Georgia Residents Moving to Florida: Beware of the "Presumption of Continuing Legal Residence"

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Most states tax their residents' personal income. Georgia taxes "legal residents" on their entire net income regardless of the source of the income. A taxpayer seeking to move from Georgia to Florida must examine carefully the rules tied to changing "legal residence." Specifically, a taxpayer who wants to move to Florida but continue to travel back-and-forth to Georgia cannot and should not assume that buying a Florida home (and taking other steps to establish Florida domicile) is sufficient to overcome the "presumption of continuing legal residence" – a little known rule that can destroy the taxpayer's intent and plan to carve out passive income from the Georgia income tax base.

Georgia Tax Imposed on "Legal Residents"

Under Georgia law, a taxable resident includes a "legal resident" of the state. Official Code of Georgia Annotated ("O.C.G.A.") § 48-7-1(10)(A)(i). Most taxpayers who live and work in Georgia are "legal residents," to wit: they are physically present in Georgia on income tax day (December 31) with the corresponding intent to remain in Georgia indefinitely. Legal residence is synonymous with domicile. Domicile or legal residence is demonstrated by (1) physical presence (2) with an intention to remain. A "legal resident" of Georgia must pay Georgia income tax on *all* income.

Georgia Tax Imposed under the 183-Day (or Part-Day) Provision

The same statute that defines a taxable resident as a "legal resident" (O.C.G.A. § 48-7-1(10)) also provides other ways by which 100 percent of a taxpayer's income is subject to Georgia income tax, even though the taxpayer is not a "legal resident" of the state. Under the 183-day rule, all income is subject to Georgia tax, if on December 31 the individual has been residing in Georgia for 183 days or part-days or longer, in the aggregate, of the immediately preceding 365 day period. O.C.G.A. § 48-7-1(10)(A)(ii). This rule does not require "legal residence" but merely "residence" in Georgia for 183 days or part days. As noted above, "legal residence" is different from "residence." A person can have more than one residence, to wit: he/she can be a "legal resident" of Florida but also be a "resident" of Georgia.

Misplaced Reliance on the 183-Day Provision

The 183-day rule in O.C.G.A. § 48-7-1(10)(A)(ii) does not authorize a longtime legal resident of Georgia to move to Florida and continue to return to Georgia to conduct business or work at a job in Georgia. But the 183-day rule can confuse such a taxpayer into believing that he/she can establish new legal residence in Florida and report to Georgia only the income from business conducted in Georgia.

In a typical scenario, the longtime legal resident of Georgia wants to shield passive income from tax. So the taxpayer buys a home in Florida, registers to vote in Florida, gets a Florida driver's license and gets Florida license plate for his/her car. The taxpayer believes that the 183-day rule allows the taxpayer to return to Georgia for 182 days each year. The taxpayer understands that he/she must report to Georgia all income from the work or business conducted in the Georgia. The taxpayer files a Georgia income tax return (as a nonresident, of course) but includes only the income from Georgia activity or work. The taxpayer excludes passive income (dividends, interest income, gains on dispositions of stock). The taxpayer believes that he/she can shield passive income from Georgia tax because he/she has been outside of Georgia for at least 183 days or part-days. Unfortunately, the taxpayer does not realize that the 183-day rule does not apply.

The 183-day rule allows Georgia to tax 100 percent of the income of an individual who not a "legal resident" of Georgia but who is in Georgia for 183-days or part days. Under the 183-day rule, the taxpayer may not own a home in Georgia. But the taxpayer remains subject to Georgia tax on 100 percent of his/her income because he/she is physically present in Georgia for 183-days or part days during the prior year.

The Presumption of Continuing Legal Residence

A legal resident of Georgia cannot rely on the 183-day rule to shield passive income from Georgia tax by (1) moving to Florida, (2) continuing to earn Georgia income, (3) paying Georgia income tax only on the Georgia-source income and (4) excluding from the Georgia tax base all passive income (or any other income not earned in Georgia). Such a taxpayer is susceptible to the "presumption of continuing legal residence," under which 100 percent of the taxpayer's income remains subject to Georgia tax.

Most state residency laws include a presumption that a legal resident of the state continues to be a legal resident until he/she proves otherwise. Under Georgia law:

> Once a person has become a [legal resident] of Georgia for tax purposes ... he/she is deemed to continue to be a Georgia resident until showing, to the satisfaction of the State Revenue Commissioner that he/she has become a legal resident/domiciliary of another state and that he/she does not come within (A)(iii) [relating to number of days in Georgia].

O.C.G.A. § 48-7-1(10)(B). The taxpayer can overcome the presumption by showing that he/she (1) abandoned his/her Georgia domicile, and (2) established a new domicile in Florida, through physical presence coupled with an intent to remain in Florida indefinitely. But the taxpayer cannot travel back-and-forth to Georgia several times during the year. This activity raises suspicion that the taxpayer never broke ties with Georgia.

Dealing With a Client Who Has Already "Moved to Florida"

"Residency" is complicated and fact-intensive. Indeed, as a matter of policy, the Georgia Department of Revenue will not issue written letter rulings on residency issues. Thus, practitioners should advise their clients on the dangers in flirting with changing legal residence to Florida.

A taxpayer who at any time is a "legal resident" under O.C.G.A. § 48-7-1(A)(i), and thus subject to tax on 100 percent of his/her income, continues to be a "legal resident" until proving otherwise. A taxpayer who has relied on the 183-day rule and failed to report 100 percent of his/her income to Georgia can minimize the damage by coming forward through a voluntary disclosure to the Georgia Department of Revenue to limit exposure and penalties (criminal and civil). This option does not apply to every taxpayer, so the taxpayer should consult a state tax advisor about the best course of action.

Richard C. Litwin, Esq. is an Atlanta attorney, who specializes in state and local taxation and tax disputes, including personal income tax, residency for state income tax purposes, sales and use tax and corporate income tax. Mr. Litwin also speaks regularly on multistate taxation, including residency issues, at national and state bar seminars and at seminars sponsored by GSCPA.