

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE PROTEST OF
FIDEL G. AND SADIE ANN AVILUCEA,
PROTEST TO DENIAL OF CLAIM FOR REFUND

NO. 99-27

DECISION AND ORDER

This matter came on for hearing on September 24, 1999 before Gerald B. Richardson, Hearing Officer. Mr. and Mrs. Avilucea, hereinafter, "Taxpayers", represented themselves at the hearing. The Taxation and Revenue Department, hereinafter, "Department", was represented by Javier López, Special Assistant Attorney General. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayers are longtime residents of New Mexico. At all times pertinent to this matter, they owned a home in Las Cruces and they owned vehicles registered with the State of New Mexico.
2. In January, 1990, the Taxpayers accepted three year tours of duty in Rota, Spain, as civilian employees with the United States Department of the Navy.
3. The Department of the Navy withheld federal income withholding tax from the Taxpayer's compensation but did not withhold any state taxes.
4. During 1990, the Taxpayers became concerned about whether they would be held liable for state income tax upon their wage income. They had heard from other overseas federal employees that other overseas employees had found themselves subject to payment of not only

back taxes, but substantial amounts of interest and penalty when they returned to their stateside homes from their tours of duty. In order to avoid this potential situation, in July of 1990, the Taxpayers wrote to the Department explaining their situation and asked for advice with respect to their responsibilities for New Mexico income tax.

5. On November 2, 1990, Mr. Thomas M. Sharp, an information specialist with the Department, responded to the Taxpayers' inquiry. Mr. Sharp informed the Taxpayers that unless they had decided to make another state their permanent place of residence when they returned from Spain, that they were still considered to be New Mexico residents. Mr. Sharp's letter further explained that as New Mexico residents, they were subject to New Mexico income tax on their income from employment, even when that employment occurred outside of New Mexico.

6. After receiving the Department's response, the Taxpayers notified the Finance Officer for the Department of Navy that they should have New Mexico personal income taxes withheld from their wages. The Finance Officer informed them that the Department of the Navy did not withhold any state withholding taxes from the wages of overseas employees.

7. The Taxpayers then wrote Mr. Sharp at the Department and informed him of their quandry and asked for guidance as to how to estimate how much tax to withhold, pay and report to the Department themselves.

8. Apparently, the Taxpayers did not receive a response to their inquiry as to how to determine how much tax to pay to the Department. The Taxpayers also had difficulty obtaining the New Mexico personal income tax filer's kit and instructions for reporting income taxes.

9. For the 1990 tax year, the Taxpayer's wrote the Department, explained their situation and sent in a payment in the amount of \$962.34. The Taxpayer's letter to the Department explained that this payment was an estimate of the amount they owed, based upon

what had been withheld from their income during the previous tax year. The Taxpayer's letter further requested that the Department inform them if they had overpaid or underpaid taxes.

10. The Taxpayer's followed a similar procedure for tax years 1991 and 1992. For tax year 1991 the Taxpayer made payment of \$1,636.95 to the Department. For tax year 1992 the Taxpayer made payment of \$1,840 to the Department.

11. Because these transactions occurred such a long time ago, the Department does not have copies of the correspondence submitted by the Taxpayers or a record of whether actual returns were submitted, or simply the Taxpayer's estimated payments.

12. The Taxpayers returned to New Mexico from Spain in August, 1993.

13. In estimating their tax payments, the Taxpayers used their gross income, before any standard or itemized deductions which they might have claimed, as the basis for calculating their payments. Because the Taxpayers would have been eligible to claim either a standard or itemized deduction, undoubtedly, they over paid their income taxes to the Department. Because the Taxpayers did not produce the information upon which the actual amount of their income tax liability for tax years 1990 through 1992 could be calculated, it is impossible to determine at this time the actual amount of their overpayment.

14. After the Taxpayers returned to New Mexico, they reported and paid \$1,081 in personal income taxes to the Department for tax year 1993.

15. Sometime after returning to New Mexico, the Taxpayers again questioned whether they should have paid New Mexico income taxes on their compensation received when they were in Spain. Mrs. Avilucea went to the Department's Las Cruces office and explained the situation to an unidentified employee. At that time, Mrs. Avilucea was informed that she and her

husband were not subject to New Mexico personal income tax on their compensation received when they were working in Spain.

16. Subsequently, on April 16, 1998, the Taxpayers applied to the Department for a refund in the amount of \$5,519.95, representing the personal income taxes they had paid to the Department for tax years 1990-1993.

17. On December 3, 1998, the Department denied the Taxpayers' claim for refund of personal income taxes for tax years 1990-1993.

18. On February 17, 1999, the Taxpayer's filed a protest to the Department's denial of their claim for refund.

DISCUSSION

The issue to be determined is whether the Department properly denied the Taxpayers' claim for refund. The Department denied the refund on the basis that the statute of limitations for claiming the refund at issue had passed. The pertinent statutory provision is Section 7-1-26 (C)(1) NMSA 1978, which provides in pertinent part:

no credit of refund of any amount may be allowed of made to any person unless as the result of a claim made by that person as provided in this section:

(1) within three years of the end of the calendar year in which:

(a) the payment was originally due or the overpayment resulted from an assessment by the department pursuant to Section 7-1-17 NMSA 1978, whichever is later;

Pursuant to § 7-2-12 NMSA 1978, personal income tax returns and payments are due on or before the 15th day of the fourth month following the end of the taxable year. Because the Taxpayers used a calendar year as their taxable year, their returns were due on April 15th of the year following their taxable year. For the 1990 through 1993 tax years, those returns would have

been due on April 15, 1991, 1992, 1993 and 1994, respectively. Because the Taxpayer's claim for refund, filed on April 16, 1998, was filed more than three years after the end of the calendar years of those due dates, their claim was filed beyond the limitation period for filing such claims.

It may be small consolation for the Taxpayers, but their extraordinary efforts to properly pay their state income taxes did, in fact, protect them from facing a liability for additional tax, penalty and interest on their income earned while in Spain. This is because New Mexico imposes an income tax on the income of every resident individual. Section 7-2-3 NMSA 1978. A resident is defined at § 7-2-2(S) of the Income Tax act as follows:

“resident” means in individual who is *domiciled* in this state during any part of the taxable year; but any individual, who on or before the last day of the taxable year changed his place of abode to a place without this state *with the bona fide intention of continuing actually to abide permanently without this state* is not a resident for the purposes of the Income Tax Act. (emphasis added).

This definition of resident links residency to where an individual is domiciled. A person's domicile depends upon where they intend to reside. Domicile within a state does not require physical presence in the state at all times. Rather it requires physical presence in the state at some time in the past together with a concurrent intention to make the state one's home. **Hagan v. Hardwick**, 95 NM 517, 624 P.2d 26 (1981). In accord with the common law definition of domicile, Regulation 3 NMAC 3.1.9.2 defines domicile as follows:

A domicile is a place of a true, fixed home and a permanent establishment to which one intends to return when absent and where a person has voluntarily fixed habitation of self and family with the intention of making a permanent home.

In this case, the evidence supports a conclusion that the Taxpayers were residents of New Mexico, even while overseas on a tour of duty with the Department of the Navy. That is because at all times they retained their home in New Mexico, kept their vehicles registered here, and

otherwise indicated their intention to return to their home in New Mexico after their tour of duty. As residents of New Mexico, their income was subject to New Mexico income tax even though it was earned while they were in Spain.

Unfortunately, in all probability, the Taxpayers overpaid the amount of income tax for which they would have been liable. The Taxpayers are upset because when they sent in their estimated payments they asked the Department to inform them if they had overpaid or underpaid their taxes. Because of the passage of time, the Department no longer has a record of the documents the Taxpayer's submitted with their estimated payments. It appears, however, that the Department would not have had the information it would have needed to actually determine whether there were overpayments of tax because it does not appear that actual returns were submitted by the Taxpayers, but only estimated payments. Without more information as to the amount of the Taxpayers' itemized deductions and other pertinent information, the Department could not have known how to respond to the Taxpayer's request. Had the Taxpayer's brought in this information shortly after their return from Spain, a claim for refund could have been submitted within the applicable statute of limitations.

While I, as a decision-maker, am unable to provide the relief requested by the Taxpayers, I would be remiss if I did not commend them for their extraordinary, honest and sincere efforts to comply with the tax laws of the State of New Mexico.

CONCLUSIONS OF LAW

1. Taxpayers filed a timely protest to the Department's denial of their claim for refund pursuant to Section 7-1-26 NMSA 1978, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayers claim for refund of personal income taxes for tax years 1990-1993 was untimely and barred by the provisions of Section 7-1-26(C)(1)(a) NMSA 1978.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.

DONE, this 21st day of October, 1999.