

1 was a resident of New Mexico in 2018. The Hearing Officer considered all of the evidence and
2 arguments presented by both parties. Because the Taxpayer failed to overcome the presumption
3 of correctness, the Hearing Officer finds in favor of the Department. IT IS DECIDED AND
4 ORDERED AS FOLLOWS:

5 **FINDINGS OF FACT**

6 1. On March 17, 2021, the Department assessed the Taxpayer for personal income
7 tax, penalty, and interest for the 2018 tax year. The assessment was for tax of \$6,383.00, penalty
8 of \$1,276.60, and interest of \$534.95. The assessment also showed a credit of \$145.07, for a
9 total liability of \$8,049.48. [Admin. file L0274008496].

10 2. On April 23, 2021, the Taxpayer filed a timely written protest to the assessment.
11 [Admin. file protest].

12 3. On May 31, 2021, the Department acknowledged its receipt of the protest.
13 [Admin. file L1148828080].

14 4. On June 17, 2022, the Administrative Hearings Office learned of the Taxpayer's
15 protest when the Department filed its answer to the protest and a request for hearing. [Admin.
16 file request].

17 5. On July 15, 2022, a telephonic scheduling hearing was conducted, which was
18 within 90 days of the request as required by statute. Neither party objected that the hearing
19 satisfied the 90-day requirement. [Admin. file].

20 6. On November 4, 2022, the Department pre-filed its exhibits with its prehearing
21 statement. [Admin. file].

1 7. Prior to the hearing, the Taxpayer provided his exhibits to the Department, but he
2 did not pre-file his exhibits with the Administrative Hearings Office. [Admin. file; Testimony of
3 Taxpayer].

4 8. Prior to 2016, the Taxpayer established his residency in New Mexico.
5 [Testimony of Taxpayer; Testimony of Mr. Pacheco; Exhibit A; Exhibit B; Exhibit C; Exhibit
6 D].

7 9. In 2016, the Taxpayer began working for a company in Amarillo, Texas.
8 [Testimony of Taxpayer].

9 10. In 2018, the Taxpayer was working full-time and frequently volunteered for any
10 available overtime, which resulted in a very busy schedule for the Taxpayer. [Testimony of
11 Taxpayer].

12 11. In 2018, the Taxpayer decided to move to Amarillo, Texas. [Testimony of
13 Taxpayer].¹

14 12. The Taxpayer's employer provided housing while the Taxpayer was on duty.
15 [Testimony of Taxpayer].

16 13. When not on duty, the Taxpayer was responsible for his own housing.
17 [Testimony of Taxpayer].

18 14. From March to May, the Taxpayer rented a house and made an offer to buy it that
19 was not accepted. [Testimony of Taxpayer; Exhibit 1].

20 15. From October to one month after the end of the year, the Taxpayer rented a room.
21 [Testimony of Taxpayer; Exhibit 2].

¹ Unless otherwise noted, the findings of fact following fact #11 refer to the tax year 2018.

1 16. During the remaining six months of the year², the Taxpayer could not recall what
2 specific arrangements he made for his own housing. The Taxpayer assumes that his work
3 schedule was such during those months that his personal responsibility for housing was minimal
4 and that he stayed in hotels or with friends. [Testimony of Taxpayer].

5 17. As he had in the past, the Taxpayer continued to use his address in Albuquerque,
6 New Mexico on his important documents and work papers, including his W-2s. [Testimony of
7 Taxpayer; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit F].

8 18. The Taxpayer did not change his address to Texas because he was worried that
9 important documents would get lost given his temporary living situations. [Testimony of
10 Taxpayer].

11 19. The Taxpayer discussed the possibility of selling his home in Albuquerque, New
12 Mexico to a friend, but the sale was never completed. The Taxpayer still resides at the same
13 address in Albuquerque, New Mexico. [Testimony of Taxpayer; Exhibit 2].

14 20. The Taxpayer had a New Mexico driver's license. [Testimony of Taxpayer;
15 Exhibit A].

16 21. The Taxpayer had two vehicles, both of which were registered in New Mexico.
17 When the registration on one of the vehicles was expiring, the Taxpayer renewed its registration
18 in New Mexico. [Testimony of Taxpayer; Exhibit A].

19 22. The Taxpayer claimed he was too busy to bother registering his vehicle in Texas
20 when its registration expired and that it was more convenient to use New Mexico's online
21 registration renewal. [Testimony of Taxpayer].

² January, February, June, July, August, and September.

1 7-1-3 (Z) (2019). *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Dep't*, 1989-
2 NMCA-070, 108 N.M. 795. The presumption of correctness under Section 7-1-17 (C) extends to
3 the Department's assessment of penalty and interest. *See* 3.1.6.13 NMAC (2001). *See also*
4 *Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50, ¶16, 139 N.M.
5 498, 503 (agency regulations interpreting a statute are presumed proper and are to be given
6 substantial weight). Therefore, the assessment issued to the Taxpayer is presumed to be correct,
7 and it is the Taxpayer's burden to present evidence and legal argument to show that he is entitled
8 to an abatement. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶8.

9 **Residency.**

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

18 A person who changes his place of abode to a location outside of New Mexico during the
19 taxable year "with the bona fide intention" of abiding there permanently is not a resident for the
20 period of time after that change of abode. *Id.* Everyone is deemed to be domiciled somewhere,
21 and a person has only one domicile at a time. *See* 3.3.1.9 NMAC (2010). Once domicile is
22 established, it does not change until the person moves "with the bona fide intention" of making
23 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 2018. [Testimony of Taxpayer; Exhibit A; Exhibit B;
9 Exhibit C; Exhibit D; Exhibit F]. Therefore, the Taxpayer’s residency in New Mexico is
10 presumed to continue unless 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. A person is domiciled where that person intends to return after an absence
21 and “has voluntarily fixed habitation of self and family with the intention of making a permanent
22 home.” 3.3.1.9 (C) (1) NMAC. The Taxpayer’s employer did not intend for the housing it
23 provided to be the Taxpayer’s permanent home as it was only available when the Taxpayer was

1 on duty. The Taxpayer rented a room and rented a house for part of the year. [Testimony of
2 Taxpayer]. The Taxpayer made an offer on the house, but it was rejected. [Testimony of
3 Taxpayer; Exhibit 1]. The Taxpayer does not recall what living arrangements he made for six
4 months of year, but he admits that it likely consisted of staying in hotels or with friends.
5 [Testimony of Taxpayer]. The Taxpayer claims he was too busy to do anything other than work.
6 [Testimony of Taxpayer]. There was no evidence that the Taxpayer took any other steps to
7 secure a permanent home in Texas. [Testimony of Taxpayer]. Given the temporary nature of the
8 housing that the Taxpayer secured and the lack of effort to find a permanent home, this factor
9 supports a finding that the Taxpayer was still a resident of New Mexico.

10 The second factor is where the person spends their time and how it is spent. *See* 3.3.1.9
11 (C) (4) (b) NMAC. The Taxpayer was employed and staying at various addresses in Texas. The
12 Taxpayer did not give many details on where or how he spent his time other than working.
13 There was little evidence on how or where the Taxpayer spent his time when not required to be
14 on location for work. The Taxpayer estimated that he spent only 10 days in New Mexico.
15 [Testimony of Taxpayer]. Given the amount of time spent in Texas as opposed to in New
16 Mexico, the evidence on this factor slightly supports a finding of residence in Texas.

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

20 The fourth factor is "home of place of abode of the individual's spouse, children, and
21 dependent parents, and where minor children attend school". 3.3.1.9 (C) (4) (d) NMAC. There
22 was no evidence that the Taxpayer has a spouse or children or dependent parents. Therefore, this
23 factor does not apply.

1 The fifth factor is the location of residence in prior years. *See* 3.3.1.9 (C) (4) (e) NMAC.
2 It was undisputed that the Taxpayer was a resident of New Mexico for several years prior to
3 2018. [Testimony of Taxpayer; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit F]. This
4 factor supports a finding that the Taxpayer was a resident of New Mexico.

5 The sixth factor is “ownership of real property other than residences”. 3.3.1.9 (C) (4) (f)
6 NMAC. The only evidence was that the Taxpayer owned a residence in Albuquerque, New
7 Mexico. There was no evidence of owning real property other than that residence. Therefore,
8 this factor does not apply.

9 The seventh factor is the “location of transactions with financial institutions, including
10 the individual’s most active checking account and rental of safety deposit boxes”. 3.3.1.9 (C) (4)
11 (g) NMAC. There was no direct evidence on this issue. The Taxpayer argues that Exhibit E is a
12 check written in 2021, when the Taxpayer admits that he was a New Mexico resident. The
13 Taxpayer argues that the address listed on Exhibit E is not probative of his residence in 2018.
14 Given the lack of evidence on this issue and the Taxpayer’s admission that he did not change his
15 address with anyone in 2018, this factor slightly supports a finding that the Taxpayer was a
16 resident of New Mexico because the financial institution had his address in New Mexico.

17 The eighth factor is the location of club memberships and community affiliations. *See*
18 3.3.1.9 (C) (4) (h) NMAC. There was no evidence of any club memberships or community
19 affiliations. Therefore, this factor does not apply.

20 The ninth factor is the address used to file federal tax returns. *See* 3.3.1.9 (C) (4) (i)
21 NMAC. The Taxpayer used a New Mexico address to file his federal tax returns for 2017.
22 [Exhibit F]. The Taxpayer argues that his address in 2017 is not probative of his residence in
23 2018. The Taxpayer filed his 2017 income tax when it was due in 2018. [Exhibit F]. The

1 Taxpayer admitted that he continued to use his New Mexico address for all important paperwork
2 during 2018. [Testimony of Taxpayer]. Therefore, this factor supports a finding that the
3 Taxpayer was a resident of New Mexico.

4 The tenth factor is where one is registered to vote. *See* 3.3.1.9 (C) (4) (j) NMAC. The
5 Taxpayer was registered to vote in New Mexico and appeared in person to vote in the 2018
6 general election. [Testimony of Taxpayer; Exhibit C]. Therefore, this factor supports a finding
7 that the Taxpayer was a resident of New Mexico.

8 The eleventh factor is where one has a driver's license or professional license. *See*
9 3.3.1.9 (C) (4) (k) NMAC. The Taxpayer admitted that he had a New Mexico driver's license
10 and did not apply for a Texas driver's license. [Testimony of Taxpayer; Exhibit A]. This factor
11 supports a finding that the Taxpayer was a resident of New Mexico.

12 The twelfth factor is residence for purposes of tuition, hunting licenses, and other official
13 purposes. *See* 3.3.1.9 (C) (4) (l) NMAC. The Taxpayer admitted that his vehicles were
14 registered in New Mexico, and that he renewed one vehicle's registration in New Mexico on in
15 2018. [Testimony of Taxpayer; Exhibit A]. Therefore, this factor supports a finding of
16 residence in New Mexico.

17 The final factor is where "items of significant sentimental or economic value" are
18 located. *See* 3.3.1.9 (C) (4) (m) NMAC. The Taxpayer owned two vehicles and one airplane.
19 [Testimony of Taxpayer]. One vehicle and the airplane were located in Texas. [Testimony of
20 Taxpayer]. The vehicle was used as normal transportation, and the airplane was used to facilitate
21 the Taxpayer's availability to work overtime in other locations in Texas. [Testimony of
22 Taxpayer]. The Taxpayer's other vehicle was located in New Mexico. [Testimony of
23 Taxpayer]. There was no evidence that the Taxpayer emptied his house of property, and as

1 residence is presumed to continue until proven otherwise, it is likely that most of the Taxpayer's
2 tangible personal property was still at his house in New Mexico. Therefore, this factor slightly
3 supports a finding of residence in New Mexico.

4 Three factors weigh neutrally, two factors weigh in favor of the Taxpayer, and eight
5 factors weigh in favor of the Department. A person's declarations of intent are given weight, but
6 they are not conclusive. *See* 3.3.1.9 (C) (4) NMAC. No one factor is conclusive, and driver's
7 licenses, voter registrations and home addresses may be given less weight given the ease with
8 which they can be changed for tax purposes. *See id.* The Taxpayer did not take what are
9 considered easy steps to change his residence. The Taxpayer also testified that he would still be
10 a Texas resident if he had not lost his job in Texas. [Testimony of Taxpayer]. Residence is
11 synonymous with domicile, not with employment. *See Hagan*, 1981-NMSC-002, ¶ 10. Once
12 domicile is established, it is presumed to continue until it is shown to have changed. *See id.* at ¶
13 11. *See also* 3.3.1.9 NMAC. Despite his declared intent, the Taxpayer did not take even what
14 are considered to be easy steps, such as changing driver's license, to change his residence.
15 Based upon the totality of the evidence, the Taxpayer failed to overcome the presumption of
16 correctness. *See* NMSA 1978, § 7-1-17. *See N.M. Taxation & Revenue Dep't v. Casias*
17 *Trucking*, 2014-NMCA-099, ¶8.

18 **Assessment of Penalty.**

19 Penalty "*shall* be added to the amount assessed" when a tax is not paid on time due to
20 negligence. *See* NMSA 1978, § 7-1-69 (2007) (emphasis added). The word "shall" indicates that
21 the assessment of penalty is mandatory, not discretionary. *See Marbob Energy Corp. v. N.M. Oil*
22 *Conservation Comm'n.*, 2009-NMSC-013, ¶ 22, 146 N.M. 24. Assessments of penalty are

1 presumed to be correct, and it is a taxpayer's burden to show that the assessment was not correct.
2 See 3.1.11.8 NMAC (2001). See NMSA 1978, § 7-1-17. See also *El Centro*, 1989-NMCA-070.

3 If a taxpayer is not negligent, penalties may be excused. See 3.1.11.11 NMAC (2001)
4 (listing several factors, such as consulting an accountant, that indicate non-negligence).
5 Negligence includes inadvertence. See 3.1.11.10 (C) (2001). The Taxpayer argues that he was
6 not negligent because he followed an accountant's advice when he filed a New Mexico PIT
7 return for 2018 as a part-year resident. [Testimony of Taxpayer; Exhibit D]. The Taxpayer filed
8 the 2018 PIT return after the assessment had been made in an effort to appease the Department.
9 [Testimony of Taxpayer; Exhibit D]. Consulting an accountant after an assessment does not
10 establish non-negligence. See 3.1.11.11 NMAC. Therefore, penalty was properly assessed.

11 **Assessment of Interest.**

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

18 **CONCLUSIONS OF LAW**

19 A. The Taxpayer filed a timely written protest to the assessment, and jurisdiction lies
20 over the parties and the subject matter of this protest. See NMSA 1978, § 7-1B-8 (2019).

21 B. The first hearing was timely set and held within 90 days of the request for hearing.
22 *See id.*

1 C. Prior to 2018, the Taxpayer was domiciled in New Mexico, and residence is
2 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* 3.1.6.13 and 3.3.1.9 NMAC.

6 E. The Taxpayer failed to establish that he was not negligent. *See* NMSA 1978, § 7-1-
7 69. *See* 3.1.6.13 and 3.1.11.10 and 3.1.11.11 NMAC.

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

10 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
11 Taxpayer is liable for \$5,085.93 in personal income tax, \$1,276.60 in penalty, and \$876.88 in
12 interest for a total outstanding liability of \$7,239.41.³ Interest continues to accrue until the tax
13 principal is paid. *See* NMSA 1978, § 7-1-67.

14 DATED: November 30, 2022.

15 *Dee Dee Hoxie*

16 Dee Dee Hoxie
17 Hearing Officer
18 Administrative Hearings Office
19 P.O. Box 6400
20 Santa Fe, NM 87502

³ These figures are taken from Exhibit G. The difference in the current personal income tax liability and the assessment reflects that the Taxpayer made a partial payment of the tax when he filed the 2018 PIT return after the assessment. The penalty remains the same. The difference in the current interest and the assessment reflects the additional interest accrued on the outstanding tax principal.

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**

14 On November 30, 2022, a copy of the foregoing Decision and Order was submitted to the
15 parties listed below in the following manner:

16 *First Class Mail and Email*

First Class Mail and Email

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