

LAW REVIEW¹ 17037

April 2017

SCRA Makes it Unlawful for State To Consider the Service Member's Military Income in Determining the Rate at which the Income of the Non-Military Spouse is Taxed

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

4.5—SCRA protection from state/local tax authorities

Q: I am a Lieutenant (O-3) in the Navy, and I have read with great interest your Law Review 17034 (April 2017), concerning the concept of domicile and the provisions of the Servicemembers Civil Relief Act (SCRA) that affect the eligibility of the active duty service member to vote in a specific place and the liability of the service member to pay state income tax and personal property tax.

I was born and raised in Miami, Florida and graduated from high school there in 2008. Just a few days later, I reported to the United States Naval Academy (USNA) for “Plebe Summer.” In 2012, I graduated from the USNA and was commissioned an Ensign. I am nearing the end of my

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 of the articles.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

obligated service period, but I plan to remain on active duty for a full career of 20 years or more.

I have been told that it is important that I maintain my domicile in Florida, at the place where I lived with my parents when I graduated from high school and then reported to the USNA. Having read your most informative Law Review 17034, I now understand fully why maintaining my Florida domicile is so important and what I need to do to maintain it for a full active duty career.

In 2015, the Navy transferred me to State X, a state with a high and progressive state income tax. By maintaining my domicile in Florida, which has no state income tax, I have managed to avoid paying this state income tax and the State X personal property tax on my automobile.

Shortly after I transferred to State X, I met the love of my life, and we married at the end of 2015. My wife has lived in State X her whole life and has never been to Florida, except for one trip with me to meet my parents. My wife is a corporate executive, and she makes substantially more money than I make as a junior Navy officer.

For all of calendar year 2016, we lived together in the same apartment in State X, near the Navy base where I am stationed and near her office. As I understand it, we are domiciled in different states, although we live together in the same apartment. She is domiciled in State X, and I am domiciled in Florida. Is that correct?

We recently filed our 2016 federal income tax return, jointly. We paid federal income tax on all our income, mine plus hers. She then filed a separate state income tax return with State X and paid state income tax on her income, without regard to mine.

State X concedes that it cannot tax my military income directly, because of the SCRA and because I am domiciled in Florida, not State X, but State X wants to know how much money I earned from the Navy in 2016 and it wants to consider my Navy income in determining the rate of tax on my wife's income. Because the State X income tax is progressive, factoring in my Navy income will cause her to have to pay substantially more in state income tax. Is that legal?

A: No. The SCRA contains a subsection that specifically addresses this exact situation. That subsection reads as follows:

- A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.³

Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers' and Sailors Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I. The SSCRA did not have a clause like section 4001(e) of the SCRA, and at least one state

³50 U.S.C. § 4001(e).

successfully asserted the right to consider the service member's military income in determining the rate of tax for the non-military spouse. Section 4001(e) was included in the SCRA specifically to preclude States from doing what State X is trying to do to your wife. Under Article VI, Clause 2 of the United States Constitution (the "Supremacy Clause"), a federal statute like the SCRA trumps a conflicting state statute or even a state constitution.

It is true that your wife is domiciled in State X while you are domiciled in Florida. Marrying you did not make her a Florida domiciliary, and she is not exempt from having to pay State X's tax on her income. It is entirely possible for a married couple to live together in the same apartment or house but be domiciled in different states, if one or both are on active duty. That situation is very common in military families.

Update – March 2022⁴

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.⁵ Section 302(a) of the Act adds to the SCRA to allow spouses of a servicemember to use the same residence for purposes of taxation as the servicemember regardless of when they were married.⁶ The provision is codified in 50 U.S.C. § 4001(a)(2)(B) as follows:

For any taxable year of the marriage, the spouse of a servicemember may elect to use the same residence for purposes of taxation as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

Therefore, if your wife would like to change her domiciliary to Florida she may, even though she has never lived in Florida. She may change it to Florida because this is where you, a junior Navy officer, are a domiciliary of. This would likely be beneficial for her because if she changes her domicile to Florida then she will avoid paying the hefty Hawaii state income tax.⁷

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This article is one of 2000-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For

⁴Update by Second Lieutenant Lauren Walker, USMC.

⁵Veterans Benefits and Transition Act of 2018, Pub. L. NO. 115-407. 132 Stat. 5367. *See also The Veterans Benefits and Transition Act, MILITARY BENEFITS*, <https://militarybenefits.info/veterans-benefits-transition-act/> (last visited Mar. 18, 2022).

⁶Veterans Benefits and Transition Act § 302(a).

⁷See Samuel F. Wright, *SCRA Amended regarding Voting Rights of Military Spouses*, ROA LAW REVIEW 19020 (Feb. 2019) (discussing the Veterans Benefits and Transition Act of 2018 and how it affects spouses of service members).

many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association 1 Constitution Ave. NE Washington, DC 20002