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

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**IN THE MATTER OF THE PROTEST OF  
MICHAEL L. HUGHES  
TO THE ASSESSMENT  
ISSUED UNDER LETTER ID NO. L0279044528**

v.

**AHO No. 21.06-038A, D&O No. 22-01**

**NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

**DECISION AND ORDER**

On December 10, 2021, Hearing Officer Dee Dee Hoxie, Esq. conducted a videoconference hearing on the merits of the protest to the assessment. The Taxation and Revenue Department (Department) was represented by Peter Breen, Staff Attorney, who appeared by video. Patrick Zeller, Auditor, also appeared by video on behalf of the Department. Michael Hughes (Taxpayer) represented himself and appeared by internet and telephone. The Taxpayer and Mr. Zeller testified. The Hearing Officer took notice of all documents in the administrative file. The Department requested that the Taxpayer have additional time to submit exhibits. The request was granted, and the Taxpayer was given a deadline of December 20, 2021 to provide exhibits. Exhibits were timely submitted by the Taxpayer, but they were not marked or paginated. The exhibits were marked by the Hearing Officer<sup>1</sup>. The Taxpayer's exhibits #1 (affidavit), #2 (acknowledgment letter), #3 (letter from Taxpayer), #4 (letter from district sales manager), #5 (letter on insurance), #6 (response to notice of intent), #7 (2015 W-2), #8 (2016 W-

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<sup>1</sup> The exhibits were numbered by document and in the order in which they were submitted.

1 2), #9 (paystub), and #10 (bank statements)<sup>2</sup> were admitted. No objections or responses to the  
2 exhibits were submitted by the Department by January 3, 2022.<sup>3</sup>

3 The issue to be decided is whether the Taxpayer is liable for personal income tax,  
4 penalty, and interest for the 2015 and 2016 tax years. The determination hinges on whether the  
5 Taxpayer was a resident of New Mexico during the tax years. The Hearing Officer considered  
6 all of the evidence and arguments presented by both parties. Because the Taxpayer failed to  
7 overcome the presumption of correctness, the Hearing Officer finds in favor of the Department.

8 IT IS DECIDED AND ORDERED AS FOLLOWS:

9 **FINDINGS OF FACT**

10 1. On February 1, 2021, the Department assessed the Taxpayer for personal income  
11 tax, penalty, and interest for the 2015 and 2016 tax years. The assessment was for \$2,905.00 tax,  
12 \$581.00 penalty, and \$559.37 interest. [Admin. file L0279044528; Testimony of Taxpayer;  
13 Testimony of Mr. Zeller].

14 2. On February 26, 2021, the Taxpayer filed a timely written protest to the  
15 assessment. [Admin. file protest].

16 3. On March 11, 2021, the Department acknowledged its receipt of the protest.  
17 [Admin. file L0799519152; Exhibit 2].

18 4. On June 10, 2021, the Department filed its answer to the protest with a request for  
19 hearing with the Administrative Hearings Office. [Admin. file request].

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<sup>2</sup> The Hearing Officer paginated the exhibit in the order in which it was submitted by the Taxpayer; therefore, the bank statements are not all in chronological order. The exhibit contains statements which show transactions in every month of 2015, in January 2016, and in June through December of 2016.

<sup>3</sup> The deadline to respond to a pleading is 14 calendar days when no other deadline has been ordered. *See* 22.600.3.16 (H) (2020).

1           5.       On July 9, 2021, a telephonic scheduling hearing was conducted, which was  
2 within 90 days of the request as required by statute. Neither party objected that the hearing  
3 satisfied the 90-day requirement. [Admin. file].

4           6.       The Taxpayer works as an automotive technician for a company that has locations  
5 in various states. The Taxpayer has worked for the same company since 2010. [Testimony of  
6 Taxpayer; Exhibit 1; Exhibit 3; Exhibit 4; Exhibit 5; Exhibit 7; Exhibit 8; Exhibit 9].

7           7.       From 2010 to 2014 or 2015, the Taxpayer worked for the company at one of their  
8 locations in Hobbs, New Mexico. [Testimony of Taxpayer; Exhibit 1; Exhibit 3; Exhibit 4].

9           8.       The Taxpayer admits that he was a New Mexico resident during that time.  
10 [Testimony of Taxpayer].

11          9.       The Taxpayer's parents are residents of New Mexico. [Testimony of Taxpayer;  
12 Exhibit 1; Exhibit 3].

13          10.      Sometime in 2014 or 2015, the Taxpayer's duty station with the company was  
14 transferred to Odessa, Texas. [Testimony of Taxpayer; Exhibit 1; Exhibit 3; Exhibit 4; Exhibit  
15 5; Exhibit 7; Exhibit 8; Exhibit 9].

16          11.      The Taxpayer was allowed to live at the company's business location in Odessa,  
17 Texas in a travel trailer or mobile home, and his utilities were included in his compensation.  
18 [Testimony of Taxpayer; Exhibit 1; Exhibit 3; Exhibit 4].

19          12.      The Taxpayer used the company's business address as his address on his W-2s in  
20 2015 and 2016. [Testimony of Taxpayer; Exhibit 1; Exhibit 3; Exhibit 7; Exhibit 8; Exhibit 9].

21          13.      The Taxpayer maintained his driver's license and vehicle registrations in New  
22 Mexico in 2015 and 2016. [Testimony of Taxpayer; Exhibit 1; Exhibit 3; Testimony of Mr.  
23 Zeller].



1 NMCA-070, 108 N.M. 795. The presumption of correctness under Section 7-1-17 (C) extends to  
2 the Department’s assessment of penalty and interest. *See* 3.1.6.13 NMAC (2001). *See also*  
3 *Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M.  
4 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given  
5 substantial weight). Therefore, the assessment issued to the Taxpayer is presumed to be correct,  
6 and it is the Taxpayer’s burden to present evidence and legal argument to show that he is entitled  
7 to an abatement. *See N.M. Taxation & Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8.

8 **Residency.**

9 Personal income tax is imposed “upon the net income of every resident individual” in  
10 New Mexico. NMSA 1978, § 7-2-3 (1981). The Taxpayer argues that he was not a resident of  
11 New Mexico because he did not spend 185 or more days in the state. [Testimony of Taxpayer;  
12 Exhibit 1; Exhibit 3]. A person is a resident if the person is present in the state for 185 days or  
13 more during the taxable year or “is domiciled in this state during any part of the taxable year”.  
14 NMSA 1978, § 7-2-2 (S) (2014). Therefore, it is possible for the Taxpayer to be a resident of  
15 New Mexico by being domiciled in New Mexico during any part of the taxable year, even if he  
16 did not spend 185 or more days within the state.

17 A person who changes his place of abode to a location outside of New Mexico during the  
18 taxable year “with the bona fide intention” of abiding there permanently is not a resident for the  
19 period of time after that change of abode. *Id.* Everyone is deemed to be domiciled somewhere,  
20 and a person has only one domicile at a time. *See* 3.3.1.9 NMAC (2010). Once domicile is  
21 established, it does not change until the person moves “with the bona fide intention” of making  
22 the new location his permanent home. *See* 3.3.1.9 (C) (2) NMAC. There is not a change of

1 domicile if a person’s “intent is to stay away only for a limited time, no matter how long”. *See*  
2 3.3.1.9 (C) (3) NMAC.

3 Residence is synonymous with domicile, and domicile does not require a person’s  
4 continued physical presence. *See Hagan v. Hardwick*, 1981-NMSC-002, ¶ 10, 95 N.M. 517.  
5 Domicile requires a physical presence at some time in the past with the intent to make a home  
6 there. *See id.* Once domicile is established, it is presumed to continue until it is shown to have  
7 changed. *See id.* at ¶ 11. *See also* 3.3.1.9 NMAC. The Taxpayer admitted that he was a resident  
8 of New Mexico for several years prior to 2015 and 2016. [Testimony of Taxpayer; Exhibit 1;  
9 Exhibit 3]. Therefore, the Taxpayer’s residency in New Mexico is presumed to continue unless  
10 and until he proves that it changed. *See Hagan*, 1981-NMSC-002.

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

17 The regulation uses similar criteria. *See* 3.3.1.9 (C) (4) NMAC. The first factor used to  
18 determine domicile is “homes or places of abode owned or rented (for the individual’s use) by  
19 the individual, their location, size and value; and how they are used by the individual”. 3.3.1.9  
20 (C) (4) (a) NMAC. Specifics about the type of dwelling that the Taxpayer was using are  
21 unknown. It is referred to as a “trailer home” [Exhibit 1], as a “travel trailer” [Exhibit 3], and as  
22 a “mobile home” [Exhibit 4].<sup>6</sup> The Taxpayer indicated that part of his compensation included

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<sup>6</sup> For ease of reference throughout the decision, this dwelling will be referred to as a trailer.

1 parking the trailer and payments for its utilities, but the specific portion or value of his  
2 compensation related to the trailer was not given. [Testimony of Taxpayer; Exhibit 1; Exhibit 3;  
3 Exhibit 4]. Details on the size, use, and whether the trailer was a type that could be pulled  
4 behind a pickup or required a commercial mover were not given. The Taxpayer was staying in a  
5 trailer that was parked “at the office location at 1620 Viceroy, Odessa Texas”. [Exhibit 4; *see*  
6 *also* Exhibit 1; Exhibit 3; Exhibit 7; Exhibit 8; Exhibit 9; Testimony of Taxpayer]. A person is  
7 domiciled where that person intends to return after an absence and “has voluntarily fixed  
8 habitation of self and family with the intention of making a permanent home.” 3.3.1.9 (C) (1)  
9 NMAC. It is unlikely that the Taxpayer or his employer intended for the Taxpayer to make their  
10 office location his permanent home. There was no evidence that the Taxpayer took any steps to  
11 secure a permanent home in Texas, either by renting or buying, until 2017. [Testimony of  
12 Taxpayer]. Given the lack of details, the apparent mobility of the trailer, and the unlikelihood of  
13 making the office location a permanent home, this factor supports a finding that the Taxpayer  
14 was still a resident of New Mexico.

15 The second factor is

16 where the individual spends time during the tax year and how that time is spent;  
17 e.g., whether the individual is retired or is actively involved in a business, and  
18 whether the individual travels and the reasons for traveling, and where the  
19 individual spends time when not required to be at a location for employment or  
20 business reasons, and the overall pattern of residence of the individual[.] 3.3.1.9  
21 (C) (4) (b) NMAC.  
22

23 The Taxpayer was employed and lived in a trailer in Texas. The Taxpayer did not give many  
24 details on where or how he spent his time. It is apparent that the Taxpayer made several

1 purchases in Texas every month, but he also made purchases in New Mexico<sup>7</sup> most months<sup>8</sup>.  
2 [Exhibit 10]. The Taxpayer stated that he traveled within Texas for work. [Exhibit 1]. The  
3 Taxpayer did not provide any explanation for his travel in New Mexico; rather, he attempted to  
4 redact evidence of his purchases in New Mexico. [Exhibit 10]. There was no information on  
5 how or where the Taxpayer spent his time when not required to be on location for work. Given  
6 the number of purchases made in Texas [Exhibit 10], the evidence on this factor slightly supports  
7 a finding of residence in Texas.

8 The third factor is the individual's employment and its location. *See* 3.3.1.9 (C) (4) (c)  
9 NMAC. It was undisputed that the Taxpayer's employment was in Texas. This factor supports a  
10 finding of residence in Texas.

11 The fourth factor is "home of place of abode of the individual's spouse, children, and  
12 dependent parents, and where minor children attend school". 3.3.1.9 (C) (4) (d) NMAC. There  
13 was no evidence that the Taxpayer has a spouse or children. His parents reside in New Mexico,  
14 but there was no evidence that they are his dependents. Therefore, this factor does not apply.

15 The fifth factor is the location of residence in prior years. *See* 3.3.1.9 (C) (4) (e) NMAC.  
16 It was undisputed that the Taxpayer was a resident of New Mexico for several years prior to  
17 2015. [Testimony of Taxpayer; Exhibit 1]. This factor supports a finding that the Taxpayer was  
18 a resident of New Mexico.

19 The sixth factor is "ownership of real property other than residences". 3.3.1.9 (C) (4) (f)  
20 NMAC. There was no evidence that the Taxpayer owned any real property until 2017.  
21 Therefore, this factor does not apply.

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<sup>7</sup> As shown by the unsuccessful attempted redactions, many of which still show POS purchases at locations in New Mexico despite the attempted redactions.

<sup>8</sup> Of the months provided in the exhibit.



1           The seventh factor is the “location of transactions with financial institutions, including  
2 the individual’s most active checking account and rental of safety deposit boxes”. 3.3.1.9 (C) (4)  
3 (g) NMAC. The Taxpayer’s bank account was located in New Mexico. [Testimony of  
4 Taxpayer; Exhibit 1; Exhibit 10]. Most deposits and transfers appear to have been done  
5 electronically. [Exhibit 10]. There was no evidence on locations of any in-person transactions  
6 with the financial institution itself or the rental of any safety deposit box. Given the lack of  
7 evidence, this factor slightly supports a finding that the Taxpayer was a resident of New Mexico  
8 because the financial institution is located in New Mexico.

9           The eighth factor is the location of club memberships and community affiliations. *See*  
10 3.3.1.9 (C) (4) (h) NMAC. There was no evidence of any club memberships or community  
11 affiliations. Therefore, this factor does not apply.

12           The ninth factor is the address used to file federal tax returns. *See* 3.3.1.9 (C) (4) (i)  
13 NMAC. The Taxpayer used a New Mexico address to file his federal tax returns for 2015 and  
14 2016. The Taxpayer argues that this was an oversight and a mistake. [Testimony of Taxpayer;  
15 Exhibit 1; Exhibit 3]. The Taxpayer argues that he filed at least one amended return using his  
16 address in Texas. [Testimony of Taxpayer; Exhibit 1; Exhibit 3]. However, the Taxpayer  
17 attempted to amend his return using address of the home that he purchased in 2017, and the  
18 amended return was not filed until the Department had notified the Taxpayer that he was under  
19 audit. [Testimony of Taxpayer; Exhibit 6]. Amending a return to use an address where he did  
20 not reside during 2015 and 2016 is not effective to establish his residence for 2015 and 2016.  
21 Therefore, this factor supports a finding that the Taxpayer was a resident of New Mexico.

1           The tenth factor is where one is registered to vote. *See* 3.3.1.9 (C) (4) (j) NMAC. The  
2 Taxpayer was not registered to vote in New Mexico or in Texas. [Testimony of Taxpayer;  
3 Exhibit 1]. Therefore, this factor does not apply.

4           The eleventh factor is where one has a driver’s license or professional license. *See*  
5 3.3.1.9 (C) (4) (k) NMAC. In 2015 and 2016, the Taxpayer had a New Mexico driver’s license.  
6 [Testimony of Taxpayer; Testimony of Mr. Zeller]. This factor supports a finding that the  
7 Taxpayer was a resident of New Mexico.

8           The twelfth factor is residence for purposes of tuition, hunting licenses, and other official  
9 purposes. *See* 3.3.1.9 (C) (4) (l) NMAC. The only evidence on this issue comes from the  
10 exhibit, where the attempted redaction was unsuccessful and it indicates that in March 2015, the  
11 Taxpayer purchased a special hunts license from New Mexico’s Game and Fish Department.  
12 [Exhibit 10.9]. Therefore, this factor slightly supports a finding of residence in New Mexico.

13           The final factor is where “items of significant sentimental or economic value” are  
14 located. *See* 3.3.1.9 (C) (4) (m) NMAC. The Taxpayer owned some vehicles, with other family  
15 members’ names on the titles during 2015 and 2016, and those vehicles were located in New  
16 Mexico. [Testimony of Taxpayer; Exhibit 1; Exhibit 3]. Therefore, this factor slightly supports  
17 a finding of residence in New Mexico.

18           Four factors weigh neutrally, two factors weigh in favor of the Taxpayer, and seven  
19 factors weigh in favor of the Department. A person’s declarations of intent are given weight, but  
20 are not conclusive. *See* 3.3.1.9 (C) (4) NMAC. No one factor is conclusive, and driver’s  
21 licenses, voter registrations and home addresses may be given less weight given the ease with  
22 which they can be changed for tax purposes. *See id.* Based upon the totality of the evidence, the  
23 Taxpayer failed to overcome the presumption of correctness.

1 **Assessment of Penalty.**

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

10 **Assessment of Interest.**

11 Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is  
12 due. NMSA 1978, § 7-1-67 (A) (2013). Again, the word “shall” indicates that the assessment of  
13 interest is mandatory, not discretionary. See *Marbob Energy Corp. v. N.M. Oil Conservation*  
14 *Comm’n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. The assessment of interest is not designed to  
15 punish taxpayers, but to compensate the state for the time value of unpaid revenues. Because the  
16 tax was not paid when it was due, interest was properly assessed.

17 **CONCLUSIONS OF LAW**

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

20 B. The first hearing was timely set and held within 90 days of the request for hearing.  
21 See NMSA 1978, § 7-1B-8 (2019).

1 C. Prior to 2015 and 2016, the Taxpayer was domiciled in New Mexico, and residence  
2 is presumed to continue until proven otherwise. *See Hagan*, 1981-NMSC-002. *See Texas*, 306 U.S.  
3 398. *See* 3.3.1.9 NMAC.

4 D. The Taxpayer failed to overcome the presumption that the assessment was correct.  
5 *See* NMSA 1978, § 7-1-17. *See also* 3.3.1.9 NMAC.

6 E. Assessment of penalty and interest was required and appropriate under the statutes.  
7 *See* NMSA 1978, § 7-1-67 and § 7-1-69.

8 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that  
9 Taxpayer is liable for tax principal of \$2,905.00, penalty of \$581.00, and interest of \$559.37 for a  
10 total outstanding liability at the time of the assessment of \$4,045.37<sup>9</sup>.

11 *Dee Dee Hoxie*

12 \_\_\_\_\_  
13 Dee Dee Hoxie  
14 Hearing Officer  
15 Administrative Hearings Office  
16 P.O. Box 6400  
Santa Fe, NM 87502

17 **NOTICE OF RIGHT TO APPEAL**

18 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
19 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
20 file-stamped date shown above. If an appeal is not timely filed with the Court of Appeals within  
21 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA  
22 articulates the requirements of perfecting an appeal of an administrative decision with the Court  
23 of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the

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<sup>9</sup> Interest continues to accrue until tax principal is paid. The updated liability amount for interest was not provided at the hearing.

1 Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the  
2 Administrative Hearings Office may begin preparing the record proper. The parties will each be  
3 provided with a copy of the record proper at the time of the filing of the record proper with the  
4 Court of Appeals, which occurs within 14 days of the Administrative Hearings Office receipt of  
5 the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

6 **CERTIFICATE OF SERVICE**

7 On February 7, 2022, a copy of the foregoing Decision and Order was sent to the parties  
8 listed below in the following manner:

9 *Email* *Email*

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11 INTENTIONALLY BLANK