

[REDACTED] and a Certificate of Degree of Indian Blood certifying that Taxpayer is a member of the Tribe.

8. Taxpayer received per-capita payment from the Tribe.
9. Taxpayer's federal income tax return was prepared by [REDACTED] Tax Service.
10. The tax preparation documents from [REDACTED] indicated that Taxpayer declined to have [REDACTED] prepare a state income tax return for the state of Arizona.
11. Taxpayer moved to Arizona in 2003 to attend ASU.
12. During tax year 2005 Taxpayer was living in Arizona attending Arizona State University (ASU).
13. During 2005 Taxpayer paid out-of-state non-resident tuition to ASU.
14. Taxpayer began paying in-state resident tuition to ASU in the fall of 2006.
15. During 2005 Taxpayer had an Arizona driver's license and her car was registered in Arizona.
16. Taxpayer testified she was not sure whether she would remain in Arizona after her graduation.
17. Prior to moving to Arizona Taxpayer attended school in New York.

CONCLUSIONS OF LAW

1. The presumption is that an assessment of additional income tax is correct. *Arizona State Tax Commission v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948).
2. A person cannot have more than one domicile at a time. *Clark v. Clark*, 71 Ariz. 194, 225 P.2d 486 (1950).
3. A new residence or domicile is acquired only by the concurrence of an intention to establish a new domicile and acts evidencing that intention. *Kauzlarich v. Board of Trustees*, 78 Ariz. 267, 278 P.2d 888 (1955).

4. A change of domicile requires an intent to abandon the former domicile and remain at the new. *DeWitt v. McFarland*, 112 Ariz. 33, 537 P.2d 20 (1975).
5. A person is never without a domicile somewhere. *DeWitt v. McFarland, supra*.
6. A question of residency for state income tax purposes cannot be answered by a general rule but depends largely on the circumstances of each case, considering all relevant facts. Arizona Individual Income Tax Procedure (ITP) 92-1.
7. The determination of residency is dependent on physical presence and an intent to abandon the former residence and remain in the new residence for an indefinite period of time. ITP 92-1.
8. A resident of Arizona is subject to income tax on all of his taxable income wherever derived. Arizona Revised Statutes (A.R.S.) § 43-102(A)(4).
9. ASU is maintained by the Arizona State Board of Regents (ABOR). A.R.S. § 15-1601(A).
10. The ABOR may fix tuitions and fees to be charged by the universities under its control and differentiate the tuitions and fees between residents and nonresidents. A.R.S. § 15-1626(A)(5).
11. The ABOR is required to adopt guidelines applicable to all institutions under its jurisdiction that will ensure uniform criteria to aid the institutions in determining the tuition status of any student. A.R.S. § 15-1805(A).
12. A person having a domicile elsewhere than in Arizona is not eligible for classification as an in-state student for tuition purposes. A.R.S. § 15-1802(A).
13. A person is not entitled to classification as an in-state student until the person is domiciled in this state for one year immediately preceding the last day of registration. A.R.S. § 15-1802(B); ABOR Policies § 4-203(A).
14. Each student is responsible for obtaining a tuition classification determination prior to registration and payment of fees. ABOR Policies § 4-204(A)(1).

15. A student who applies for classification as a resident student must establish by clear and convincing evidence all factors necessary to provide a basis for such a classification determination. ABOR Policies § 4-204(B).
16. For tuition purposes domicile is defined as a person's true, fixed and permanent home and place of habitation. It is the place where he intends to remain and to which he expects to return when he leaves without intending to establish a new domicile elsewhere. A.R.S. § 15-1801(3).
17. To establish domicile in Arizona, a student must establish that he or she was concurrently physically present in Arizona and had the intention of abandoning his or her former domicile and remain in Arizona for an indefinite period of time. ABOR Policies § 4-204(E).
18. ABOR Policies § 4-205 lists objective factors to be considered to determine whether a person was eligible for in-state tuition status.
19. A student's actions used to indicate an intent to remain in Arizona for an indefinite period of time must be accomplished at the beginning of and maintained throughout the domicile year. ABOR Policies § 4-205(B).
20. The objective factors used by ABOR to determine whether a student was domiciled in Arizona are similar to the factors in ITP 92-1.
21. Based on the facts of this case, Taxpayer was an Arizona resident for state income tax purposes in tax year 2005 when she received the per-capita payment from the Tribe.
22. The state cannot impose an income tax on a Native American Indian who lives and works on a reservation of which he is a member. *McClanahan v. State Tax Commission of Arizona*, 411 US 164, 93 S.Ct. 1257 (1973).
23. A Native American Indian who does not live on a reservation of which he is a member may be taxed by the state, even if he is living on another Tribe's

reservation. *LaRock v. Wisconsin Dept. of Revenue*, 241 Wis.2d 87, 621 N.W.2d 907 (2001).

24. Federal law does not preempt state income taxation of a taxpayer's distributions from gaming operations on the taxpayer's Indian tribe's reservation earned while the taxpayer resided on another tribe's reservation. *Mike v. Franchise Tax Bd.*, 182 Cal.App.4th 817, 106 Cal.Rptr.3d 139 (2010).
25. A.R.S. § 42-1123(C) provides that if the tax “or any portion of the tax is not paid” when due “the department shall collect, as a part of the tax, interest on the unpaid amount” until the tax has been paid.
26. A.R.S. § 42-1125(A) imposes a penalty for failure to file an Arizona income tax return when due.
27. The proposed assessment issued by the Section for tax year 2005 was proper.

DISCUSSION

Taxpayer came to Arizona in 2003 to attend ASU. Taxpayer was a student at ASU during tax year 2005. Taxpayer received in-state resident student tuition classification for the fall semester of 2006. Taxpayer is a Native American member of the [REDACTED] located in California. In 2005 Taxpayer received a per-capita payment from the Tribe. The payment was a distribution to the members of the Tribe from gaming operations conducted by the Tribe.

Taxpayer filed a federal income tax return for 2005 reporting the distribution but Taxpayer did not file an Arizona income tax return. Based on information received from the IRS, the Section issued an assessment to Taxpayer imposing the Arizona income tax on the distribution Taxpayer received from the Tribe. Taxpayer protested the assessment stating that her income for tax year 2005 was from a non-Arizona taxable source. Two legal issues are thus presented:

- Was Taxpayer a resident of Arizona for tax year 2005, and

- Can Arizona tax distributions received by a Native American from a Tribe of which she is a member if she did not also live on the reservation?

Was Taxpayer a Resident of Arizona for 2005?

Taxpayer was a student at ASU. Prior to coming to ASU, Taxpayer was going to school in New York. Taxpayer testified that when she came to ASU she was not certain whether or not she would stay in Arizona after graduation. Taxpayer was classified as an in-state student beginning with the fall semester of 2006. In order to be classified as an in-state student, Taxpayer was required to establish that she was domiciled in Arizona for at least one year immediately preceding the last day of registration for the 2006 fall semester.

The objective factors used by the ABOR to determine whether a student was domiciled in Arizona are similar to the factors used by the Department. For ABOR, Taxpayer had to establish that she was domiciled in Arizona for all or most of 2005.¹ A person cannot have more than one domicile at a time. Once Taxpayer established that she was domiciled in Arizona in 2005 for in-state tuition purposes, she also established that she was domiciled in Arizona for state income tax purposes. However, while the ABOR requires a student to be domiciled in Arizona for at least twelve months before the student is entitled to in-state tuition, Taxpayer immediately became an Arizona resident for state income tax purposes when she decided to remain in Arizona for an indefinite period.

An Arizona resident is subject to income tax on all of her taxable income wherever derived. The record does not reflect the date of the per-capita payment from the Tribe. The presumption is that an assessment of income tax is correct. Taxpayer

¹ The record does not reflect the last day of registration for the 2006 fall semester.

has not established that she was a non-resident of Arizona when the per-capita payment was made. Taxpayer has not overcome the presumption of correctness.

Was the Distribution Taxable by Arizona?

Taxpayer is a Native American member of the Tribe from which she received the distribution. The state cannot impose an income tax on a Native American Indian who lives and works on a reservation of which he is a member. However, Taxpayer was not living on the Tribe's reservation at the time she received the payment. The California Court of Appeals recently held that Federal law does not preempt state income taxation of a taxpayer's distributions from gaming operations on the taxpayer's Indian tribe's reservation earned while the taxpayer resided on another tribe's reservation. That is like the situation here in that Taxpayer did not reside on her Tribe's reservation when she received the distribution. Arizona was not precluded from taxing Taxpayer's distribution.

The proposed assessment also included interest and a penalty for failure to file when due. A.R.S. § 42-1123(C) provides that if the tax "or any portion of the tax is not paid" when due "the department shall collect, as a part of the tax, interest on the unpaid amount" until the tax has been paid. For Arizona purposes, therefore, interest is a part of the tax and generally may not be abated unless the tax to which it relates is found not to be due for whatever reason.

A.R.S. § 42-1125(A) provides in part as follows:

A. If a taxpayer fails to make and file a return for a tax administered pursuant to this article on or before the due date of the return or the due date as extended by the department, then, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, four and one-half per cent of the tax required to be shown on such return shall be added to the tax for each month or fraction of a month elapsing between the due date of the return and the date on which it is filed. The total penalty shall not exceed twenty-five per cent of the tax found to be remaining due. . . .

Taxpayer failed to timely file a return for tax year 2005. The failure to file when due penalty may be abated only if the failure to file "is due to reasonable cause and not due to wilful neglect." A.R.S. § 42-1125(A). "Reasonable cause" is generally defined to mean the exercise of "ordinary business care and prudence." *Daley v. United States*, 480 F. Supp. 808 (D.N.D. 1979). Taxpayer has not established reasonable cause. Therefore, the imposition of the failure to file when due penalty must be upheld.

Based on the foregoing, the Section's proposed assessment dated October 27, 2010 is affirmed.

DATED this 9th day of May, 2012.

ARIZONA DEPARTMENT OF REVENUE
HEARING OFFICE

[REDACTED]
Hearing Officer

Original of the foregoing sent by
certified mail to:

[REDACTED]

Copy of the foregoing delivered to:

Arizona Department of Revenue
Individual Income Tax Audit Section