

Document Number	17-118
Tax Type	Individual Income Tax
Description	Domicile - burden of proof is on the Taxpayer to show he was not subject to income tax in Virginia.
Topic	Residency, Filing Status, Records>Returns/Payments
Date Issued	06-29-2017 June 29, 2017

Re: § 58.1-1821 Application: Individual Income Tax

Dear *****:

This will reply to your letter in which you seek correction of the individual income tax assessment issued to ***** (the "Taxpayer") for the taxable year ended December 31, 2013.

FACTS

The Taxpayer filed a 2013 Virginia part-year resident individual income tax return. Under audit, the Department determined that the Taxpayer was a resident of Virginia for the entire year and issued an assessment. The Taxpayer filed an appeal, contending he did not become a resident of Virginia until July 2013.

DETERMINATION

Residency

Two classes of residents, a domiciliary resident and an actual resident, are set forth in *Va. Code* § 58.1-302. The domiciliary residence of a person means the permanent place of residence of a taxpayer and the place to which he intends to return even though he may reside elsewhere. For a person to change domiciliary residency to another state or country, that person must intend to abandon his Virginia domicile with no intention of returning to Virginia. Concurrently, that person must acquire a new domicile where that person is physically present with the intention to remain there permanently or indefinitely. An actual resident of Virginia means a person who, for an aggregate of more than 183 days of the taxable year, maintained his place of abode within Virginia. A Virginia domiciliary resident, therefore, working in other parts of the country or in another country who has not abandoned his Virginia residency continues to be subject to Virginia taxation. Additionally, a person who is not a domiciliary resident of Virginia, but who stays in Virginia for an aggregate of more than 183 days is also subject to Virginia taxation.

Domicile

In order to change from one legal domicile to another legal domicile, there must be (1) actual abandonment of the old domicile, coupled with an intent not to return to it, and (2) an acquisition of a new domicile at another place, which must be formed by personal presence and an intent to remain there permanently or indefinitely. The burden of proving that the domicile has been changed lies with the person alleging the change.

In determining domicile, consideration may be given to the individual's expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, profession or employment, income sources, residence of spouse, marital status, situs of real or tangible property, motor vehicle registration and licensing, and such other factors as may be reasonably deemed necessary to determine the person's domicile. A person's true intention must be determined with reference to all the facts and circumstances of the particular case. A simple declaration is not sufficient to establish residency.

The Department determines a taxpayer's intent through the information provided. A taxpayer has the burden of proving that he or she abandoned his or her Virginia domicile. If the information is inadequate to

meet this burden, the Department must conclude that he or she intended to remain indefinitely in Virginia.

The Taxpayer was enrolled in a Virginia college from January through May 2013, but claims he was a resident of Pennsylvania while he attended college. It has been the Department's experience that college students rarely establish domicile in the state where they attend college. See Public Document (P.D.) 82-39 (4/21/1982), P.D. 11-121 (6/30/2011), and P.D. 16-191 (9/20/2016). Likewise, employment engaged in by college students tends to be temporary in nature.

The Taxpayer states that he held a paid internship while he was still a college student. The information provided is unclear as to where the Taxpayer performed the internship. He claims that he was renting an apartment in Virginia, but was an intern at a company located in Pennsylvania. Further, while he asserts he was a Pennsylvania resident during the first half of 2013, he failed to respond to requests for objective evidence to support his claims.

Following graduation, the Taxpayer states he took a full-time position with the same entity with which he was an intern. According to the Taxpayer, he worked at the employer's Pennsylvania location until July when he was relocated to Virginia. The Taxpayer concedes he changed his domicile to Virginia in July 2013.

Actual Resident

Even if the Taxpayer did not establish domicile in Virginia until July 2013, an individual may be subject to tax as a Virginia resident simply by maintaining a place of abode in the Commonwealth for more than 183 days during a taxable year whether domiciled in Virginia or not. For purposes of *Va. Code* § 58.1-302, a "day" is any portion of a day in which a person is physically present except for a part of a day during which an individual is present solely while in transit to a destination outside Virginia. See P.D. 98-183 (10/31/1998).

Further, when individuals travel into and out of Virginia multiple times during a taxable year, it is difficult for the Department to determine whether they moved into or out of Virginia. See P.D. 15-99 (5/11/2015).

Thus, an individual who maintains a place of abode in Virginia and has spent more than 183 days in Virginia is a resident for essentially all of the days they are physically present in the Commonwealth whether or not they have changed their domicile.

As indicated above, the Department does not generally consider college students to establish domicile merely by attending college in that state. Any place in which a college student resides is considered a "place of abode" even if it is temporary residence, such as a dormitory, apartment, or other on or off campus housing. Typically, students at Virginia colleges, however, attend classes from January into May for the spring semester and late August into December for the fall semester. Even if they return to their domiciliary state for spring, summer, winter and other breaks, it is likely Virginia college students maintain a place of abode for more than 183 days in Virginia during a taxable year. Because they tend to travel back and forth in this manner for several years, the students will generally be considered to be residents for the entire year in which they attend classes for both the spring and fall semesters in Virginia.

The information provided does not clearly indicate where the Taxpayer was physically residing from January through June 2013. Because he was renting an apartment near the Virginia college he was attending, the Department will presume he was maintaining a place of abode in Virginia from January through May 2013.

Coupled with the permanent place of abode the Taxpayer established in July, he was easily a resident for the entire year based on the number of days he maintained a place of abode in Virginia during the 2013 taxable year.

Part-Year Residents

Even if the Taxpayer resided in Virginia for only a portion of the 2013 taxable year, he failed to file an appropriate return. *Virginia Code* § 58.1-303 provides that a person who becomes a resident of Virginia is subject to taxation during the period in which he or she is a Virginia resident and is taxed as a resident only for the portion of the year that he or she resides in Virginia. Accordingly, Virginia taxable income is

computed by determining income, deductions, subtractions, additions and modifications attributable to the period of residence in Virginia. In addition, a part-year resident may claim a portion of his Virginia personal exemptions, but the exemptions will be prorated based upon the number of days that the taxpayer was a Virginia resident. Further, a part-year resident may claim a prorated Virginia standard deduction if he claims that standard deduction for federal income tax purposes. See P.D. 14-67 (5/20/2014).

When an individual maintains a place of abode in Virginia for more than 183 days, but less than the full year, he may file as a part-year resident of Virginia. See P.D. 89-160 (5/22/1989). In this ruling, an individual moved into Virginia with the intention of moving back out of Virginia within one year. The Department held that in the year the individual moved into Virginia, only the portion of income received while residing in Virginia would be subject to Virginia's income tax. However, if the individual remained in Virginia in the following year, they would be subject to Virginia's income tax as an actual resident.

Similarly, in P.D. 11-177 (10/24/2011), the Department ruled that a couple who lived in Virginia for more than 183 days during each of successive taxable years were part-year residents. The individuals were considered to have moved into Virginia because of one spouse's medical condition and moved out when that spouse was able to travel back to their domiciliary residence.

The Department has also ruled in a case where a married couple traveled back and forth between Virginia and another state throughout several taxable years. See P.D. 15-99 (5/11/2015). Because *Va. Code* § 58.1-303 considers an individual to have become a resident of Virginia "by moving to the Commonwealth" from outside Virginia, the Department concluded that individuals who travel into and out of Virginia multiple times during a taxable year were residents of Virginia who visited another state or other states, including domiciliary states, for short periods of time. Under such circumstances, the Department will consider domiciliary residents of another state who spend more than 183 days in Virginia during a taxable year to be actual residents from the date they first enter Virginia to the last date they spend in Virginia. College students, like the Taxpayer, usually return to classes in early January and finish in December, unless they are graduating in May or June.

Nonresident Income

If the Taxpayer was a part-year resident for the 2013 taxable year, he may still have income from Virginia sources during the portion of the year he was not a resident. Pursuant to *Va. Code* § 58.1-303 C, a part-year resident who, as a nonresident of Virginia for any portion of the taxable year, derived income from any property owned or from any business, trade, profession or occupation carried on in Virginia is subject to Virginia income tax as a nonresident. Under *Va. Code* § 58.1-325, individuals who are neither domiciliary nor actual residents of Virginia and have income from Virginia sources are taxed as nonresidents. *Virginia Code* § 58.1-302 limits the term income and deductions from Virginia sources to the items of income, gain, loss and deductions attributable to the ownership of property in Virginia or the conduct of a business, trade, profession or occupation in Virginia.

Again, the Taxpayer has provided insufficient information to show whether the internship was performed in Virginia, Pennsylvania, or some other location. If he was not a resident at the time of the internship, but he was assigned to the company's facility located in Virginia, he may have had income from Virginia sources subject to tax for the period he was a nonresident.

Out-of-State Tax Credit

Depending on the Taxpayer's residency status and where the internship occurred, he may be eligible for a credit for tax paid to Pennsylvania. *Virginia Code* § 58.1-332 A allows Virginia residents a credit against their income tax liability when they pay income tax to another state on earned or business income, or any gain from the sale of a capital asset. The intent of the credit is to grant Virginia residents relief in situations when they are taxed by both Virginia and another state on these types of income. As a general rule, the credit for income tax paid to another state by a Virginia resident is limited to the lesser of: (1) the amount of

tax actually paid to the other state; or (2) the amount of Virginia income tax actually imposed on the taxpayer on the income derived in the other state.

Notwithstanding the provisions of *Va. Code* § 58.1-332, *Va. Code* § 58.1-303 prohibits part-year residents that move into Virginia from claiming any credit against their Virginia tax liability for tax paid to any other state or jurisdiction of residence or domicile for that portion of the taxable year during which they were a resident of such other state or jurisdiction. See P.D. 13-28 (3/5/2013).

Reciprocity

Virginia Code § 58.1-342 B grants the Department the authority to enter into reciprocal agreements with other states to exempt nonresidents from the Virginia income tax when they earn salaries and wages from working in Virginia if such other states similarly exempt Virginia residents. In addition, employers are not required to withhold Virginia income tax from residents of these states. Virginia currently has this type of agreement with Maryland, West Virginia and Pennsylvania.

The reciprocity agreement with Pennsylvania permits Virginia residents working daily in Pennsylvania to have taxes withheld and paid to Virginia only. If a Virginia resident has filed and paid income tax to Pennsylvania when earning wages in Pennsylvania, he should file an amended income tax return with that state in order to receive a refund.

In P.D. 98-183, the Department determined that an individual who was an actual resident of Virginia was required to file Virginia income tax returns as a resident even though he was domiciled in Pennsylvania. The Taxpayer in this case is similarly situated in that he maintained his domicile in Pennsylvania for a portion of 2013 while he may have been an actual resident of Virginia beginning when he returned to Virginia for classes in January.

CONCLUSION

As indicated above, the information provided does not clearly indicate when and where the Taxpayer worked as an intern for the Pennsylvania company. By letter dated December 12, 2016, the Department requested additional documentation to clarify assertions previously submitted by the Taxpayer in order to determine his appropriate residency status with Virginia for the 2013 taxable year. To date, the Taxpayer has failed to respond to this request for supplemental information.

Virginia Code § 58.1-205 provides that in any proceeding relating to the interpretation of the tax laws of Virginia, an "assessment of a tax by the Department shall be deemed prima facie correct." As such, the burden of proof is on the Taxpayer to show he was not subject to income tax in Virginia. Furthermore, *Va. Code* § 58.1-1826 precludes a court from granting relief to taxpayers seeking correction of erroneous state tax assessments in cases in which the erroneous assessment is attributable to the taxpayers' willful failure or refusal to provide the Department with necessary information as required by law.

Based on the information provided, it appears likely the Taxpayer first entered Virginia sometime in January, returned to Pennsylvania from May through June before changing his domicile to Virginia in July 2013. If he was in Virginia through his graduation in May and then returned to Virginia permanently in July, the Taxpayer would have been in Virginia for more than 183 days during 2013. As such, while the Taxpayer may not have become a domiciliary resident of Virginia until July, he would be considered to be a resident when he first entered Virginia in January 2013. Under this analysis, the Department correctly held the Taxpayer was a resident for the entire 2013 taxable year.

The assessment at issue was made based on the best information available to the Department pursuant to *Va. Code* § 58.1-111. The Taxpayer may have information that better represents his Virginia income tax liability for the year at issue. It is clear the Taxpayer was required to file a 2013 part-year return (Form 760PY), and may be required to file a nonresident return (Form 763) or a resident return (Form 760).

Therefore, the Taxpayer should file the appropriate return or returns, and include the supplemental documentation requested by the Department if he believes he was not a resident of Virginia for the entire taxable year.

The Taxpayer should either pay the assessment or file the appropriate return along with sufficient documentation to support his filing status within 30 days of the date of this letter. Please mail the forms, document, and payment for the corresponding liability to: Virginia Department of Taxation, Office of Tax Policy, Appeals and Rulings, Attention: *****, P.O. Box 27203, Richmond, Virginia 23218-7203. A copy of this determination letter should be attached to your submission. Once a return is received, it will be processed and the assessment will be adjusted accordingly. If the return or returns are not filed within the allotted time, the assessment will be considered correct and collection action will resume.

The *Code of Virginia* sections and public documents cited are available on-line at www.tax.virginia.gov in the Laws, Rules & Decisions section of the Department's web site. If you have any questions regarding this determination, you may contact ***** in the Office of Tax Policy, Appeals and Rulings, at, *****.

Sincerely,

Craig M. Burns
Tax Commissioner

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Rulings of the Tax Commissioner