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Tax Type	Individual Income Tax
Description	Residency : Domicile - Military Servicemember; Military Spouse Residency : Domicile - Part Year
Topic	Appeals
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June 25, 2019

Re: § 58.1-1821 Application: Individual Income Tax

Dear *****:

This will reply to your letter in which you seek correction of the individual income tax assessment issued to ***** (the "Taxpayers") for the taxable year ended December 31, 2015.

FACTS

The Department received information from the Internal Revenue Service (IRS) indicating that the Taxpayers, a husband and wife, may have been required to file a Virginia income tax return for the 2015 taxable year. A review of the Department's records showed that the Taxpayers had not filed a return. The Department requested additional information from the Taxpayers in order to determine if their income was taxable in Virginia. When a response was not received, the Department issued an assessment. The Taxpayers appeal, contending they were only subject to Virginia income tax from June to October 2015.

DETERMINATION

Domicile

Two classes of residents, a domiciliary resident and an actual resident, are set forth in *Virginia Code* § 58.1-302. The domiciliary residence of a person means the permanent place of residence of a taxpayer and the place to which he intends to return even though he may reside elsewhere. For a person to change domiciliary residency to another state or country, that person must intend to abandon his Virginia domicile with no intention of returning to Virginia. Concurrently, that person must acquire a new domicile where that person is physically present with the intention to remain there permanently or indefinitely. An actual resident of Virginia means a person who, for an aggregate of more than 183 days of the taxable year, maintained his place of abode within Virginia. A Virginia domiciliary resident, therefore, working in other parts of the country or in another country who has not abandoned his Virginia residency continues to be subject to Virginia taxation. Additionally, a person who is not a domiciliary resident of Virginia, but who stays in Virginia for an aggregate of more than 183 days is also subject to Virginia taxation.

In order to change from one legal domicile to another legal domicile, there must be (1) actual abandonment of the old domicile, coupled with an intent not to return to it, and (2) an acquisition of a new domicile at another place, which must be formed by personal presence and an intent to remain there permanently or indefinitely. The burden of proving that the domicile has been changed lies with the person alleging the change.

In determining domicile, consideration may be given to the individual's expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, profession or employment, income sources, residence of spouse, marital status, situs of real or tangible property, motor vehicle registration and licensing, and such other factors as may be reasonably deemed necessary to determine the person's domicile. A person's true intention must be determined with reference to all the facts and circumstances of the particular case. A simple declaration is not sufficient to establish residency.

The Department determines a taxpayer's intent through the information provided. A taxpayer has the burden of proving that he or she has abandoned his or her Virginia domicile. If the information is inadequate to meet this burden, the Department must conclude that he or she intended to remain indefinitely in Virginia.

Residency of a Military Service Member

The Servicemembers Civil Relief Act (the "Act") provides that military and naval personnel do not abandon their legal domicile solely by complying with military orders that station them in a different state or country whether permanently or temporarily. See 50 U.S.C. § 4001. The Act, however, does not preclude the possibility that armed forces personnel may acquire a new legal domicile in the state where they are stationed, and thus subject themselves to taxation by that state as if they were a domiciliary resident. In order for the change of domicile to occur, there must be an abandonment of the old domicile and the acquisition of a new one. This change must be exhibited by an individual's intent and conduct. See *United States of America v. Minnesota Department of Revenue*, 97 F. Supp. 2d 973 (2000) (hereinafter, "Minnesota").

In general, the Department will not seek to tax an active duty military service member so long as the member maintains sufficient connections with another state to indicate intent to maintain domicile there. Such connections would include filing a State of Legal Residence Certificate (Department of Defense Form 2058), obtaining a driver's license, registering to vote and voting in local elections, registering an automobile, and exercising other benefits or obligations of a particular state. As long as a military service member maintains such connections, they would be considered to be a resident of the other state even though they work, live, and establish a permanent place of abode in Virginia. See Public Document (P.D.) 10-237 (9/30/2010).

The Taxpayers assert that they moved from ***** (State B) to Virginia in May 2015. They state that prior to living in State B, they lived in ***** (State A), which is the state they considered to be their domicile. The Taxpayers explain that the wife became an active duty military service member in November 2015. In light of these facts, they claim that they were only subject to Virginia income tax from June through October of 2015.

The fact that the wife entered active duty military service in November 2015 does not necessarily mean that she ceased to be subject to Virginia income tax. As the Department has previously observed, the Act does not provide blanket immunity from state taxation. See P.D. 17-126 (6/29/2017). If the wife established domicile in Virginia prior to entering the military, she would remain taxable as a domiciled resident of Virginia until she changed her domicile.

Residency of a Military Spouse

The Act was amended, effective for the 2009 taxable year and thereafter, to address the residency of military spouses. Specifically, 50 U.S.C. § 4001(a)(2) was enacted to provide that a spouse can neither lose nor acquire domicile or residence in a state when the spouse is present in the state "solely to be with the service member in compliance with the service member's military orders if the residence or domicile, as the case may be, is the same for the service member and the spouse." The Act does not apply to the spouses of military and naval personnel who have established domiciliary status within Virginia. See P.D. 11-114 (6/21/2011).

In Virginia Tax Bulletin (VTB) 10-1 (1/29/2010), the Department explained that the domicile of a military spouse must be the same as the service member in order to be exempt from Virginia's income tax. The determination of a military spouse's domicile requires analysis of the facts and circumstances. The elements that may be examined include:

1. Whether the person claiming exemption is married to a service member who is present in Virginia pursuant to military orders.
2. The service member's domicile.

3. The spouse's domicile and the circumstances in which it was established.
4. The extent to which the spouse has maintained contacts with the domicile.
5. Whether the spouse has taken any action in Virginia that is inconsistent with maintaining a domicile elsewhere.

As with military service members, the Department will not seek to tax the spouse so long as the spouse maintains sufficient connections with the service member's domiciliary state to indicate intent to maintain domicile there. Such connections would include obtaining and retaining a driver's license, registering to vote and voting in local elections, registering an automobile, and exercising other benefits or obligations of a particular state. As long as the spouse of a military service member maintains such connections, he or she would be considered to be a resident of the other state even though the work, live, and establish a place of abode in Virginia.

When a spouse moves to follow military personnel to a new duty station, they will generally abandon their former real property and move the family. The spouse will establish a new permanent place of abode near the new duty station, enroll the children in school, and seek employment of an indeterminate duration. The spouse will also change social, charitable and church associations. Moreover, the military service member and the spouse move with no assurance that they may move back to a former duty station.

In P.D. 15-186 (9/28/2015), the Department suggested, given the language of the Act, that certain activities conducted by a military spouse, such as the spouse's profession or employment, income sources, permanent place of abode, enrolling children in local schools, and situs of real and tangible property, may no longer be considered to be activities associated with establishing domicile in a state. While such activities may normally be considered to be incidental to a spouse's presence in the state as a result of the service member's military orders, they will be considered when there appears to be an affirmative choice to make their current state of residence their domicile. See, P.D. 17-126 (6/29/2017).

In addition, the Department has repeatedly stated that a change of domicile occurs as part of a process in which no single factor is dispositive. See, *e.g.*, P.D. 10-180 (8/16/2010), P.D. 11-90 (6/2/2011), and P.D. 13-115 (6/26/2013). Therefore, more weight may be assigned to such factors to the extent any continued after the service person retired or was reassigned elsewhere from a Virginia duty station. The Department would consider the fact that any such connections continued to be evidence that a taxpayer initially intended to establish a Virginia domicile.

The husband states that he was a military retiree and claimed State A as his home of record and domicile. A service member's "home of record" refers to the state from which a service member entered the military. Its primary purpose is determining military benefits such as travel entitlements upon separation from service. Depending on the circumstances, a service member's state of legal domicile and home of record might be the same. That is not true, however, for all service members. A change of domicile results from the establishment of a new residency in fact, coupled with an intent to abandon the old domicile and remain in the new, regardless of what state is listed as the home of record. Even for active duty military service members, their "home of record" may have little, if anything, to do with what is their current state of domicile. Once an individual leaves military service, it becomes even less relevant as a factor in determining the individual's domicile, and a military retiree should not assume that his former military home of record is his domicile. Ultimately, that determination must be made with reference to all of the relevant facts and circumstances.

Part-Year Residents

Virginia Code § 58.1-303 provides that a taxpayer who becomes a resident of another state during the taxable year is subject to taxation for the period in which she was a Virginia resident. Accordingly, Virginia taxable income is computed by determining income, deductions, subtractions, additions and modifications attributable to the period of residence in Virginia. In addition, part-year residents may claim a portion of their Virginia personal exemptions, but the exemptions will be prorated based upon the number of days that the

taxpayer was a Virginia resident. Further, part-year residents may claim a prorated Virginia standard deduction if they claim the standard deduction for federal income tax purposes.

While the appeal was pending, the Taxpayers filed a part-year return purportedly reflecting their Virginia income tax liability for June through October 2015, the only period they claim they were subject to Virginia income tax. The Taxpayers' appeal, however, raises issues that could impact their Virginia income tax liability for the 2015 taxable year, and, as a result, the Department has been unable to verify its accuracy. The Department must consider, for example, whether and when the Taxpayers established domicile in Virginia. If so, the Taxpayers would have been subject to Virginia income tax from the time they established domicile in Virginia until the time they abandoned such domicile. If they moved into Virginia for the first time in 2015, established domicile and kept the domicile for the remainder of the year, they would have been subject to Virginia income tax as part-year residents from their move-in date to the end of the year, regardless of the wife's active duty military status. In addition, for part-year Virginia residents, it may be necessary for the Department to obtain more information regarding how the Taxpayers' income and any applicable deductions, subtractions or other modifications should be attributed to the Taxpayers' proper period of Virginia residency, once that is established.

CONCLUSION

By letters dated January 3, 2019, and March 4, 2019, the Department attempted to gather more information regarding the Taxpayers' domicile. To date, a response has not been received. *Virginia Code* § 58.1-205 provides that in any proceeding relating to the interpretation of the tax laws of Virginia, an "assessment of a tax by the Department shall be deemed *prima facie* correct." As such, the burden of proof is on the Taxpayer to show he was not subject to income tax in Virginia. Furthermore, *Virginia Code* § 58.1-1826 precludes a court from granting relief to taxpayers seeking correction of erroneous state tax assessments in cases in which the erroneous assessment is attributable to the taxpayers' willful failure or refusal to provide the Department with necessary information as required by law.

The Taxpayers, therefore, will be given one final opportunity to provide the information requested. The information must be submitted within 30 days of the date of this letter to: Virginia Department of Taxation, Office of Tax Policy, Appeals and Rulings, P.O. Box 27203, Richmond, Virginia 23161-7203, Attention: *****. The information will be reviewed, and the Department will determine if more information is necessary in order to establish the Taxpayers' proper Virginia income tax liability for the 2015 taxable year. If the Taxpayers fail to respond to the previous information request concerning their domicile or any subsequent information request in the time allotted, the assessment will be considered to be correct and collection action will begin.

The *Code of Virginia* sections, public documents and tax bulletin cited are available on-line at www.tax.virginia.gov in the Laws, Rules & Decisions section of the Department's web site. If you have any questions regarding this determination, you may contact ***** in the Office of Tax Policy, Appeals and Rulings, at *****.

Sincerely,

Craig M. Burns
Tax Commissioner

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