

SC TEMPORARY REVENUE RULING #10-5

- SUBJECT:** Federal Military Spouses Residency Relief Act
(Income Tax)
- EFFECTIVE DATE:** Applies to tax years beginning on or after January 1, 2009.
- SUPERSEDES:** Information Letter #09-21 and all previous advisory opinions and any oral directives in conflict herewith.
- REFERENCES:** S.C. Code Ann. Section 12-6-2220(1), (2), and (3) (2000 and Supp. 2009)
- AUTHORITY:** S.C. Code Ann. Section 12-4-320 (2000)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3
- SCOPE:** The purpose of a Temporary Revenue Ruling is to provide immediate guidance to the public and to Department personnel. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is temporary, and is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

INTRODUCTION

The Military Spouses Residency Relief Act (PL 111-97) (Act) was signed into federal law on November 11, 2009. The Act amends the Servicemembers Civil Relief Act to allow a military servicemember's spouse to retain a tax domicile other than the state in which she is living provided the spouse meets certain conditions. Additionally, income from services performed by a spouse of a servicemember is not taxable to the state where the services are performed if the spouse is a nonresident who is in the state solely to be with the servicemember serving in compliance with military orders. Prior to this Act, regardless of the state of domicile, the spouse, like any other worker, would be taxed on wages and other service income in South Carolina if the income was earned in South Carolina.

This Revenue Ruling addresses some of the common questions associated with the income tax provisions of the Act. Other provisions of the Act which deal with personal property taxes and voting are not covered in this Revenue Ruling.

LAW

The Act amends Section 571 of the Servicemembers Civil Relief Act to provide, in part:

(a) Residence or domicile

(2) Spouses – A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United State solely to be with the servicemember in compliance with the servicemember’s military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.

(b) Military service compensation.

Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.¹

(c) Income of a Military Spouse – Income from service performed by the spouse of a servicemember shall not be deemed to be income for service performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.

QUESTIONS AND ANSWERS²

For purposes of simplicity, this ruling will refer to the spouse as “she” and the servicemember as “he.”

1. Generally, how does the Military Spouses Residency Relief Act of 2009 affect state income taxes of a servicemember’s spouse?

There are two major state income tax provisions in the Act. If the servicemember’s spouse meets certain conditions, the Act provides (1) the spouse may retain a domicile other than the state in which she is living and (2) a spouse who is not domiciled in the state in which she is working is not be required to pay income taxes on service income to the state where she is working. The spouse will still be liable for any income taxes due in the spouse’s domiciliary state.

¹ Subsection (b) was part of the law prior to the Act.

² Note: The questions and answers below are the Department of Revenue’s interpretation of the federal law as it applies in South Carolina. Other states may take different positions.

2. What are the requirements for a servicemember's spouse to be exempt from income tax on her service income earned in South Carolina?

1. The state where the servicemember and spouse are living is not the domicile of the spouse
or the servicemember;
2. The spouse resides in the state solely in order to live with the servicemember;
3. The servicemember is present in the state as a result of military orders; and
4. The spouse and the servicemember both have the same domicile.

3. Are the servicemember and spouse required to have the same domicile for the Act to apply?

Yes. The servicemember and spouse must have the same domicile for the Act to apply. See questions 4 and 5 for more details and examples.

4. Can a servicemember's spouse choose any state as her domicile?

No. The claimed domicile must be the actual domicile of the spouse.

5. Can the spouse adopt the domicile of the servicemember without being domiciled in that state herself?

No. The spouse cannot adopt the state of domicile of the servicemember. The spouse must be able to show that the domicile she is claiming is her domicile. A spouse cannot claim a state that she has not lived in as her domicile.

Example: A servicemember domiciled in Texas is stationed in South Carolina and marries someone from South Carolina. The spouse would continue to have a South Carolina domicile. Because the spouse and servicemember do not have the same domicile, the spouse is not covered under the Act. The spouse will be required to pay income taxes in South Carolina on any service income earned.

Example: A servicemember domiciled in Texas is stationed in North Carolina and marries someone from North Carolina while in the state. The couple then moves to South Carolina. The Act does not apply because the spouse and servicemember do not have the same domicile. The spouse may choose to continue to be domiciled in North Carolina or become a domiciled in South Carolina; however, regardless of whether the spouse is domiciled in North Carolina or South Carolina, the Act does not apply.

NOTE: If you and your spouse are not from the same domicile, the rest of the document will not apply.

6. Can a spouse who lives in South Carolina with a servicemember and works in South Carolina be exempt from South Carolina income tax on her South Carolina service income if the servicemember is stationed in a state bordering South Carolina and is allowed to commute from South Carolina to his permanent duty station?

Yes. A spouse who lives in South Carolina with the servicemember and works in South Carolina is covered under the Act if the servicemember is stationed in a state bordering South Carolina provided the servicemember and spouse are not domiciled in South Carolina or the state where the servicemember is stationed. In this situation, the spouse's service income will not be taxed in South Carolina. Even though the servicemember is not stationed in South Carolina, he is still living in South Carolina as a result of his military orders and his spouse will still qualify under the Act.

Example: A servicemember and his spouse are domiciled in Mississippi. The servicemember is stationed in Georgia. The servicemember and his spouse choose to live in South Carolina and the servicemember commutes to his duty station in Georgia. The servicemember's spouse works in South Carolina. The spouse will qualify under the Act and is not required to pay South Carolina income tax on her service income.

7. Can a spouse who lives in a state bordering South Carolina with a servicemember who is stationed in the border state and who works in South Carolina be exempt from South Carolina income tax on her South Carolina service income?

Yes. A spouse who lives in a state bordering South Carolina with the servicemember who is stationed in the border state is exempt from South Carolina income tax on service income earned in South Carolina provided the servicemember and his spouse are not domiciled in South Carolina or the border state. In this case, the spouse is still working in South Carolina to be with the servicemember in compliance with military orders of the spouse.

Example: A servicemember and his spouse are domiciled in Mississippi. The servicemember is stationed in Georgia and the servicemember and his spouse live in Georgia. The servicemember's spouse commutes to work in South Carolina. The spouse will qualify under the Act and is not required to pay South Carolina income tax on her service income.

8. Can a spouse who is domiciled and living in a state that borders South Carolina with a servicemember who is stationed in the border state and who works in South Carolina be exempt from south Carolina income tax on her South Carolina service income?

No. A spouse who is domiciled and living in a state that borders South Carolina with a servicemember who is stationed in the border state and who works in South Carolina is not covered under the Act. Since the border state is the spouse's domicile, the spouse is not with her servicemember spouse solely because of the servicemember's military orders. She is in the jurisdiction at least in part because it is her state of domicile. She must pay South Carolina income tax on her service income earned in South Carolina.

Example: A servicemember and his spouse are domiciled in North Carolina and live in North Carolina where the servicemember is stationed. The spouse works in South Carolina. The spouse is not covered under the Act since she is not living in North Carolina solely because of the servicemember's military orders. The couple is domiciled in North Carolina. As a result, the spouse will be required to pay South Carolina income tax on any income, including service income, earned in South Carolina.

9. Are the income tax laws the same for the servicemember and for the servicemember's spouse?

No. Under the federal law, the only service income of a servicemember that is excluded from South Carolina income tax when a non-domiciliary servicemember is stationed in South Carolina is income earned from military service. If the servicemember has a civilian job in addition to his military job, he must pay tax on the service income earned in South Carolina.

10. What types of the spouse's income are excluded from income under the Act?

If the servicemember's spouse qualifies under the Act, income earned from services performed by the spouse is excluded from state income tax. For purposes of the exclusion, income from services includes salaries, wages, tips, professional fees, and other compensation received for personal services. If the spouse actively works in a sole proprietorship, partnership, LLC taxed as a sole proprietorship or partnership, or an S corporation, service income from these entities can be excluded. The income or loss from a sole proprietorship, partnership, or LLC taxed as a sole proprietorship or partnership will be considered service income if it is required to be included in the computation of net earnings from self-employment for purposes of the federal self-employment tax.

11. If the servicemember's spouse meets the conditions of the Act, what types of income from the servicemember's spouse can South Carolina continue to tax when the spouse is not domiciled in South Carolina?

The Act only applies to income from services performed by the spouse. Additionally, any income that is sourced to the domicile of a taxpayer, such as interest and dividends not connected with the taxpayer's business, should not be taxed in South Carolina if the servicemember's spouse is not domiciled in South Carolina. See Code Section 12-6-2220(1) and (2).

If a servicemember's spouse has rental property located in South Carolina, the spouse would still be taxed on that rental income. See Code Section 12-6-2220(3). Similarly any South Carolina business income from partnerships, LLCs, or sole proprietorships that is not service income for the spouse will need to be reported as income in South Carolina in the same manner that any nonresident individual would report this income.

12. Does the exclusion still apply if the servicemember is temporarily assigned outside the United States or to another state and the servicemember's spouse remains in South Carolina?

If a servicemember's spouse has met the conditions for exclusion from income and the servicemember is subsequently temporarily assigned outside the United States or to another state, and the spouse remains in South Carolina, the income exclusion will continue to apply as long as South Carolina remains the servicemember's permanent duty station. The income exclusion will no longer apply if the service member's permanent duty station is no longer in South Carolina and the spouse remains in South Carolina.

13. If a servicemember and his spouse are domiciled in South Carolina, but are stationed and live in another state, are the servicemember and his spouse required to file a South Carolina income tax return?

Yes. If the servicemember and his spouse are domiciled in South Carolina, they need to file a South Carolina income tax return, SC 1040, as residents of South Carolina. If the spouse is working in another state and has not had South Carolina withholdings on her wages, she may need to make estimated tax payments in South Carolina to avoid penalties for failure to pay sufficient taxes to South Carolina during the year. For more information, see SC 1040 General Instructions.

14. For income tax purposes, what tax years are affected by the Military Spouses Relief Act of 2009?

The Act applies to tax years beginning on or after January 1, 2009.

15. Can a qualifying spouse of a servicemember get a refund of South Carolina income taxes withheld in 2009 or thereafter?

Yes. Any refund of wage withholding or estimated tax payments made for taxable year 2009 or thereafter that is not taxable as a result of this Act may be claimed by filing a South Carolina Individual Income Tax Return (Form SC 1040) including a Schedule NR (Nonresident Schedule) for the appropriate year.

The spouse's service income should be included in Column A (Income as Shown on Federal Return) and excluded in Column B (South Carolina Income). The servicemember's income from military service is excluded from Column A and excluded from Column B.

Information Letter #09-21 advised that on the Schedule NR the nonresident spouse's service income should be treated in the same manner as provided in the Instructions to the Schedule NR (Nonresident Schedule) for a nonresident serviceman's military compensation. Taxpayers may follow this information letter for 2009, but for future years should follow the instructions indicated in the preceding paragraph.

16. What information must a servicemember's spouse provide to the employer to qualify for exemption from South Carolina withholding tax?

In order to qualify for exemption from South Carolina withholding tax, the employee (spouse) must provide the following information to the employer:

1. A completed SCW-4, Annual Withholding Tax Exemption Certification for Servicemember's Nonresident Spouse.
2. An original of the servicemember's latest Leave and Earning Statement (LES). The LES assignment location must match the information provided on SCW-4.
3. A current military identification card identifying the employee as a military spouse.

After the enactment of the Act, the Department of Revenue issued Information Letter #09-21 providing instructions to qualifying spouses on how to stop further South Carolina withholding from their paychecks. That information letter instructed qualifying spouses to file a federal Form W-4 for South Carolina purposes only by writing at the top of the form “Nonresident Military Spouse for State Purposes Only.” The information letter instructed that this Form W-4 should be provided to the employer and recommended that the spouse retain a copy for her records. Now that the Department has issued Form SCW-4, all non-domiciliary spouses should complete this form SCW-4 and provide the employer with the information indicated in above.

17. What information must the employer retain in the event of an audit by the Department of Revenue to prove that the employer properly accepted the SCW-4.

The employer must retain the completed SCW-4, a copy of the servicemember’s latest Leave and Earning Statement and a copy of the employee’s current military identification card identifying the employee as a military spouse. Military identification cards are issued every four years; therefore, a military identification card that is more than four years old should not be accepted by the employer.

18. How long is the SCW-4 effective?

The SCW-4 is an annual form. It must be completed before January 1 of each calendar year during which the employee’s income remains exempt. The exemption expires on December 31 unless a new SCW-4 is completed.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Ray N. Stevens

Ray N. Stevens, Director

March 22 _____, 2010
Columbia, South Carolina