleges and universities, fishing and hunting licenses, and
5 other official purposes; and

6 (m) where items or possessions that the individual considers "near
7 and dear" to his or her heart are located, e.g., items of significant
8 sentimental or economic value (such as art), family heirlooms,
9 collections or valuables, or pets.

10 Turning to the evidence on the record. The Hearing Officer will first note that Ms. Pauly's
11 declaration of intent to reside and be domiciled in Virginia was extremely credible. Were there
12 nothing further to consider, then the Hearing Officer would have been satisfied based merely on Ms.
13 Pauly's testimony that she changed her domicile to Virginia. Yet, the law requires more than a mere
14 declaration of intent, no matter how credible. As the Department's regulation explains, "the
15 department shall give due weight to an individual's declaration of intent. However, those
16 declarations shall not be conclusive where they are contradicted by facts, circumstances and the
17 individual's conduct." Accordingly, the Hearing Officer must proceed to evaluate all of the factors.

18 The first factor evaluates homes or places of abode either owned or rented, their location,
19 size, value, and how they are used. It was undisputed that Ms. Pauly rented an apartment in Virginia
20 where she resided while she was employed there. According to the Resident Ledger Summary
21 Report, Ms. Pauly paid anywhere from \$732 to \$835 per month in rent, plus additional fees
22 associated with parking, pets, utilities, and other unspecified fees for a total monthly fee than might
23 exceed \$1,300 in a given month. Meanwhile, however, Ms. Pauly also owns a residence in New
24 Mexico with her spouse. Since ownership of a residence in New Mexico suggests an intention to
25 return to New Mexico, the Hearing Officer finds that this factor weighs in favor of New Mexico as
26 Ms. Pauly's domicile. In contrast, the act of renting under the circumstances presented by the

1 evidence in this case, suggests a temporary living arrangement, and is consistent with an intention to
2 eventually return to New Mexico where her spouse resides in their marital residence.

3 The second factor considers where the individual spends time during the tax year and how
4 that time is spent. Ms. Pauly credibly testified that the demands of managing a television station
5 leave little time for other activities. The evidence did not establish how much of the year Ms. Pauly
6 spent in Virginia or how often she may have returned to New Mexico. The Hearing Officer may
7 infer based on Ms. Pauly's credible testimony that she was very busy and had little free time to
8 travel unless it was for her employment. For this reason, the Hearing Officer presumes that Ms.
9 Pauly spent the majority of her time in activities relating to her work in Virginia. This factor weighs
10 in favor of Virginia as Ms. Pauly's domicile.

11 The third factor considers Ms. Pauly's employment. As previously discussed, Ms. Pauly was
12 a general manager for a television station. Those sorts of job opportunities are limited and have
13 caused Mr. and Ms. Pauly to relocate several times, that is until Mr. Pauly decided that he would
14 prefer to remain at the marital home in New Mexico instead of follow Ms. Pauly to her next
15 employment opportunity. Since then, Ms. Pauly has continued to relocate as her career has required.
16 As of the date of hearing, she was employed in Lubbock, Texas but not before enjoying
17 employment in Oregon in 2015 and New Mexico from 2016 to 2017. The fact that Ms. Pauly
18 returned to New Mexico from 2016 to 2017 is significant because it exemplifies her intention to
19 return to New Mexico despite statements to the contrary. Yet, the Hearing Officer also recognizes
20 that her actual return to New Mexico in 2016 may not have been contemplated when Ms. Pauly
21 departed for Virginia in 2010 or before her employment there ended in 2015.

22 Moreover, Ms. Pauly has seemingly accepted that her career opportunities in her chosen
23 field are rarely permanent, and for that reason, it was the Hearing Officer's perception that Ms.

1 Pauly has become accustomed to the transient nature of her career. In fact, it is unlikely based on
2 her previous experience in her chosen field that she enjoys the luxury of security or the ability to
3 establish deep roots in any community that she has worked. The totality of these observations leads
4 the Hearing Officer to weigh this factor evenly between New Mexico and Virginia.

5 The fourth factor considers the home or place of abode of the individual's spouse. In this
6 case, Mr. Pauly continued to reside at the marital home in New Mexico. This factor weighs in favor
7 of New Mexico as Ms. Pauly's domicile.

8 The fifth factor considers the location of domicile in prior years. The evidence established
9 that Mr. and Ms. Pauly had previously resided in New Mexico but that they left when a career
10 opportunity arose in another state. When that job ended, Mr. and Ms. Pauly returned to New
11 Mexico establishing what would appear to be an intent to maintain New Mexico as domicile. Ms.
12 Pauly registered to vote in New Mexico and obtained a New Mexico driver's license. This is further
13 supported by the purchase of the marital residence which Mr. and Ms. Pauly still own and in which
14 Mr. Pauly continues to reside fulltime. Moreover, as previously stated, Ms. Pauly returned to New
15 Mexico yet again from approximately 2016 to 2017 before departing for Lubbock, Texas. This
16 factor weighs in favor of New Mexico as Ms. Pauly's domicile.

17 The sixth factor concerns ownership of real property other than residences. There is no
18 evidence on the record concerning this factor which will be weighed neutrally between New
19 Mexico and Virginia.

20 The seventh factor evaluates the location of transactions with financial institutions,
21 including the individual's most active checking account and rental of safety deposit boxes.
22 Although the evidence presented on this issue was minimal, Ms. Pauly testified that she established
23 financial accounts in Virginia. Although reference to financial accounts was fleeting, the reference

1 permits this factor to weigh slightly in favor of Virginia. Other than the fact that Mr. Pauly handles
2 what may be considered marital business, such as the payment of automobile registration or
3 licensing fees, there was no evidence to establish the location of the institutions relied upon to
4 handle marital finances.

5 The eighth factor considers that place of community affiliations, such as club and
6 professional and social organization memberships. There was little evidence to evaluate, except for
7 a brief reference to Ms. Pauly's community activities in Virginia, which she emphasized were
8 encouraged by her job. In other words, there were benefits to her employer through community
9 involvement. This factor weighs in favor of Virginia as Ms. Pauly's domicile, although not as
10 heavily had the activities not been associated with or encouraged or inspired by Ms. Pauly's job.

11 The ninth factor is the home address used for filing federal income tax returns. The
12 address used, not only on Mr. and Ms. Pauly's federal income tax returns, but also returns filed in
13 Virginia, was the marital address in New Mexico. This factor weighs heavily in favor of New
14 Mexico. The fact that Ms. Pauly did not admittedly give the address much thought does not
15 diminish its significance. It was an outward representation to the federal government and the states
16 in which she was reporting and paying taxes of her unique relationship to New Mexico.

17 The tenth factor is the place where Ms. Pauly is registered to vote. In this case, Ms. Pauly
18 admitted that she was registered to vote in New Mexico since 2009 or 2010. However, Ms. Pauly's
19 voting records also indicate that she participated in early voting in New Mexico in 2012, during the
20 same period of time she claimed to be domiciled in Virginia. The fact that Ms. Pauly was both
21 registered to vote in New Mexico and actually voted in New Mexico in 2012 weighs heavily in
22 favor of New Mexico as Ms. Pauly's domicile since the right to vote in New Mexico is predicated
23 upon residency. *See* N.M. Const. art. VII, § 1; NMSA 1978, Section 1-1-4 (A).

1 The eleventh factor is the state of Ms. Pauly’s driver’s license or professional licenses.
2 There is no evidence to establish that Ms. Pauly maintained any professional licenses. However,
3 Ms. Pauly readily admitted that she continued to maintain a New Mexico driver’s license. A review
4 of Ms. Pauly’s driver’s license history indicates that she received a REAL ID compliant driver’s
5 license in November of 2017. This observation is significant because in order to obtain a New
6 Mexico REAL ID compliant driver’s license, an applicant is required to show proof and attest to
7 New Mexico residency, among other requirements. Ms. Pauly would have presumably been denied
8 a New Mexico REAL ID compliant driver’s license had she claimed to be a resident of a state
9 outside of New Mexico. NMSA 1978, Section 66-5-9 (B) clearly states:

10 An application for a REAL ID-compliant driver's license, an
11 instruction permit or provisional license, or renewal of a REAL ID-
12 compliant driver's license, instruction permit or provisional license
13 *shall contain* the applicant's full legal name; date of birth; sex; and
14 *current New Mexico residence address* and shall briefly describe the
15 applicant and indicate whether the applicant has previously been
16 licensed as a driver and, if so, when and by what state or country and
17 whether any such license has ever been suspended or revoked or
18 whether an application has ever been refused and, if so, the date of
19 and reason for the suspension, revocation or refusal.

20 [Emphases Added]

21 This factor weighs heavily in favor of New Mexico as Ms. Pauly’s domicile.

22 The twelve factor concerns resident or nonresident status for purposes of tuition at state
23 schools, colleges and universities, fishing and hunting licenses, and other official purposes. There
24 was no evidence proffered on which to evaluate this factor so it will weigh neutrally between New
25 Mexico and Virginia.

26 The thirteenth and final factor considers where items or possessions that Ms. Pauly
27 considers “‘near and dear’ to his or her heart are located, e.g., items of significant sentimental or
28 economic value (such as art), family heirlooms, collections or valuables, or pets.” Except for Ms.

1 Pauly's cat, there was no evidence to establish where such items were kept during Ms. Pauly's time
2 in Virginia. Although Ms. Pauly had her cat in Virginia, she also adopted her cat in Virginia. This
3 factor weighs slightly in favor of Virginia as Ms. Pauly's domicile.

4 The majority of factors weigh in favor of New Mexico as Ms. Pauly's domicile. For that
5 reason, despite Ms. Pauly's most credible testimony regarding her intentions, a closer review of the
6 factors indicate that her stated intentions are not necessarily consistent with the surrounding facts
7 and circumstances. The Hearing Officer viewed the following facts to be the most compelling. First,
8 Ms. Pauly has consistently returned to New Mexico after periods of out-of-state employment
9 because New Mexico is the domicile of her spouse and the location of the marital residence.
10 Second, Ms. Pauly's voting activity strongly favors New Mexico as her domicile. Ms. Pauly is not
11 only registered to vote in New Mexico, but she exercised that right during the period of time she
12 claimed to have been domiciled in Virginia (November 2012). Third, during all relevant periods of
13 time, Ms. Pauly maintained a New Mexico driver's license. In fact, she acquired a REAL ID
14 compliant driver's license in 2017 that she maintained as of the date of the hearing. Although 2017
15 is after the time of the assessment, it is significant because it establishes an ongoing and
16 uninterrupted intention to maintain New Mexico as her domicile, even if she is employed out of
17 state. As of the date of the hearing, Ms. Pauly was employed in Texas and explicitly denied New
18 Mexico residency. However, that assertion was contradicted by evidence that Ms. Pauly continued
19 to maintain a current and valid New Mexico REAL ID compliant driver's license, which identified
20 New Mexico as her place of residence. This observation is significant because the law requires that
21 "[w]hen a person, after applying for or receiving a driver's license, moves from the address
22 named in the application or in the issued license... shall, within ten days, notify the division of the
23 new address[.]" *See* NMSA 1978, Section 5-5-22 (A). The fact that Ms. Pauly never changed her

1 address or obtained a new driver's license in another state suggests clear intention to return to New
2 Mexico, which is reasonable under the totality of the circumstances, particularly with regard to the
3 location of Ms. Pauly's spouse and the marital residence.

4 The evidence established by more than a preponderance that Ms. Pauly was a resident of
5 New Mexico during all periods of time relevant to the protest.

6 **Penalty**

7 When a taxpayer fails to pay taxes due to the State because of negligence or disregard of
8 rules and regulations, but without intent to evade or defeat a tax, NMSA 1978, Section 7-1-69
9 (2007) requires:

10 there *shall* be added to the amount assessed a penalty in an amount
11 equal to the greater of: (1) two percent per month or any fraction of
12 a month from the date the tax was due multiplied by the amount of
13 tax due but not paid, not to exceed twenty percent of the tax due
14 but not paid.

15 (Emphasis Added)

16 As previously explained, the statute's use of the word "shall" makes the imposition of
17 penalty mandatory in all instances where a taxpayer's actions or inactions meet the legal
18 definition of "negligence." *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-
19 NMSC-013, ¶22, 146 N.M. 24, 32 (use of the word "shall" in a statute indicates that a provision is
20 mandatory absent clear indication to the contrary).

21 Regulation 3.1.11.10 NMAC defines negligence in three ways: (A) "failure to exercise that
22 degree of ordinary business care and prudence which reasonable taxpayers would exercise under
23 like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence,
24 indifference, thoughtlessness, carelessness, erroneous belief or inattention." In this case, Taxpayer
25 was negligent due to the failure to accurately compute, report and pay personal income tax
26 obligations under C.

1 On occasions where a taxpayer might fall under the definition of civil negligence
2 generally subject to penalty, Section 7-1-69 (B) provides a limited exception in that “[n]o penalty
3 shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a
4 mistake of law made in good faith and on reasonable grounds.”

5 Although Taxpayer did not specifically request the abatement of penalty, such request
6 may be implied by Ms. Pauly’s reference to her long-term reliance on a tax professional from
7 Oregon. The reference to Ms. Pauly’s long-term tax professional suggests that negligence was
8 founded on a “mistake of law made in good faith and on reasonable grounds.” However, the
9 evidentiary record does not permit the Hearing Officer to afford relief from penalty on those
10 grounds. There was no evidence to suggest that Ms. Pauly sought advice on the specific issue
11 underlying her dispute, the facts upon which such advice could have relied, or what advice was
12 provided in response to the facts. Moreover, and most compelling, is that there is no evidence to
13 establish the qualifications, and therefore the competency, of the person rendering the advice.
14 For example, as a tax professional based in Oregon, there was no evidence to establish the tax
15 professional’s familiarity, and therefore, competence, in New Mexico tax law. For these reasons,
16 there is insufficient evidence in the record to establish that the mistake of law provision of
17 Section 7-1-69 (B) should provide for an abatement of penalty in this case. *See C & D Trailer*
18 *Sales v. Taxation & Revenue Dep’t*, 1979-NMCA-151, ¶¶8-9, 93 N.M. 697, 604 P.2d 835 (penalty
19 upheld where there was no evidence that the taxpayer “relied on any informed consultation” in
20 deciding not to pay tax).

21 The other grounds for abatement of civil negligence penalty are found under Regulation
22 3.1.11.11 NMAC. That regulation establishes eight indicators of non-negligence where penalty

1 may be abated. Based on the evidence presented, only one factor under Regulation 3.1.11.11
2 NMAC is potentially applicable in this proceeding:

3 D. the taxpayer proves that the failure to pay tax or to file a return
4 was caused by reasonable reliance on the advice of competent tax
5 counsel or accountant as to the taxpayer's liability after full
6 disclosure of all relevant facts; failure to make a timely filing of a
7 tax return, however, is not excused by the taxpayer's reliance on an
8 agent;

9 Once more, there was no evidence to suggest, much less establish by a preponderance,
10 that Ms. Pauly's long-term, Oregon-based tax professional satisfied the baseline competency
11 requirement necessary to find reasonable reliance on that individual's advice.

12 As previously stated, knowing that her long-term tax professional was based in Oregon, it
13 is unknown whether Ms. Pauly made any inquiry into that individual's experience in New
14 Mexico tax law, particularly with respect to the issues subject of this protest, or what the
15 response may have been to such inquiries. Even if her Oregon-based tax professional was well-
16 versed in New Mexico tax law, there is no evidence on the record to permit the Hearing Officer
17 to evaluate whether any shortcomings in reporting or paying taxes was "caused by *reasonable*
18 *reliance* on the advice of *competent tax counsel or accountant* as to the taxpayer's liability after
19 *full disclosure of all relevant facts.*" See Regulation 3.1.11.11 (D) NMAC.

20 It is the Taxpayer's duty under *Tiffany Construction Co.*, 1976-NMCA-127, ¶5, to
21 ascertain the tax consequences of her actions. A taxpayer cannot "abdicate this responsibility [to
22 learn of tax obligations] merely by appointing an accountant as its agent in tax matters." *El Centro*
23 *Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795.

24 The Department did not allege that Taxpayer's inaction was with the intent to evade or
25 defeat a tax. In other words, Taxpayer did not act with bad intentions. Yet, *El Centro Villa*

1 *Nursing* established that the civil negligence penalty is appropriate for inadvertent error and
2 Regulation 3.1.11.11 (D) NMAC does not provide grounds for abatement of the penalty.

3 For the reasons stated, Taxpayer did not overcome the presumption of correctness that
4 attached to the assessment, and the protest should be DENIED.

5 CONCLUSIONS OF LAW

6 A. Taxpayer filed a timely, written protest to the Department's assessment, and
7 jurisdiction lies over the parties and the subject matter of the protest.

8 B. A hearing was timely set and held within 90 days of Taxpayer's protest under
9 NMSA 1978, Section 7-1B-8 (2015).

10 C. Taxpayer carries the burden to present countervailing evidence or legal argument
11 to show that it is entitled to an abatement of an assessment. *See Casias Trucking*, 2014-NMCA-
12 099, ¶8.

13 D. If a taxpayer presents sufficient evidence to rebut the presumption, then the
14 burden shifts to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*,
15 2003-NMCA-021, ¶13.

16 E. Taxpayer did not rebut the statutory presumption of correctness that attached to the
17 assessment under NMSA 1978, Section 7-1-17 and the burden did not therefore shift to the
18 Department to re-establish the correctness of its assessment.

19 F. Taxpayer (Ms. Pauly) was a resident of New Mexico in all times relevant to the
20 assessment pursuant to NMSA 1978, Section 7-2-2 (S) (2003) and Regulation 3.3.1.9 NMAC.

21 G. Taxpayer's (Ms. Pauly's) compensation from employment in the years 2013 and
22 2014 in the Commonwealth of Virginia is taxable in New Mexico pursuant to NMSA 1978, Section
23 7-2-11 (A) (3) which requires that, "compensation ... of a resident taxpayer shall be allocated to this

1 state.”

2 For the foregoing reasons, Taxpayer’s protest should be DENIED. Taxpayer shall remit
3 payment as provided in the assessment adjusted for any interest or penalty accruing until paid in
4 full.

5 DATED: April 13, 2021

6 

7 Chris Romero
8 Hearing Officer
9 Administrative Hearings Office
10 P.O. Box 6400
11 Santa Fe, NM 87502

12 **NOTICE OF RIGHT TO APPEAL**

13 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
14 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
15 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
16 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
17 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
18 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
19 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
20 Hearings Office may begin preparing the record proper. The parties will each be provided with a
21 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
22 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
23 statement from the appealing party. *See* Rule 12-209 NMRA.

1 **CERTIFICATE OF SERVICE**

2 On April 13, 2021, a copy of the foregoing Decision and Order was submitted to the parties
3 listed below in the following manner:

4 *E- Mail*

E- Mail

5 INTENTIONALLY BLANK
6

7 _____
8 John D. Griego
9 Legal Assistant
10 Administrative Hearings Office
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12 Santa Fe, NM 87502
13 PH: (505)827-0466
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