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New SCRA Amendment Changes the Treatment of Military Spouses for State Income Tax Purposes

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

[Update on Sam Wright](#)

4.5—SCRA protection against state and local tax authorities

On 12/31/2018, President Trump signed into law the Veterans Benefits and Transition Act of 2018, Public Law 115-407. Section 302 of this new Act makes a significant change in the Servicemembers Civil Relief Act (SCRA)³ regarding the treatment of the spouses of active duty members of the uniformed services⁴ for state income tax purposes.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² 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. For 42 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.

³ On 12/19/2003, President George W. Bush signed the SCRA into law as a long-overdue update and rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917. Please see Law Review 116 (March 2004), by Colonel Mark E. Sullivan, USA (Ret.).

⁴ For SCRA purposes, the uniformed services are the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic & Atmospheric Administration.

Section 302 of the 2018 Act amended section 4001(a) of title 50 of the United States Code. Prior to the recent amendment, section 4001(a) read as follows:

- (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.*⁵

The 2018 Act amended section 4001(a) to read as follows:

- (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) A spouse
 - (B) Election—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.
 - (b) Applicability—The amendments made by subsection (a) shall apply to any return of State or local income tax filed for any taxable year *beginning with the taxable year that includes the date of enactment of this Act.*⁶

⁵ 50 U.S.C. 4001(a) (emphasis supplied).

⁶ 50 U.S.C. 4001, as amended (emphasis supplied). Because President Trump signed the Veterans Benefits and Transition Act of 2018 on the last day of 2018, this change in the law applies to 2018 state income tax returns filed during the opening months of 2019. Do not expect your income tax preparer to be aware immediately of this very recent statutory amendment. I suggest that you provide the preparer a copy of this article.

To understand the change made by this very recent amendment, let us consider the hypothetical but realistic Colonel Joe Smith, USMC and his wife Mary Jones. Since they married in 2015, they have lived together in a condominium in Arlington, Virginia, but he is and has been a domiciliary of Texas for tax and voting purposes and she has been a domiciliary of Virginia. She has an excellent job in Washington, DC and makes more money than Joe. She pays Virginia state income tax on her salary. Joe is on active duty in the Marine Corps, serving at the Pentagon, and the SCRA exempts him from the obligation to pay Virginia state income tax on his military compensation. Joe does not pay state income tax because Texas is one of nine states that do not have a state income tax.⁷

In 1992, Joe graduated from high school in Houston. At the time he was living with his parents and younger siblings in the house where the family moved when Joe was in elementary school. Just days after his high school graduation, Joe reported to the United States Naval Academy in Annapolis, Maryland for plebe summer. He survived plebe summer and excelled at the Academy, and in 1996 he graduated and was commissioned a Second Lieutenant in the Marine Corps. He has remained on active duty continuously and is now a Colonel.

Joe has not slept in the Houston house since 1992, except for a few short visits home while at the Naval Academy. In 1999, Joe's father died. His mother sold the house and moved to California. In 2012, the new owner sold the house to a developer, and the developer tore down the house and all the neighboring houses to make room for a new commercial development. Joe has no relatives living in Houston and he cannot receive mail at the former Houston address or any address in the county. Nonetheless, the former address is Joe's domicile (legal residence) until he establishes a new domicile elsewhere or leaves active duty, whichever comes first.

Through the years, Joe has had many physical residences, near his duty stations within and outside our country, but he has maintained his domicile at the Houston address where he lived with his parents until he left in 1992 to report to the Naval Academy. Joe has not voted or registered to vote in any of the places where he has had physical residences. In each major election, he has voted by absentee ballot in Harris County, Texas, using as his "permanent home address" the Houston home address. Maintaining his domicile in Texas has saved Joe tens of thousands of dollars in state income tax over his long and distinguished military career.

In 2014, shortly after he was promoted from Lieutenant Colonel to Colonel, Joe was transferred from Camp Pendleton (in California) to the Pentagon (in Arlington, Virginia). Joe rented an apartment in Arlington, to commute to his duty station in the Pentagon. Joe met the love of his life, Mary, and they married in 2015. Together, they bought a condominium, where they live together as a married couple.

⁷ The other eight states are Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Washington, and Wyoming.

Mary has spent her entire life in Northern Virginia and has never been to Texas. Marrying a Texan in 2015 did not make Mary a Texan. Until very recently, the SCRA did not protect Mary from the obligation to pay Virginia state income tax on her substantial salary. Although Joe and Mary have been living together in the same condominium, Joe has been domiciled in Texas and has been exempt from having to pay Virginia state income tax on his military compensation, while Mary has been domiciled in Virginia and has been required to pay Virginia state income tax on her salary.

The 2018 amendment is a big deal for people like Mary. Starting with her soon-to-be-filed 2018 income tax return, Mary can claim to be a Texan, although she has never set foot in the state, and she can be exempt from having to pay Virginia state income tax.

We should expect that Virginia and other affected states will challenge the constitutionality of this recent federal amendment. I predict that their challenge will be unsuccessful.⁸

⁸ See *Dameron v. Brodhead*, 345 U.S. 322 (1953). I discuss that case in detail in Law Review 09017 (April 2009).