

**Office of The Judge Advocate General**  
*Legal Assistance Policy Division*

*OTJAG Practice Note*

**Military Spouses Residency Relief Act (MSRRA): Use Caution and Read Carefully**

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On 11 November 2009, President Obama signed the Military Spouses Residency Relief Act (MSRRA) into law.<sup>1</sup> The MSRRA amends the Servicemembers Civil Relief Act (SCRA)<sup>2</sup> to provide some military spouses the ability to regain a “lost” domicile for tax purposes. As in everything, the devil is in the details.

Much of the news coverage about the MSRRA is misleading. This law does not simply permit a Soldier’s spouse to “pick” or “choose” a legal domicile in any state—say, for example, one that does not have income tax. The MSRRA states:

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.

Essentially, the MSRRA allows military spouses to maintain their domicile if they move to accompany their Soldier-spouse due to military orders and the spouse has the same domicile as the Soldier. As used in the SCRA, the terms “residence” and “domicile” are interchangeable. These terms denote the place where a Soldier—and now, the Soldier’s spouse—maintains his permanent home and to which the Soldier has the intention to return whenever he is absent. The SCRA, as amended by the MSRRA, now protects Soldiers from owing income taxes on military pay, except in their state of legal residence or domicile, and protects spouses from owing income taxes earned in the state in which they reside solely to be with the Soldier due to military orders, unless the state is also their state of legal residence or domicile. Spouses may not simply pick their domicile to be the same as the Soldier, however. Spouses must meet the requirement of physical presence in the state and show indicia of intent to make the state their permanent home, in order to benefit from the MSRRA’s protections.

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<sup>1</sup> Pub. L. No. 111-97, 123 Stat. 3007 (2009).

<sup>2</sup> Pub. L. No. 108-189, 117 Stat. 2835 (2003).

Domicile is established, not chosen, even though it is no secret that many Soldiers have a propensity to establish domicile in income tax free states, such as Texas, Florida, Washington, Nevada, Alaska, South Dakota, and Wyoming, as well as other tax-favored states, such as New Hampshire and Tennessee. A Soldier must complete DD Form 2058, “State of Legal Residence Certificate,” and file the completed form with the personnel office to declare his state of residence or domicile.<sup>3</sup> The Defense Finance and Accounting Service (DFAS) uses the DD Form 2058 to determine whether state income tax should be withheld from the Soldier’s military pay. However, the DD Form 2058 does not, by itself, legally change the Soldier’s domicile.

The DD Form 2058 describes the difference between “home of record” and legal residence or domicile. The instructions explain that residence and domicile are a matter of “physical presence in the new State with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile. In most cases, you must actually reside in the new State at the time you form the intent to make it your permanent home. Such intent must be clearly indicated.”<sup>4</sup>

The following scenarios highlight some of the implications of the MSRRA.

Example 1. Soldier is a resident/domiciliary of Texas. His spouse takes the required steps to establish and maintain residency/domicile in Texas as well. Soldier is then assigned to Virginia, and his spouse moves to Virginia to live with the Soldier. The spouse eventually gets a job in Virginia. The spouse can assert the SCRA, and Virginia cannot tax the spouse’s income earned in Virginia.

Example 2. Soldier is a resident/domiciliary of Texas. He is assigned to Virginia, and while in Virginia he meets and marries his spouse, who is working in Virginia. The MSRRA does not permit the spouse to now claim Texas residency/domiciliary. Virginia can tax the spouse’s income.

Example 3. Soldier is a resident/domiciliary of Pennsylvania. Her spouse takes the required steps to establish and maintain residency/domicile in Pennsylvania.

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<sup>3</sup> U.S. Dep’t of Def., DD Form 2058, State of Legal Residence Certificate (Feb. 1977).

<sup>4</sup> *Id.*

Soldier is then assigned to North Carolina, and her spouse moves to North Carolina to live with the Soldier. The spouse eventually gets a job in North Carolina. The spouse can assert SCRA, and North Carolina cannot tax the spouse's income earned in North Carolina; however, Pennsylvania can tax the income. It is incumbent on the spouse to file Pennsylvania estimated taxes on the income and file a Pennsylvania tax return.

States are still sorting out the implications of this law on their income and personal property tax systems. The law is effective for tax year 2009, and state-by-state guidance concerning refunds on 2009 taxes can be found online at individual state tax websites.<sup>5</sup> In general, if a military spouse seeks a refund for the income tax withheld by a state, both the Soldier and the spouse should expect some inquiry into their claims of domicile.

Especially in states with large military populations (e.g., Virginia, Maryland, North Carolina, and California,) the initial burden of establishing the bona fides of residence and domicile will fall on the Soldier and spouse. The required indicia of domicile differ from state to state, so Soldiers and their spouses should be careful to check their state's tax form instructions for guidance. Even after a Soldier has demonstrated sufficient evidence to establish residence or domicile in a state, the state may require additional evidence of the spouse's shared domicile with the Soldier. State refunds will often be held pending confirmation of qualification under the MSRRA. Tax refunds may even be delayed in states that allow MSRRA claims to be filed electronically.

In short, legal assistance practitioners should keep the following key points in mind when educating their clients on the MSRRA. First, the MSRRA does *not* create the right to pick and choose any state as a state of residence. Second, the claims of residency of both spouses and Soldiers are likely to be scrutinized carefully by state taxing authorities because the basis for the new SCRA protection is the shared residence or domicile of a Soldier and spouse. Third, unsupported claims of changed residency may be viewed as fraudulent by state taxing authorities and may subject the family to significant additional tax penalties and interest. Finally, contrary to media reports, neither the SCRA nor the MSRRA exempt Soldiers or spouses who physically reside in a particular state from complying with that state's driver's license requirements.

For more information concerning individual state guidance on these issues, visit the Tax Discussion Board on JAGCNet.

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<sup>5</sup> See generally Federation of Tax Administrators, FTA Links Page, <http://www.taxadmin.org/fta/link/> (last visited Jan. 26, 2010) (providing links to individual state tax websites).