



# TAX BULLETIN 10 – 1

## *Virginia Department of Taxation*

January 29, 2010

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### **Important Tax Information Regarding Spouses of United States Military Servicemembers**

**This Tax Bulletin supplements Tax Bulletin 09-10 (11/11/09)**

On November 11, 2009, President Obama signed into law the Military Spouses Residency Relief Act (hereinafter, the “Act”) (S. 475). The Act amends the Servicemember Civil Relief Act (hereinafter, “SCRA”) to provide that a spouse shall 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 is the same for both the service member and spouse.

#### **Spouses Must Have Same Domicile:**

The SCRA, as amended, states that spouses of active duty service members will not lose or acquire domicile or residency if present in a state solely to accompany an active duty service member present in the state on military orders “if the residence or domicile, as the case may be, is the same for the service member and the spouse.” Based on the Committee Report and statements made on the floor of Congress during consideration of the bill, TAX interprets this language as requiring both the service member and spouse to have the same domicile in order for the SCRA to exempt any of the spouse’s income from tax.

For example, if the service member is domiciled in Texas, but the spouse has never lived in Texas, then the SCRA does not protect the spouse’s income from taxation in Virginia even though the spouse is in Virginia to be with the service member. The spouse cannot simply elect to claim the service member’s domicile. In order to claim a domicile in another state, the spouse must have (i) resided in the other state with the intent to make a permanent home there, and (ii) not abandoned that domicile when moving to reside with the service member or for any other reason.

#### **Income Tax**

##### **“Actual resident” Rule May Not Apply:**

Virginia law taxes individuals as residents if they made Virginia their primary place of abode for 183 days or more, regardless of domicile. If a spouse has maintained the same non-Virginia domicile as the service member, but has been taxed by Virginia for several years as an actual resident, that spouse may immediately claim the protection

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of the SCRA for income earned from services performed, including a refund of income tax withheld for 2009, provided the spouse meets the other requirements of the SCRA.

**Separation and Divorce:**

The SCRA protection ceases to apply no later than the entry of a divorce decree. SCRA protection may end before divorce if the spouse voluntarily maintains a residence in Virginia that is separate from the service member's residence, since SCRA applies only when the spouse is present in the state solely to be with the service member.

**Business Income:**

A spouse who qualifies for protection under SCRA is exempt from Virginia income tax on income for services performed by the spouse, such as wages received as an employee. Other income from Virginia sources would be taxable, such as rental income from property located in Virginia. A spouse's income from self-employment may or may not qualify for the exemption. If the spouse's business does not employ others, and does not employ significant capital, then the predominant source of the business' income is from the spouse's performance of services.

For example, assume a service member's husband is an owner operator of a truck who is paid by the mile. The FMV of the truck is \$100,000, while his net income is \$30,000 (after deducting depreciation on the truck and interest on the truck acquisition loan). Because the value of the truck is a material part of the business, the husband's income from operating the truck is not protected from Virginia taxation by SCRA.

On the other hand, a self-employed spouse in a sales business, who is paid on commission, may use a car for both personal and business purposes. The business use of a personal vehicle alone will not disqualify the income from the sales business from protection under SCRA.

**Documentation for Proving Domicile:**

Determination of a person's domicile requires analysis of the facts and circumstances, so it is not possible to identify which facts or documents will be determinative. Elements that may be examined include:

- Whether the person claiming exemption is married to a service member who is present in Virginia pursuant to military orders.
- The service member's domicile.
- The spouse's domicile and the circumstances in which it was established.
- The extent to which the spouse has maintained contacts with the domicile.
- Whether the spouse has taken any action in Virginia that is inconsistent with maintaining a domicile elsewhere.

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**Effective Date:**

The SCRA applies to the spouse's income for taxable year 2009. If the spouse has a fiscal year for tax purposes, the SCRA applies to income for the fiscal year that includes November 11, 2009.

**Withholding Tax:**

Tax Bulletin 09-10 provided guidance about how a taxpayer may claim this exemption. A revised Form VA-4 Personal Exemption Worksheet may be used to claim this exemption and can be found on TAX's website at [www.tax.virginia.gov](http://www.tax.virginia.gov). Spouses claiming exemption from Virginia income tax should consider the impact on their income tax (and estimated income tax) liability in their domicile state.

**Personal Property Tax**

**In General:**

Motor vehicles and other tangible personal property owned by the spouse of a service member will be protected from Virginia taxation to the same extent as if owned by the service member. The protection applies whether titled or leased in the name of the service member, the spouse, or both as long as both are domiciled in a state other than Virginia. The protection will not apply if someone other than the service member and/or spouse is an owner or lessor of the property.

As in the case of withholding tax, a spouse claiming the protection of SCRA with respect to a motor vehicle in Virginia should consider the potential impact on property tax liability in the domicile state.

**Business Property:**

Property used in a trade or business is not protected from Virginia taxation by the SCRA. If the spouse is claiming depreciation on the property for federal income tax purposes, it will not be exempt from Virginia property taxes. Thus, for example, a truck used in a business and owned by the spouse of a service member would not be protected by SCRA. The fact that a personal motor vehicle is occasionally used for business does not disqualify it from the SCRA protection. When a motor vehicle is regularly used for both business and personal use it may or may not be protected under the SCRA, depending on the facts and circumstances.

**Effective Date:**

The Act amending the SCRA does not specify an effective date for its application to taxes on personal property. Therefore, the Act is effective on the date of enactment, November 11, 2009. In Virginia, most 2009 personal property taxes are assessed

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based on the ownership and value as of January 1, 2009, and will have been assessed long before November 11, 2009, even if the taxes are not due until after that date. The SCRA does not apply to personal property taxes already assessed to the spouse of a service member before the effective date. Because assessment and billing practices vary among localities the application of the SCRA to local property taxes may vary. Each local governing body must determine how the SCRA affects its taxes. Taxpayers should consult their local Commissioner of the Revenue, Director of Finance or other tax official for information about the impact of SCRA on that locality's property tax assessments.

**Proration:**

Virginia law permits localities to assess property tax on motor vehicles, trailers and boats that acquire situs in the locality after January 1 of the tax year on a prorated basis. This occurs when someone purchases a motor vehicle or moves into the locality during the year. The SCRA applies to motor vehicles, trailers and boats that acquire situs in the locality on or after November 11, 2009, provided that such property is not used in a trade or business. In some circumstances localities that have elected to prorate personal property taxes may be required to refund taxes paid when the property loses its situs in the locality. When a spouse trades a motor vehicle in for a new motor vehicle after November 11, 2009, the spouse may be entitled to a refund on the trade in even though the new motor vehicle would be protected from tax by the SCRA. Consult your local tax official for more information.

**Business and Professional Occupational License ("BPOL") Tax**

Because a spouse must be engaged in a business to be subject to the BPOL tax, the SCRA does not protect the gross receipts of a business from BPOL tax, nor does it protect the property owned or used by the business from property tax. The spouse's income from the business may or may not be protected from income tax.

If you have any questions about the impact of SCRA on income tax, please contact TAX at (804) 367-8031. For questions about the impact of SCRA on local taxes, please contact your local Commissioner of the Revenue, Director of Finance or other local tax official.

This Tax Bulletin, along with other reference documents, is available online in the Tax Policy Library section of the Department of Taxation's website, located at [www.tax.virginia.gov](http://www.tax.virginia.gov).