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

**IN THE MATTER OF THE PROTEST OF
DANIEL & TEREZINHA MCGLYNN
TO THE RETURN ADJUSTMENT NOTICE
ISSUED UNDER LETTER ID NO. L0546105008**

AND

**IN THE MATTER OF THE PROTEST OF
DANIEL & TEREZINHA MCGLYNN
TO THE RETURN ADJUSTMENT NOTICE
ISSUED UNDER LETTER ID NO. L1149984176**

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v.

**AHO Nos. 22.10-047A and
22.10-048R
D&O No. 23-12**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

On June 23, 2023, Hearing Officer Dee Dee Hoxie, Esq. conducted an in-person hearing on the merits of the protest to the return adjustment notices. The Taxation and Revenue Department (Department) was represented by Timothy Williams, Staff Attorney. Sonya Varela, Auditor, also appeared. Daniel and Terezinha McGlynn (Taxpayers) were represented by their attorney, Bradley Odegard. Neither party presented any testimony or exhibits¹ at the hearing. The Hearing Officer took notice of all documents in the administrative file, and the parties agreed that the documents in the administrative file were sufficient evidence on this protest. The parties did not explicitly stipulate to the facts, but the arguments of both parties relied upon the same set of material facts. Therefore, the Hearing Officer treated the facts submitted with the request for hearing and the parties' prehearing statements as stipulated facts.

¹ Several of the Taxpayers' letters to the Department included attachments that they identified as exhibits; however, these numbers and letters will not be used to identify the documents in the administrative file as there are repetitions of identifications for different documents.

1 The main issue to be decided is whether the Taxpayers are entitled to a credit against
2 their New Mexico taxes for taxes paid to the state of California. For the 2019 tax year, the denial
3 of the credit resulted in additional tax owed with penalty and interest. For the 2020 tax year, the
4 denial of the credit resulted in the reduction of the Taxpayers' claimed refund. The Hearing
5 Officer considered all of the evidence and arguments presented by both parties. Because the
6 Taxpayers' income for rents on California property are allocated solely to California under the
7 statutes, the Taxpayers are not entitled to any credit against their New Mexico taxes for taxes
8 paid to California. Consequently, the Hearing Officer finds in favor of the Department. IT IS
9 DECIDED AND ORDERED AS FOLLOWS:

10 FINDINGS OF FACT

11 Procedural Findings

12 1. On May 15, 2020, the Department issued the return adjustment notice to the
13 Taxpayers for the 2019 tax year on their personal income taxes, showing a liability for tax of
14 \$11,731.00, penalty of \$41.65, and interest of \$0.00, with credits for \$9,322.00, which left a total
15 outstanding liability for the 2019 tax year of \$2,450.65. [Admin. file L0546105008].

16 2. On May 5, 2021, the Department issued the assessment for the 2019 tax year to
17 the Taxpayers. [Admin. file Department's combined answer² to protests]³.

18 3. On June 19, 2021, the Taxpayers filed a timely protest to the assessment.
19 [Admin. file protest file-stamped "Jun 19 2021"].

20 4. On September 24, 2021, the Department acknowledged its receipt of the protest.
21 [Admin. file L0504397232].

² The Department's answer refers to Letter ID No. 0511375792, which was not included in the administrative file and was not submitted by either party as an exhibit. In the Request for Hearing submitted by the Department the section with the title page "Assessment" had copies of L0546105008 and L1149984176. Based on the Department's filing, the case was captioned with these two letter id. numbers.

³ Hereinafter the Department's combined answer to protests will be referred to as "Department's Answer".

1 5. On September 17, 2021, the Department issued the return adjustment notice to the
2 Taxpayers for the 2020 tax year on their personal income taxes, showing a liability for tax of
3 \$1,280.00, penalty of \$0.00, interest of \$0.00, and credits of \$1,745.80, for an overpayment of
4 \$466.00. [Admin. file L1149984176].

5 6. On October 18, 2021, the Taxpayers filed a timely protest to the return adjustment
6 notice. [Admin. file protest file-stamped “Oct 18 REC’D”].

7 7. On April 7, 2022, the Department acknowledged its receipt of the protest.
8 [Admin. file L1839712176].

9 8. On October 6, 2022, the Department filed a request for hearing with the
10 Administrative Hearings Office on both protests with a combined answer and motion to
11 consolidate. [Admin. file request and Department’s Answer].

12 9. On November 2, 2022, a telephonic scheduling hearing was conducted, which
13 was within 90 days of the request as required by statute. [Admin. file].

14 **Substantive Findings**

15 10. The Taxpayers are a married couple residing in New Mexico and filing their
16 personal income tax returns jointly. [Department’s Prehearing Statement]⁴.

17 11. Taxpayers have income from numerous sources, including wages, interest,
18 dividends, refunds, businesses, capital assets, rents, and royalties. [Taxpayers’ Prehearing
19 Statement]⁵.

20 12. The Taxpayers have rental properties located in New York, Pennsylvania,
21 Washington, California, and New Mexico. [Department’s PHS; Taxpayers’ PHS].

⁴ Hereinafter the Department’s Prehearing Statement will be referred to as “Department’s PHS”.

⁵ Hereinafter the Taxpayers’ Prehearing Statement will be referred to as “Taxpayers’ PHS”.

1 13. The Taxpayers filed their 2019 and 2020 personal income tax (PIT) returns and
2 claimed a credit against their New Mexico taxes for taxes paid to California on nonbusiness
3 rental income. [Department’s PHS; Taxpayers’ PHS; 2019 PIT-X and PIT-B].

4 14. The Taxpayers filed an amended PIT return for 2019. [2019 PIT-X].

5 15. The aggregate of the Taxpayers’ rental incomes and losses from all states where
6 they own properties resulted in a total of \$10.00 included in their overall federal adjusted gross
7 income for the 2019 tax year. [Taxpayers’ PHS; 2019 PIT-B].

8 16. The Taxpayers’ rental income solely from New Mexico properties without the
9 benefit of the other states’ losses would include \$12,005.00. [2019 PIT-B].

10 17. The Taxpayers’ federal adjusted gross income is less than their New Mexico
11 income. [Taxpayers’ PHS; Department’s PHS; 2019 PIT-B].

12 18. The Department’s denial of the credit for taxes paid to California resulted in an
13 additional tax liability for 2019 and a reduced refund amount for 2020, which are the amounts at
14 issue in this protest. [L0546105008 and L1149984176].

15 **DISCUSSION**

16 **Burden of proof.**

17 “The taxpayer shall have the burden of proof, except as otherwise provided by law.”
18 22.600.3.24 (B) NMAC (2020). Assessments by the Department are presumed to be correct. *See*
19 NMSA 1978, § 7-1-17 (2007). As the return adjustment notice for the 2019 tax year resulted in
20 an assessment, it is presumed to be correct. *See id.* *See El Centro Villa Nursing Ctr. v. Taxation*
21 *and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. *See also Archuleta v. O’Cheskey*,
22 1972-NMCA-165, ¶11, 84 N.M. 428. *See also N.M. Taxation & Revenue Dep’t v. Casias*
23 *Trucking*, 2014-NMCA-099, ¶8. The presumption extends to the assessment of penalty and

1 interest. *See* 3.1.6.13 NMAC (2001). “The effect of the presumption of correctness is that the
2 taxpayer has the burden of coming forward with some countervailing evidence tending to dispute
3 the *factual correctness* of the assessment”. 3.1.6.12 (A) NMAC (2001) (emphasis added).

4 However, the facts in this protest were not in dispute; rather, the legal effect of allocation and credits
5 paid to another state are at issue. The Taxpayers bear the burden of proving their case. *See Gemini*
6 *Las Colinas, LLC*, 2023-NMCA-___. *See also* 22.600.1.18 and 22.600.3.24 NMAC.

7 **Credits on taxes paid to another state.**

8 A New Mexico resident who is liable to pay tax in another state on income derived from
9 sources outside of New Mexico may claim a credit against their New Mexico taxes “with respect to
10 income that is required to be either allocated or apportioned to New Mexico.” NMSA 1978, § 7-2-
11 13 (2013). Income is required to be allocated and apportioned as provided in the Uniform Division
12 of Income for Tax Purposes Act (UDITPA). *See* NMSA 1978, § 7-2-11 (2016). *See also* NMSA
13 1978, §7-4-1 *et. seq.* A taxpayer allocates nonbusiness income to a particular state, and a taxpayer
14 apportions business income between states using an appropriate formula. *See* 3.5.3.7 NMAC
15 (2001). Business income arises in the course of trade or business activities, and nonbusiness income
16 is all income other than business income. *See* NMSA 1978, § 7-4-2 (1999).

17 The Taxpayers are New Mexico residents who were required to pay taxes in California
18 because they had income derived from sources in California. [Taxpayers’ PHS; Department’s
19 PHS]. *See* NMSA 1978, § 7-2-13. The Taxpayers identified the income from their properties in
20 various states, including California, as rental income and did not identify it as business income.
21 [2019 PIT-B; 2019 Schedule E⁶]. Therefore, the rental income at issue is nonbusiness income. *See*

⁶ The 2019 Schedule E included in the file has four pages.

1 NMSA 1978, § 7-4-2. Consequently, the Taxpayers must allocate the nonbusiness rental income to
2 a particular state. *See* 3.5.3.7 NMAC (2001).

3 Allocation of net income is dictated by the UDITPA. *See* NMSA 1978, § 7-4-3 (1981).
4 Specific provisions dictate how nonbusiness rental income is to be allocated. *See* NMSA 1978, § 7-
5 4-5 (1965). Rental income derived from property located in New Mexico is allocated to New
6 Mexico. *See* NMSA 1978, § 7-4-6 (1965). Nonbusiness rental income derived from property
7 located in other states is not mentioned in the statute; therefore, it is not required to be allocated to
8 New Mexico. *See id.* Nonbusiness rental income derived from property located in another state is
9 allocable to the state where the property is located. *See id.* *See also Allied-Signal, Inc. v. Director,*
10 *Div. of Taxation*, 504 U.S. 768, 785, 112 S.Ct. 2251, 2262 (June 15, 1992) (noting that state
11 legislatures have relied upon precedent from the court by enacting tax codes which allocate
12 nonbusiness income to the domiciliary state of that income).

13 Therefore, the Taxpayers' nonbusiness rental income from California is allocable to
14 California. *See* NMSA 1978, §7-4-6. *See also Allied-Signal, Inc.*, 504 U.S. 768. The credit against
15 New Mexico taxes applies only “with respect to income *that is required to be either allocated or*
16 *apportioned to New Mexico.*” NMSA 1978, § 7-2-13 (emphasis added). As the nonbusiness rental
17 income from California is not required to be allocated to New Mexico, the credit for taxes paid to
18 another state does not extend to that income. *See* NMSA 1978, § 7-2-13. For that reason, the
19 Department disallowed the credit, which resulted in additional tax liability in 2019 and a reduced
20 refund in 2020. [L0546105008 and L1149984176]. The Taxpayers concede that the Department's
21 position on this issue is technically an accurate application of the statute.

22 However, the Taxpayers also argue that the technical application of the New Mexico statute
23 results in double taxation and argues that double taxation is a violation of the dormant commerce

1 clause. [Taxpayers' PHS]. The Taxpayers' protests focus on the effect of California's tax statutes.
2 [Admin. file protests]. Complaints about the effects of other states' tax statutes should be taken up
3 with the other states. *See Murphy v. Taxation & Revenue Dep't*, 1980-NMSC-012, ¶ 14, 94 N.M.
4 54 (recognizing that double taxation is a heavy burden on a taxpayer but upholding the New Mexico
5 tax⁷ with an admonition to take it up in the other jurisdiction regarding the application of their tax).
6 To determine if a tax violates the dormant commerce clause, courts use the "internal consistency"
7 test, which supposes that an identical tax is imposed in every state to determine if the tax places
8 interstate commerce at a disadvantage as compared to intrastate commerce. *See Comptroller of the*
9 *Treasury of Maryland v. Wynne*, 575 U.S. 542, 562, 135 S.Ct. 1787, 1802 (May 18, 2015). If the
10 tax would result in discrimination against interstate commerce without regard to the tax policies of
11 other states, then the tax is impermissible and violates the dormant commerce clause. *See id.*

12 The Taxpayers do not explain how New Mexico's tax credit against taxes paid in another
13 state on income that is allocable to New Mexico discriminates against interstate commerce.
14 [Taxpayers' PHS]. The Taxpayers' argument rests on the presumption that the dormant commerce
15 clause strictly prohibits any form of double taxation. [Taxpayers' PHS]. However, it is possible for
16 a tax scheme to incentivize interstate commerce and result in double taxation when two states have
17 tax structures that are different but nondiscriminatory and internally consistent. *See Comptroller of*
18 *the Treasury of Maryland*, 575 U.S. at 562. The Taxpayers' have failed to demonstrate how the
19 New Mexico tax would prejudice interstate commerce. Therefore, there is no basis to find that the
20 tax violates the dormant commerce clause. To the extent that the Taxpayers' argument might be
21 construed as a challenge to the statute, it is arguably beyond the scope of the administrative
22 hearing and is similarly without demonstrable prejudice. *See Maso v. State*, 2004-NMCA-025,

⁷ The tax at issue in this case was on nonresidents required to file in New Mexico and reciprocity of other jurisdictions, a statute that has since been repealed.

1 135 N.M. 152 (holding that a constitutional challenge to the statute would have been beyond the
2 scope of the administrative hearing). *See also AA Oilfield Serv. v. N.M. State Corp. Comm'n*,
3 1994-NMSC-085, ¶ 18, 118 N.M. 273 (holding that the quasi-judicial powers of an
4 administrative body are limited to making factual and legal determinations as authorized by the
5 statute). *See Gzaskow v. Pub. Employees Ret. Bd.*, 2017-NMCA-064, ¶35 (recognizing *AA*
6 *Oilfield Serv.* for the proposition that an agency with quasi-judicial powers did not have authority
7 to grant an equitable remedy). *See also* NMSA 1978, § 7-1B-1, *et seq.*

8 The Taxpayers also argue that the Taxpayers' federal adjusted gross income, which is the
9 base of New Mexico's income tax⁸, includes the nonbusiness rental income from California. For
10 that reason, the Taxpayers argue that they are entitled to an equitable remedy and argue that they
11 should receive credit against their New Mexico taxes for the entirety of the amount on taxes paid to
12 California.

13 The New Mexico statutes allow equitable adjustment to the standard allocation to fairly
14 represent a taxpayer's "business activity in the state". NMSA 1978, § 7-4-19 (1986). Under
15 UDITPA, "a corporate taxpayer can challenge the application of statutory or regulatory formula to
16 its business by presenting evidence that the application of the formula to its operations results in an
17 unfair representation of the taxpayer's business activities in New Mexico." *United Parcel Serv. Inc.*
18 *(Ohio) & Affiliates v. N.M. Taxation & Revenue Dep't*, 2023-NMCA-____, No. A-1-CA-38585, ¶
19 14, 2023 WL 4140849. Thus, the burden is on the taxpayer to show why the Department should
20 deviate from the statute. *See id.* Even if the statutory equitable adjustment based on a taxpayer's
21 business activity were to apply to the Taxpayers' nonbusiness rental income, the Taxpayers have
22 not met their burden. *See id.* The Taxpayers' dispute involves nonbusiness rental income allocated

⁸ *See* NMSA 1978, §7-2-3 (1981) and § 7-2-2 (2021).

1 to California, and that income was not apportioned or taxed in New Mexico so there is no need to
2 apply an equitable adjustment to the facts of this protest. *See* NMSA 1978, § 7-4-19.

3 In unusual circumstances, the Department is authorized to enter into a written agreement
4 with a taxpayer with respect to the allocation and apportionment of their income. *See* NMSA 1978,
5 § 7-4-20 (1986). The Department is not required to enter into such an agreement. *See id.* The
6 Taxpayers and the Department have not entered into such an agreement in this case.

7 The Taxpayers argue that the statutes allow for other equitable remedies in order to
8 effectuate their general purpose under Section 7-4-21. *See* NMSA 1978, § 7-4-21 (1965). The
9 general purpose of UDITPA is “to make uniform the law of those states which enact it.” *Id.*
10 Deductions and tax credits are to be construed narrowly. *See Team Specialty Prods. v. N.M.*
11 *Taxation & Revenue Dep’t*, 2005-NMCA-020, ¶ 9, 137 N.M. 50 (noting that tax credits are
12 strictly matters of legislative grace and to be construed against a taxpayer). Unlike deductions
13 and credits, “there is a presumption in favor of taxation and therefore statutes such as UDITPA
14 are construed to effectuate such a presumption.” *Public Service Co. of NM v. N.M. Taxation &*
15 *Revenue Dep’t*, 2007-NMCA-050, ¶ 33, 141 N.M. 520. *See also Allied-Signal, Inc.*, 504 U.S. at
16 785.

17 The Department argues that the Taxpayers are not entitled to any equitable remedy as they
18 are already in a better position than they would be without the use of the federal adjusted gross
19 income. The Department points out that the Taxpayers’ federal adjusted gross income is less than
20 the amount of income allocable to New Mexico. [2019 PIT-X and 2019 PIT-B]. The Department’s
21 argument is persuasive. According to the amounts reported by the Taxpayers, their total federal
22 income was \$328,822. [2019 PIT-B]. Their total New Mexico income was \$354,027. [2019 PIT-
23 B]. The total amount of income attributable to rents and royalties in their federal income, which

1 included property from other states, was \$10. [2019 PIT-B]. The total amount of income
2 attributable to rents and royalties in their New Mexico income, which included only property
3 located within New Mexico, was \$12,005. [2019 PIT-B]. Because the amount of the New Mexico
4 income for rents and royalties is greater than the amount of the federal income for rents and
5 royalties, the Department treats the \$10 of federal income as being fully allocable to New Mexico.

6 The Department also points out that PIT-B already has an equitable calculation for the
7 adjustment of income tax. [2019 PIT-B]. On line 11, total income is reported with federal income
8 in column 1 and New Mexico income in column 2. [2019 PIT-B]. On line 12, the amount of New
9 Mexico income is divided by the amount of federal income⁹. [2019 PIT-B]. On line 13 is the
10 amount of tax due to New Mexico based on the federal income. [2019 PIT-B]. The percentage in
11 line 12 is then multiplied by line 13. [2019 PIT-B]. The result of multiplying line 12 by line 13 is
12 entered on line 14 and is the final adjusted amount of New Mexico tax due. [2019 PIT-B]. For
13 example, a total federal income equal to \$100,000, with a total New Mexico income equal to
14 \$10,000, would result in 0.1000 on line 12. Assuming a tax rate that would result in \$1,000 on line
15 13 for the New Mexico tax due on the total federal amount, then the final amount of tax due to New
16 Mexico would be adjusted to \$100¹⁰ on line 14.

17 Because the Taxpayers' New Mexico income was greater than their federal income, the
18 result of dividing the two income amounts was 100%¹¹. [2019 PIT-B]. Because the Taxpayers'
19 New Mexico income was greater than their federal income, the multiplication of line 12 by line 13
20 did not affect the amount of tax owed to New Mexico. [2019 PIT-B]. Since the federal income for
21 rents and royalties was \$10 and the New Mexico income was \$12,005, the entire federal income for

⁹ Requiring four decimal places.

¹⁰ That is \$1000 multiplied by .1000.

¹¹ Dividing 354,027 by 328,822 results in 1.0766. Amounts greater than one are equal to 100%.

1 rents and royalties of \$10 is allocable to the New Mexico income for rents and royalties. [2019 PIT-
2 B]. Therefore, the Taxpayers failed to demonstrate that they were subject to double taxation in New
3 Mexico with respect to the income from rents and royalties based on the use of their federal adjusted
4 gross income to calculate the New Mexico tax due.

5 Based upon the statutorily required allocation of the Taxpayers' nonbusiness rental income
6 and the totality of the evidence, the Taxpayers failed to demonstrate that they are entitled to
7 equitable remedy. Consequently, they are not entitled to a credit against their New Mexico taxes for
8 taxes paid to California. *See* NMSA 1978, § 7-2-13.

9 CONCLUSIONS OF LAW

10 A. The Taxpayers filed a timely written protest of the Department's return adjustment
11 notices, and jurisdiction lies over the parties and the subject matter of this protest. *See* NMSA 1978,
12 § 7-1B-8 (2019).

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

15 C. The Taxpayers nonbusiness rental income from properties in California was
16 allocable to California and was not required to be allocated to New Mexico. *See* NMSA 1978, § 7-
17 4-3, § 7-4-5, and § 7-4-6. *See also Allied-Signal, Inc.*, 504 U.S. 768.

18 D. As the Taxpayers' taxes paid in California were on income that was not required to
19 be allocated to New Mexico, they were not entitled to a credit against their New Mexico taxes for
20 taxes paid to California. *See* NMSA 1978, § 7-2-13.

21 E. The Taxpayers failed to demonstrate that the New Mexico tax laws violate the
22 dormant commerce clause and failed to establish that they were entitled to an equitable remedy. *See*
23 *Team Specialty Prods.*, 2005-NMCA-020, ¶ 9. *See also Public Service Co. of NM v.*, 2007-

1 NMCA-050, ¶ 33. *See also Allied-Signal, Inc.*, 504 U.S. at 785. *See also Comptroller of the*
2 *Treasury of Maryland*, 575 U.S. at 562. *See also Maso v. State*, 2004-NMCA-025. *See also AA*
3 *Oilfield Serv.*, 1994-NMSC-085, ¶ 18. *See also Gzaskow*, 2017-NMCA-064, ¶35.

4 For the foregoing reasons, the Taxpayers’ protest **IS DENIED**.

5 DATED: July 21, 2023.

6 *Dee Dee Hoxie*

7 _____
8 Dee Dee Hoxie
9 Hearing Officer
10 Administrative Hearings Office
11 P.O. Box 6400
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 July 21, 2023, a copy of the foregoing Decision and Order was submitted to the parties

3 listed below in the following manner:

4 *First Class Mail and Email*

First Class Mail and Email

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6 ***INTENTIONALLY BLANK***