



1 Officer concluded that income derived from a retirement account by virtue of a deemed  
2 distribution while Taxpayer was a resident of New Mexico was taxable as personal income  
3 in New Mexico. IT IS DECIDED AND ORDERED AS FOLLOWS:

#### 4 **FINDINGS OF FACT**

##### 5 *Procedural History*

6 1. On September 28, 2020, the Department issued a Notice of Assessment of  
7 Taxes and Demand for Payment under Letter ID No. L2104815280 (“Assessment”) in the  
8 total amount of \$4,962.89. The total amount due was comprised of \$3,549.00 in personal  
9 income tax, \$709.80 in penalty, \$823.09 in interest, plus a credit in the amount of  
10 \$119.00, for the period of January 1, 2014 to December 31, 2014. [Administrative File;  
11 Department Ex A]

12 2. On October 28, 2020, Taxpayer submitted and the Department received a  
13 protest of the Assessment. [Administrative File; Department Ex. B]

14 3. On November 19, 2020, the Department acknowledged the receipt of  
15 Taxpayer’s protest under Letter ID No. L1034452656. [Administrative File]

16 4. On May 18, 2021, the Department submitted a Hearing Request seeking a  
17 scheduling hearing on Taxpayer’s protest. A copy of the Hearing Request was copied to  
18 Taxpayer and included New Mexico Taxation and Revenue Department’s Answer to  
19 Protest. [Administrative File]

20 5. On May 19, 2021, the Administrative Hearings Office entered a Notice of  
21 Telephonic Scheduling Hearing that set an initial scheduling hearing to occur on June 14,  
22 2021. [Administrative File]

23 6. On June 14, 2021, the Administrative Hearings Office conducted an initial

1 scheduling hearing at which time neither party objected that the hearing would satisfy the 90-day  
2 hearing requirement of NMSA 1978, Section 7-1B-8 (A). Taxpayer was notified of his right to  
3 representation and the parties also agreed to attend a second scheduling conference on September  
4 17, 2021. [Administrative File; Record of Hearing 6/14/2021]

5 7. The Administrative Hearings Office entered a Notice of Second Telephonic  
6 Scheduling Hearing on June 18, 2021, which set another scheduling hearing for September 17,  
7 2021. [Administrative File]

8 8. Mr. Rayas did not appear for the scheduling hearing on September 17, 2021. For  
9 that reason, the Administrative Hearings Office entered a Notice of Third Telephonic Scheduling  
10 Hearing on September 17, 2021, which set another scheduling hearing to occur on October 15,  
11 2021. Taxpayer was also, again, notified of his right to representation. [Administrative File;  
12 Record of Hearing 9/17/2021]

13 9. Mr. Rayas did not appear for the scheduling hearing on October 15, 2021. For that  
14 reason, the Administrative Hearings Office entered and served a Notice of Remote Video  
15 Administrative Hearing that set a hearing on the merits of Taxpayer's protest for November 3,  
16 2021, and notified Taxpayer of his right to representation. [Administrative File; Record of  
17 Hearing 10/15/2021]

18 10. On October 15, 2021, Taxpayer submitted an email to the Administrative  
19 Hearings Office requesting a continuance of the hearing on the merits that had been set to occur  
20 on November 3, 2021.

21 11. On October 18, 2021, the Administrative Hearings Office entered a Notice of  
22 Telephonic Hearing on Taxpayer's Request for Continuance. [Administrative File]

23 12. A telephonic hearing on Taxpayer's request for a continuance occurred on

1 October 19, 2021. At the conclusion of the hearing, the Administrative Hearings Office  
2 entered an Amended Notice of Remote Video Administrative Hearing which continued  
3 the hearing on the merits of Taxpayer's protest to November 9, 2021. and notified  
4 Taxpayer of his right to representation. [Administrative File; Record of Hearing  
5 10/19/2021]

6 13. On November 4, 2021, the Department filed New Mexico Taxation and  
7 Revenue Department's Exhibit List. [Administrative File]

8 14. On November 9, 2021, the Department filed New Mexico Taxation and  
9 Revenue Department's Witness and Exhibit List. [Administrative File]

10 *Material Facts*

11 15. Marcos A. Rayas and Cristina E. Rayas were married at all times relevant  
12 to the protest. They divorced in February of 2021. [Cross Examination of Mr. Rayas]

13 16. From the beginning of 2014 until approximately July 21, 2014, Mr. Rayas  
14 was employed and residing in the State of Colorado. [Direct Examination of Mr. Rayas]

15 17. During his employment in Colorado, he participated in a retirement  
16 savings account (401(k)) plan sponsored by his employer. [Direct Examination of Mr.  
17 Rayas]

18 18. At some point during his employment in Colorado, and prior to relocating  
19 to New Mexico, Mr. Rayas borrowed a sum of money from his retirement savings  
20 account which he was to repay under specified terms and conditions. The original loan  
21 amount was \$33,084.00. [Direct Examination of Mr. Rayas; Cross Examination of Mr.  
22 Rayas; Department Ex. F]

23 19. On July 21, 2014, Mr. Rayas relocated and began employment in New

1 Mexico. Mr. Rayas was domiciled and employed in New Mexico from the latter part of July  
2 2014 through the remainder of that year, as well as through the date of the hearing. [Cross  
3 Examination of Mr. Rayas; Direct Examination of Mr. Zeller]

4 20. Mr. Rayas stopped making payments on his retirement savings account loan in  
5 July of 2014 and made no subsequent payments. Therefore, the loan was “declared in default”  
6 and the outstanding balance was treated as a distribution “as stipulated by the Internal Revenue  
7 Service regulations[.]” [Direct Examination of Mr. Rayas; Cross Examination of Mr. Rayas;  
8 Department Ex. F]

9 21. Consequently, Mr. Rayas derived a total distribution in the total taxable amount of  
10 \$29,578.90 effective December 29, 2014 during which time Taxpayer was a New Mexico  
11 resident. [Direct Examination of Mr. Rayas; Direct Examination of Mr. Zeller; Cross  
12 Examination of Mr. Rayas; Department Ex. F]

13 22. In 2015, Taxpayer filed a New Mexico Personal Income Tax return for tax year  
14 2014. [Cross Examination of Mr. Rayas; Department Ex. C]

15 23. Income reported on Taxpayer’s 2014 New Mexico Personal Income Tax return  
16 did not include any income derived from Taxpayer’s retirement savings account distribution.  
17 [Cross Examination of Mr. Rayas; Direct Examination of Mr. Zeller; Department Ex. C]

18 24. On or about December 5, 2016, the Internal Revenue Service notified Taxpayer of  
19 an amount of tax, penalty, and interest due arising from the unreported income deriving from the  
20 distribution from Mr. Rayas’ retirement savings account. [Cross Examination of Mr. Rayas;  
21 Department Ex. D]

22 25. In response to the notification from the IRS that additional tax, penalty and  
23 interest was due, Mr. Rayas acknowledged the amount of tax due and entered into a payment

1 plan with the IRS. [Cross Examination of Mr. Rayas]

2 26. Taxpayer has no recollection of paying taxes on the distribution to the  
3 State of Colorado. [Cross Examination of Mr. Rayas]

#### 4 **DISCUSSION**

5 The primary issue presented for consideration was whether income derived from a  
6 retirement savings account (401(k)) is taxable as personal income in New Mexico. As explained in  
7 greater detail in the following discussion, the Hearing Officer concluded that the income  
8 distributed from a retirement savings account while Taxpayer was a resident of New Mexico was  
9 taxable as personal income in New Mexico.

#### 10 **Presumption of Correctness**

11 Pursuant to NMSA 1978, Section 7-1-17 (C) (2007), the Assessment of tax issued in this  
12 case is presumed correct and unless otherwise specified, for the purposes of the Tax  
13 Administration Act, “tax” includes interest and civil penalty. *See* NMSA 1978, Section 7-1-3 (X)  
14 (2013). Therefore, under Regulation 3.1.6.13 NMAC, the presumption of correctness under  
15 Section 7-1-17 (C) also extends to the Department’s assessment of penalty and interest. *See*  
16 *Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-050, ¶16, 139  
17 N.M. 498, 134 P.3d 785 (agency regulations interpreting a statute are presumed proper and are to be  
18 given substantial weight).

19 As a result, the presumption of correctness in favor of the Department requires that  
20 Taxpayer carry the burden of presenting countervailing evidence or legal argument to show that  
21 he is entitled to abatement of the Assessment. *See N.M. Taxation & Revenue Dep’t v. Casias*  
22 *Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. “Unsubstantiated statements that [an] assessment  
23 is incorrect cannot overcome the presumption of correctness.” *See MPC Ltd. v. N.M. Taxation &*

1 *Revenue Dep't*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d 308; *See also* Regulation 3.1.6.12  
2 NMAC. If a taxpayer presents sufficient evidence to rebut the presumption, then the burden  
3 shifts to the Department to re-establish the correctness of the assessment. *See MPC*, 2003-  
4 NMCA-021, ¶13.

### 5 **Distribution from a Retirement Savings Account**

6 Taxpayer suggests that because the contributions to his retirement savings account, which  
7 ultimately funded his loan, were earned in Colorado, the distribution deriving from his default  
8 should not be taxable to New Mexico.

9 However, it is undisputed that at the time of the distribution, on December 29, 2014,  
10 Taxpayer was residing and employed in New Mexico. The Hearing Officer perceives this fact as  
11 dispositive.

12 It has long been recognized that states reserve the right to tax the income of their  
13 residents, including income derived from employment in other states. *See Shaffer v. Carter*, 252  
14 U.S. 37 (1919). Accordingly, New Mexico imposes a tax on the net income of every resident  
15 individual. *See* NMSA 1978, Section 7-2-3 (1981). Net income includes distributions from  
16 retirement savings accounts, among other sources and categories of income. *See* NMSA 1978,  
17 Section 7-2-2 (N) (2014); Section 7-2-2 (B)(2); Section 7-2-2 (A).

18 Contributions to individual retirement accounts, including 401(k) plans, are deductible  
19 from adjusted gross income. *See* 26 U.S.C. Sec. 62. On the other hand, distributions from those  
20 same plans, with exception for circumstances not applicable under these facts, are included in  
21 federal gross income and are taxable in the year of the distribution. *See* 26 U.S.C. Sec. 408 (d)  
22 (“any amount paid or distributed out of an individual retirement plan shall be included in gross  
23 income by the payee or distributee”).

1 A distribution, or in this case, a “deemed distribution” may occur under various  
2 circumstances, including the situation existing in this protest in which Taxpayer failed to adhere  
3 to the terms and conditions for making payments on his loan. *See* 26 C.F.R. Sec. 1.72(p)-1. In  
4 other words, as simply stated by the IRS, “If the participant failed to make any installment  
5 payment when due in accordance with the terms of the loan, then the deemed distribution is the  
6 amount of the outstanding balance of the loan, plus accrued interest.” *See*  
7 <https://www.irs.gov/retirement-plans/deemed-distributions-participant-loans> (accessed  
8 12/29/2021). Therefore, unless the default is cured, which did not occur in this case, the  
9 distribution is included in Taxpayer’s gross income in the year of the distribution.

10 The Hearing Officer observed that when the IRS brought this issue to Taxpayer’s  
11 attention, he did not dispute that the distribution occurred or that it was taxable. Taxpayer merely  
12 initiated a payment plan. However, this did not satisfy Taxpayer’s personal income tax  
13 obligation to the State of New Mexico.

14 New Mexico imposes a personal income tax “upon the net income of every resident  
15 individual.” *See* NMSA 1978, Section 7-2-3. The net income that is taxed in New Mexico  
16 begins with federal adjusted gross income meaning a taxpayer’s “base income” less any  
17 applicable federal exemptions and deductions. *See* Section 7-2-2 (N).

18 Retirement income, even if initially derived from out-of-state employment, is allocated to  
19 New Mexico if the taxpayer is a New Mexico resident. *See* NMSA 1978, Section 7-2-11 (A);  
20 Regulation 3.3.11.11 (A) NMAC (12/14/00) (“All compensation received while a resident of  
21 New Mexico shall be allocated to this state whether or not such compensation is earned from  
22 employment in this state.”); *see also* Regulation 3.3.11.13 (B) (NMAC) (12/14/00) (“Retirement  
23 income of a resident is allocable to New Mexico, regardless of the source of the retirement



1 income...”); *see also The protest of Joy Odom*, Decision and Order # 11-04 (Taxation and  
2 Revenue Department Hearings Bureau, February 10, 2011, non-precedential).

3 There is no dispute that Taxpayer was a resident of New Mexico as of December 29,  
4 2014, which is the date of the distribution. Since Taxpayer was a resident of New Mexico on that  
5 date, the income derived as a result of the default on the loan and resulting deemed distribution  
6 declared on that same date is taxable to New Mexico. <sup>1</sup>

7 Taxpayer also stated some disagreement with the characterization of the distribution as a  
8 “distribution.” Having carefully contemplated the testimony and exhibits, particularly  
9 Department Ex. F in reference to this specific point, as well as the relevant authority cited in this  
10 Decision and Order, the Hearing Officer fails to see any mischaracterization or confusion of  
11 terms. The taxable event central to the protest is the distribution. Department Ex. F clearly  
12 establishes that the distribution was declared effective December 29, 2014 at which time  
13 Taxpayer was a New Mexico resident. Any assertion that this event did not qualify as a  
14 “distribution” fails for lack of legal authority and supporting evidence, especially given the  
15 substantial weight of evidence to the contrary.

16 For the reasons stated, Taxpayer’s protest is DENIED.

### 17 CONCLUSIONS OF LAW

18 A. Taxpayer filed a timely, written protest to the Assessment. Jurisdiction lies over the  
19 parties and the subject matter of this protest.

20 B. The Department made a timely request for hearing and the Administrative Hearings  
21 Office conducted a hearing within 90 days of Taxpayer’s protest under NMSA 1978, Section 7-1B-

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<sup>1</sup> Although Taxpayer suggests that the State of Colorado, instead of New Mexico, could be entitled to tax the distribution, Taxpayer presents no authority in support of that contention, nor did he present evidence to establish that he actually reported or paid taxes on the distribution to the State of Colorado.

1 8 (2015) (amended 2019).

2 C. Taxpayer carries the burden to present countervailing evidence or legal argument  
3 to show entitlement to an abatement of an assessment. *See Casias Trucking*, 2014-NMCA-099,  
4 ¶8.

5 D. If a taxpayer presents sufficient evidence to rebut the presumption, then the  
6 burden shifts to the Department to re-establish the correctness of the assessment. *See MPC Ltd.*,  
7 2003-NMCA-021, ¶13.

8 E. Taxpayer did not overcome the presumption of correctness that attached to the  
9 Assessment. *See* Section 7-1-17(C).

10 F. Under NMSA 1978, Section 7-2-3, a tax is imposed upon the net income of every  
11 resident individual employed in New Mexico.

12 G. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest  
13 under the assessment, which shall continue to accrue until the tax principal is satisfied.

14 H. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence  
15 penalty and there is no basis under the facts of the protest to permit an abatement.

16 For these reasons, Taxpayer's protest should be, and hereby is, DENIED. Taxpayer shall  
17 remit payment to the Department for the assessed amount of tax, interest, and penalty, subject to  
18 any adjustments for payments already made and for accrual of interest and penalty.

19 DATED: December 30, 2021



21 Chris Romero  
22 Hearing Officer  
23 Administrative Hearings Office  
24 P.O. Box 6400  
25 Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

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

13 **CERTIFICATE OF SERVICE**

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