

# Unintentionally Becoming a Taxable Resident of Georgia During COVID

by Richard C. Litwin

Reprinted from *Tax Notes State*, April 26, 2021, p. 389

## Unintentionally Becoming a Taxable Resident of Georgia During COVID

by Richard C. Litwin



Richard C. Litwin

Richard C. Litwin is an Atlanta attorney and former chair of the tax section of the Atlanta Bar Association and the tax section of the State Bar of Georgia. He is co-moderator of the Georgia Department of Revenue Attorney Liaison Committee and serves on the board of the National

Association of State Bar Tax Sections. Before private practice, and from 1990-1995, Litwin was an assistant attorney general in the Tax Section of the Office of the Georgia Attorney General.

In this article, Litwin examines the potential Georgia income tax obligations of individuals who resided in the state for reasons related to the COVID-19 pandemic in 2020.

Copyright 2021 Litwin Law.

The COVID-19 pandemic forced many employees to work remotely, and some worked in states other than those where they usually worked. The shift caused much confusion for employers who questioned whether they had new tax obligations to the states from which employees teleworked. Businesses that had no presence in a state before March 2020 had to consider potential employer withholding tax obligations and income tax obligations to states where employees now worked. Some state tax agencies issued guidance

that placated employer concerns.<sup>1</sup> While some states may have forgone employer withholding tax obligations and nexus enforcement, such relief did not extend to those who may have moved into the state temporarily.

During this tax season, advisers should not overlook whether those who remained in a new state for an extended period in 2020 are taxable residents in that state for 2020. Much of the law is statutory. State revenue departments may be unable or unwilling to ignore or waive statutes.

Georgia provides a good backdrop for examination of the issue. The issue turns on whether a longtime Florida domicile who is in Georgia temporarily during 2020 is subject to Georgia income tax on some or all of the Florida resident's 2020 income. In the example, the taxpayers are a married couple and have a Florida domicile. In 2020 their trip to Georgia for a few weeks becomes an extended, monthslong stay. Unintentionally, the visit to Georgia results in the imposition of Georgia income tax on 100 percent of the taxpayers' income. This article provides details and analysis of the facts based on Georgia statutory law on residency.

### Background Facts: Florida Residents Offer to Help Son

In early 2020 the taxpayers had lived in Florida for several years and had never resided in Georgia. The taxpayers were domiciles of Florida. Their 2020 income comprised income from

<sup>1</sup>For example, Alabama, California, the District of Columbia, Georgia, Indiana, Maine, Maryland, Minnesota, Mississippi, North Dakota, New Jersey, Pennsylvania, and Washington issued guidance that the employee's presence in the state will not (1) require the out-of-state employer to register and remit employer withholding taxes, (2) create nexus for the out-of-state employer, or (3) increase the payroll factor for formulary apportionment. Generally, the relief ends when the pandemic ends.

investments and payments under a noncompete that followed from the sale of a business. Also, the taxpayers once owned a vacation home in Wyoming, which they sold in March 2020 for a substantial gain. In late March 2020 the couple's son, who lives in metro Atlanta, asked the taxpayers to come to Georgia for a few weeks to help with the son's young children. Because of school closures, the children were now learning online, at home, and the son and his wife needed the help. So on April 1 the taxpayers traveled to metro Atlanta — planning to return to Florida in May, at the end of the school year.

After the school year ended in late May, facing a spike in coronavirus cases in Florida, the taxpayers decided to remain in Georgia. They postponed their return to Florida to September 1.<sup>2</sup> In early September 2020 — concerned about their at-risk status because of their ages, as well as potentially overcrowded hospitals if they required medical attention, the taxpayers, again, delayed their return to Florida, opting to stay in Georgia until Florida was safe. In February 2021 the taxpayers received COVID-19 vaccinations in Georgia and returned to Florida. Thus, for 2020 the taxpayers had been in Georgia for over 183 days, and, as of December 31, 2020, their return to Florida was not certain.

### Georgia Law on Residency

Under Georgia tax law, a resident is subject to income tax,<sup>3</sup> and there are three definitions of a resident whose income is subject to state income tax.<sup>4</sup> First, Georgia law defines a taxable resident as a legal resident of Georgia on income tax day, which is December 31. Such a person is physically present in Georgia on December 31 with an intention to remain in Georgia indefinitely.<sup>5</sup>

<sup>2</sup>With an arrival date of April 1 and a departure date of September 1, the taxpayers' trip to Georgia would have totaled five months, or about 153 days. Under Georgia tax law, as explained later, a person who remains in Georgia for 183 days or partial days is considered a resident subject to Georgia income tax.

<sup>3</sup>"[Georgia income] tax is imposed upon every *resident* of [Georgia] with respect to the Georgia taxable net income of the taxpayer as defined in [Official Code of Georgia Annotated (OCGA)] section 48-7-27." OCGA section 48-7-20(a).

<sup>4</sup>Under Georgia law, a resident is subject to income tax. For clarity, and for purposes of this article, those subject to Georgia income tax are referred to as taxable residents.

<sup>5</sup>OCGA section 48-7-1(10)(A)(i). This definition applies to residents of Georgia.

Second, the law defines a taxable resident as someone who is not a legal resident but who resides in Georgia on a more or less regular or permanent basis — not on the temporary or transitory basis of a visitor — *and* who resides in the state on December 31.<sup>6</sup> Third, the law defines a taxable resident as a person who as of December 31 has been residing in Georgia for 183 days or part-days or longer, in the aggregate, of the immediately preceding 365-day period.<sup>7</sup>

### Florida Legal Residents' Vulnerability to Georgia Income Tax for 2020

The facts show that:

- the taxpayers are longtime Florida residents;
- the taxpayers originally planned to remain in Georgia for two months (April and May 2020); and
- the COVID-19 pandemic altered those plans.

The taxpayers have not considered that their extended stay in Georgia would result in a Georgia state income tax obligation. Nevertheless, the taxpayers must consider whether their 2020 income (recall the large gain from the sale of the vacation home) is subject to Georgia tax. Below is an analysis of the application of the three definitions of taxable resident to the facts.

### 'Legal Resident' Taxable Residents

To be legal residents, the taxpayers must be domiciled in Georgia on December 31. They must be residing in Georgia on December 31, 2020, with a corresponding intent to remain in Georgia indefinitely. Here, the taxpayers do not have such intent. Since May 2020 the taxpayers had tried to return to Florida but did not because of complications arising from the pandemic. They have not sold their Florida home or bought a home in Georgia, and they

<sup>6</sup>OCGA section 48-7-1(10)(A)(ii). This definition, which does not require intent to remain in Georgia, applies to a person who may not demonstrate by his acts an intent to stay in Georgia, but who has physically remained in Georgia for most of the calendar year and resides in Georgia on December 31.

<sup>7</sup>OCGA section 48-7-1(10)(A)(iii). Note that this definition does not require that the person actually reside in Georgia on December 31 or that he or she be physically present in Georgia on December 31. Further, this definition does not require that the person intend to remain in Georgia indefinitely.

have never lived in Georgia. Their actions during 2020 reflect no intent to remain in Georgia indefinitely. The state taxing agency faces a difficult task in asserting that the taxpayers are, or have become, legal residents of Georgia.

### **'More or Less Regular or Permanent Basis' Taxable Residents**

Arguably — and perhaps technically — as of income tax day, December 31, 2020, the taxpayers resided in Georgia. But they have always considered the trip to Georgia temporary and wanted to return to Florida. They came to Georgia to help their son and not to live or stay in Georgia more or less permanently. They had to extend the trip because of the COVID-19 pandemic. The state taxing agency would be hard-pressed to argue that the taxpayers' Georgia visit was anything more than temporary.<sup>8</sup> Nevertheless, the state taxing agency could claim that the taxpayers are "more or less regular or permanent basis" taxable residents for 2020.

### **'183-Day' Taxable Residents**

The taxpayers could be subject to Georgia income tax under the 183-day definition. This category of taxable resident does not require that the taxpayers reside in Georgia on December 31, 2020 (as required by the legal resident definition and by the "more or less regular or permanent basis" definition). So even if the taxpayers were not in Georgia on December 31, 2020, for 2020, the taxpayers were taxable residents under the 183-day definition. More important, *all* of the taxpayers' 2020 income is subject to Georgia income tax.

### **Cannot Prorate Income**

In the example, the taxpayers came to Georgia on April 1, 2020. If they were taxable residents of Georgia for 2020, then — at a minimum — fairness dictates that the taxpayers be allowed to prorate their income for 2020. Specifically, the taxpayers should be taxed only on the income earned from April 1 through December 31, 2020. They should not be taxed on income earned from January 1 through March 31, 2020, which preceded their trip to Georgia. This proration rule is common, especially when a person moves to a new state. Here, proration is important. Under the facts, in March 2020, the taxpayers sold their vacation home in Wyoming, which has no income tax, and the taxpayers realized a large gain on that sale.

Georgia law allows a taxpayer to prorate his or her income, if the taxpayer moves to or leaves the state during the year. Under the law, a taxpayer is subject to state income tax only on the income earned after moving to Georgia.<sup>9</sup> But the right to prorate applies only to the first two definitions of taxable resident, legal resident, and "more or less regular or permanent basis" taxable resident.<sup>10</sup> A 183-day taxable resident, who is a taxable resident under OCGA section 48-7-1(10)(A)(iii), cannot prorate his or her income.

If the taxpayers are subject to Georgia income tax as 183-day taxable residents, then they must pay state tax on 100 percent of their 2020 income, including the gain on the sale of the Wyoming vacation home. The taxpayers face potentially devastating income tax consequences from coming to Georgia for a few weeks to help their son.

<sup>9</sup> Conversely, for a taxpayer who abandons his Georgia domicile, income earned after leaving the state is not subject to Georgia income tax. See Ga. Comp. R. & Regs. 560-7-8.27; and Ga. Comp. R. & Regs. 560-7-3-.02(1)(b) ("when a taxpayer is not liable for Georgia income taxes for an entire year because of moving into [Georgia] or moving from [Georgia], he or she shall include in his or her return only his or her income received while a resident of [Georgia]").

<sup>10</sup> Specifically, under the law, "every individual who becomes a resident of this state for income tax purposes under O.C.G.A. section 48-7-1(A)(i) (legal resident) and (A)(ii) (more or less regular or permanent basis resident) . . . for the first time during the 12-month period immediately preceding income tax day and who does not otherwise come within [(A)(iii) (183-Day taxable residents)] . . . shall be taxable as a resident only from the date of becoming a resident on an apportionment basis as prescribed in Code Section 48-7-85 (the proration statute). O.C.G.A. section 48-7-1(10)(C)." See also Ga. Comp. R. & Regs. 560-7-8.27.

<sup>8</sup> Certainly, additional facts regarding the amount and the type of clothing that the taxpayers brought with them to Georgia would confirm that they were not planning to be in the state past May 2020.

## Presumption of Continuing Legal Residence

The facts show that the taxpayers did not intend to live in Georgia or remain in Georgia after May 2020. Still, under the state income tax statutes, the taxpayers could be subject to Georgia income tax for 2020. Moreover, they could be forced to prove that they moved back to Florida and abandoned their Georgia taxable residence. Under Georgia law:

Every individual who, having become a [taxable] resident of this state for income tax purposes under [OCGA section 48-7-1(10)(A)(i) (legal resident) and OCGA section 48-7-1(10)(A)(ii) (more or less regular or permanent basis taxable resident)] is deemed to continue to be a [taxable] resident of [Georgia] until the person shows to the satisfaction of the [Georgia Department of Revenue] that he or she has become a legal resident or domiciliary of another state and that he or she does not come within [the 183-day definition of taxable resident]. Upon such a showing with respect to any 12 month period immediately preceding [December 31], the person shall be taxable as a resident of this state only to the date of becoming a nonresident on an apportionment basis as prescribed in Code Section 48-7-85. O.C.G.A. section 48-7-1(10)(B).<sup>11</sup>

The statutory presumption does not apply to all three definitions of a taxable resident; rather, the presumption applies to persons taxable as a legal resident and a “more or less regular or permanent basis” taxable resident. In the example, if the taxpayers are in Georgia on December 31, 2020, and if they are found to be taxable residents under either the legal resident definition (unlikely) or the “more or less regular

or permanent basis” definition (possible), then they may have to show that they abandoned Georgia.<sup>12</sup>

## Conclusion

Unintended tax consequences pervade the pandemic landscape and will pester individuals long after we return to normal. For now, when considering tax obligations for 2020, advisers must ask the right questions. Advisers must ensure that their individual clients have not unintentionally become subject to another state’s income tax based on an extended visit to another state forced upon them because of the pandemic. ■

<sup>11</sup> See also Ga. Comp. R. & Regs. 560-7-3-.02(1)(a) (“any person who is or has become a resident of [Georgia] shall continue to be a resident for income tax purposes even though temporarily absent from [Georgia], until he or she becomes a permanent resident of another State”).

<sup>12</sup> Trying to show that you have abandoned Georgia when you never moved to Georgia seems counterintuitive and ridiculous, but it should not be overlooked. Making the showing can be accomplished (1) by attaching to the 2020 Georgia income tax return a statement explaining that the taxpayers have filed a 2020 return because of the unique circumstances tied to living in Georgia for more than 183 days, that the taxpayers never resided in Georgia or intended to remain there permanently and, in fact, consider Florida to be their domicile; and (2) by keeping good records about the reason they came to Georgia in April 2020 and the date that they returned to Florida. If the taxpayers were not in Georgia on December 31, 2020, then they should keep records to support this fact and should add this fact to the statement attached to the 2020 return. If, for example, the taxpayers left Georgia on December 25, 2020, and returned on January 3, 2021, then they are not subject to the presumption of continuing residency.