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## Is it Lawful for the State where I Am Stationed but not Domiciled To Tax my Non-Military Income?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

Update on Sam Wright

4.5—SCRA protection from state/local tax authorities

**Q: I am on active duty in the Army as a physician, and I am currently serving in a state that has a very high state income tax. I have read with great interest your Law Review 17034, about the concept of domicile and about the section of the Servicemembers Civil Relief Act (SCRA) that protects an active duty service member like me from having to pay state income tax to a state where the service member lives only because he or she is assigned to military duty in that state.**

**I was living and domiciled in Texas (a state with no state income tax)<sup>3</sup> when I entered active duty four years ago, and I have been careful to retain my domicile in Texas. Thus, I am not required to pay state income tax to the state where I physically reside because my military duties require my presence there.**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

<sup>2</sup> BA 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. I have 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 more than 34 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 through ROA at (800) 809-9448, extension 730, or [SWright@roa.org](mailto:SWright@roa.org). Please understand that I am a volunteer, and I may not be able to respond the same day.

<sup>3</sup> The other six states that have no state income tax are Alaska, Florida, Nevada, South Dakota, Washington, and Wyoming. In addition, New Hampshire and Tennessee tax only dividend and interest income.

**In addition to my Army salary, I also have substantial income from “moonlighting” (with the explicit permission of the commanding officer of the military hospital where I am assigned) in the emergency room of a civilian hospital. I also have dividend and interest income on stocks that I own.**

**Does the SCRA protect me from having to pay state income tax on all my income? Or does the SCRA provision only apply to my Army income?**

**Answer, bottom line up front:**

The SCRA protects you from having to pay state income tax to the state where you physically reside but are not domiciled, but the SCRA provision only applies to your military income. Federal law does not preclude that state from taxing your moonlighting income and your dividend and interest income.

**Explanation:**

Here is the pertinent SCRA section:

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#### § 4001. Residence for tax purposes

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- (a) Residence or domicile.
  - (1) In general. 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 servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.
  - (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 States 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.*
- (c) Income of a military spouse. Income for services performed by the spouse of a servicemember shall not be deemed to be income for services 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.

- (d) Personal property.
  - (1) Relief from personal property taxes. The personal property of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.
  - (2) Exception for property within member's domicile or residence. This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's or the spouse's domicile or residence.
  - (3) Exception for property used in trade or business. This section does not prevent taxation by a tax jurisdiction with respect to personal property used in or arising from a trade or business, if it has jurisdiction.
  - (4) Relationship to law of state of domicile. Eligibility for relief from personal property taxes under this subsection is not contingent on whether or not such taxes are paid to the State of domicile.
- (e) Increase of tax liability. *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.*
- (f) Federal Indian reservations. An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservations and not the State where the reservation is located.
- (g) Definitions. For purposes of this section:
  - (1) Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).
  - (2) Taxation. The term "taxation" includes licenses, fees, or excises imposed with respect to motor vehicles and their use, if the license, fee, or excise is paid by the servicemember in the servicemember's State of domicile or residence.
  - (3) Tax jurisdiction. The term "tax jurisdiction" means a State or a political subdivision of a State.<sup>4</sup>

Section 4001(b), *italicized above*, makes clear that the exemption from state income tax only applies to "compensation of a servicemember for military service." The state where you are stationed but not domiciled is not precluded from taxing your moonlighting income and your dividend and interest income.

**Q: Would it be lawful for the state where I am stationed to consider my military income in determining the rate at which my non-military income is taxed?**

**A:** No. Such a practice would clearly violate section 4001(e), *italicized above*. The state must use the rate that would apply if your non-military income were your only income.

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<sup>4</sup> 50 U.S.C. 4001 (emphasis supplied).