



STATE OF HAWAII
DEPARTMENT OF TAXATION

P.O. BOX 259
HONOLULU, HAWAII 96809-0259

October 9, 1990

TAX INFORMATION RELEASE No. 90-10

RE: Clarification of Taxation and the Eligibility for Personal Exemptions and Credits of Residents and Nonresidents in the Military and Spouses and Dependents of Persons in the Military.

The purpose of this Tax Information Release ("TIR") is to clarify the taxation and the eligibility for personal exemptions and credits of: (1) residents and nonresidents in the military; and (2) spouses and dependents of persons in the military.

I. IN GENERAL

The status of an individual as a resident or nonresident is determined by all of the factual circumstances. See TIR No. 90-3. A resident is every individual domiciled in Hawaii and every other individual whether or not domiciled in Hawaii who resides in Hawaii. A nonresident is every individual other than a resident. An individual's status, however, shall not change solely because of the individual's presence in Hawaii or absence from Hawaii in compliance with military or naval orders of the United States.

A Hawaii resident who enters the military and does not change the individual's permanent residence remains a resident of Hawaii. For example, an individual born and educated in Hawaii enlists in the military and is stationed in another state. The individual has the intention of returning to Hawaii after discharge from the military. The individual is a resident of Hawaii and is subject to the Hawaii income tax on the individual's entire income from sources in Hawaii and outside Hawaii.

A nonresident individual who is on military duty in Hawaii is not a Hawaii resident unless the individual establishes residence in Hawaii. For example, where (1) an individual was previously assigned to another state, (2) the individual is assigned to duty in Hawaii by the military for three years, and (3) the individual will be assigned elsewhere at the end of the tour of duty in Hawaii, the individual, generally, is a nonresident. If the individual who is on military duty earns any income which is not related to the military duty, however, that income will be subject to the Hawaii income tax. The income of a nonresident received or derived from sources within Hawaii, other than military duty pay and income from intangibles (e.g., stocks, bonds, savings, etc.), is subject to the Hawaii income tax.

On the other hand, where (1) an individual is assigned to duty in Hawaii for 3 years, (2) the individual will be discharged from military

October 9, 1990

service in Hawaii, and (3) the individual intends to establish residence in Hawaii upon discharge from the military, the individual is a resident of Hawaii from the time the individual establishes domicile in Hawaii. Domicile is the place of an individual's true, fixed, permanent home and principal establishment and to which place the individual has the intention of returning whenever the individual is absent. It is the place at which an individual has voluntarily fixed the habitation of himself or herself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home. An individual's domicile may change where the individual: (1) has the specific intent to abandon the old domicile; (2) has an intent to acquire a specific new domicile; and (3) has an actual physical presence in the new domicile. See TIR No. 90-3 for a listing of some of the factors which may establish a change of domicile. All of the income of a resident, from sources within Hawaii and outside Hawaii are subject to the Hawaii income tax.

II. THE MARRIAGE OF A RESIDENT AND NONRESIDENT IS NOT CONTROLLING ON THE ISSUE OF RESIDENCE.

No single factor, such as the marriage of a resident and nonresident, is controlling on the issue of residency. This must be determined by all of the factual circumstances. There is no automatic adoption of one spouse's residency by the other spouse upon marriage.

Subject to Part IV regarding the filing of joint income tax returns, where a resident marries a nonresident who is temporarily assigned to duty in Hawaii by the military, the individual remains a resident of Hawaii until the individual establishes a new domicile. Thus, all of the income of the resident individual, from sources in Hawaii and outside of Hawaii, will be subject to income taxation until the individual establishes a new domicile. As to the nonresident spouse, only income from sources in Hawaii, other than military pay and income from intangibles, is subject to the Hawaii income tax, unless the resident and nonresident spouse file a joint income tax return. (Part IV discusses the result of such a filing.)

If, however, the resident individual accompanies a spouse to California at the end of the spouse's tour of duty in Hawaii and establishes domicile in California, only the income from sources in Hawaii, if any, will be subject to the Hawaii income tax.

III. MARRIED TAXPAYERS SHALL FILE THE PROPER INCOME TAX RETURN.

Married taxpayers shall file the Form N-15 nonresident joint income tax return only when both taxpayers are nonresidents. Second, where one spouse is a resident and the other spouse is a nonresident, the married taxpayers may elect to file a joint resident income tax return (Form N-12), as described in Part IV, subject to the requirements of the law. Third, where one spouse is a resident and the other spouse is a nonresident, the resident spouse may file a separate resident income tax return, as

described in Part V. If the nonresident spouse has income from Hawaii sources, other than military pay and income from intangibles, then in this third situation that spouse must file a separate nonresident income tax return.

IV. JOINT RESIDENT INCOME TAX RETURN FILED BY MARRIED TAXPAYERS.

Where a joint resident income tax return (Form N-12) is filed by a resident and a nonresident spouse, all of the income of both spouses must be included on the Hawaii income tax return, regardless of the source of the income, from the date that the resident spouse establishes residence in the State. See section 235-93, Hawaii Revised Statutes (HRS), and section 18-235-93, Hawaii Administrative Rules. Section 235-93, HRS, however, does not change the status of the nonresident spouse to a resident. Only a Hawaii resident is eligible for the tax credit under section 235-55, HRS. The credits allowed Hawaii residents for taxes under section 235-55, HRS, therefore, are not allowed for the nonresident spouse even if a joint resident income tax return is filed.

Section 18-235-93(b), Hawaii Administrative Rules, prohibits married taxpayers who file a joint resident or nonresident income tax return from amending their previously filed return and filing separate income tax returns for the same year after the due date for the income tax return. Taxpayers who file separate income tax returns, however, may amend and subsequently file a joint income tax return, generally, within three years after the date the first of the separate income tax returns was filed. See section 18-235-93(f)(1), Hawaii Administrative Rules.

V. SEPARATE RESIDENT INCOME TAX RETURN FILED BY A MARRIED TAXPAYER.

The resident spouse of a nonresident individual who is in the military may file a separate resident income tax return, instead of a joint resident income tax return. The income of the resident spouse from sources in Hawaii and outside Hawaii will be taxed by Hawaii. If a separate resident income tax return is filed, the income will be taxed at the rates applicable to married individuals filing separate income tax returns.

There may be advantages, however, to filing separate income tax returns, which include the following: (1) the income of the nonresident individual from sources outside Hawaii and the military pay earned in Hawaii will not be subject to tax, and the resident spouse may be eligible for income tax credits; (2) one spouse may claim a deduction, such as a medical expense deduction, that would not be available if a joint income tax return was filed; and (3) a spouse may avoid liability for the income tax, penalty, and interest, which may be due on the income of the other spouse.

For any income tax credits based on income levels, such as the food/excise tax credit and the credit for low-income household renters, the

nonresident spouse's income (even though not reported or taxable by Hawaii) must be included in the determination of the income tax credit amount available to the resident spouse because these credits are limited to the amount that would be allowed if a joint income tax return had been filed.

If the income tax return of a person who files a separate resident income tax return and who is married to a nonresident is selected for audit on the issue of residence, among the factors that may be relevant to a determination of residence are the following: the factors mentioned in TIR No. 90-3, including place of voting, presence of bank accounts, club memberships, place of business interests, profession or employment, place of issuance of license to drive a motor vehicle; the length of residence in Hawaii in relation to the length of the nonresident spouse's tour of duty in Hawaii; the spouse's period of enlistment; the spouse's prior assignment; the spouse's future assignment; and the existence, if any, of declarations regarding place of residence in tax returns filed with other states or in military records. The Department may request that both spouses provide proof that the spouses have filed the required income tax return(s) and paid the income taxes in other states for both the current taxable year and prior taxable years. No single factor is controlling on the issue of residency. This must be determined by all of the factual circumstances.

VI. MARRIED TAXPAYERS CLAIM FOR EXEMPTIONS AND CREDITS.

A. In General

Married taxpayers may file a joint nonresident income tax return only when both taxpayers are nonresidents. Where one spouse is a resident and the other spouse is a nonresident, the taxpayers may file a joint resident income tax return, as described in Part IV. On the other hand, the resident spouse may file a separate resident income tax return, as described in Part V; and the nonresident spouse then must file a separate nonresident income tax return if the nonresident spouse has income from Hawaii sources, other than military pay and income from intangibles.

Where the resident spouse of a nonresident military individual files a separate resident income tax return, the resident spouse may claim children or other persons as dependents if all of the dependency requirements are met. If the children qualify as dependents, the children must also meet all of the lawful requirements before the spouse may claim tax credits for the dependents on the spouse's resident tax return, including the food/excise tax credit, the general income tax credit, the low-income household renter's credit, and the medical services excise tax credit. The dependent care credit, however, may be claimed only where a joint resident income tax return is filed.

B. Dependency Exemption

Before a resident spouse who files a separate income tax return may claim a dependent, all five of the following tests must be met: (1) under the support test, the resident spouse must provide more than 1/2 of the dependent's total support for the taxable year; (2) under the gross income test, the resident spouse shall not claim an exemption for a person where the income of that person is the amount of the exemption or more unless that person is under age 19 or a full-time student under the age of 24. The exemption amount for state income tax purposes is \$1,040; (3) member of household or relationship test; (4) citizenship test; and (5) joint income tax return test.

A parent is allowed a dependency exemption where the parent provides over 1/2 the yearly support. For example, where A, the resident spouse, and B, the nonresident military individual, have more than one child, the amount of support received from A, the resident spouse, must be compared to the entire amount of support provided each child from all sources. A cannot meet the support test by applying the percentage that A contributes to the support of the entire household. For example, if A and B have four children, A has income of \$10,000 from Hawaii sources, and B has income of \$20,000, including a housing allowance, A can not claim one child (1/3 of 4) as a dependent. A did not provide over 1/2 the yearly support for any of the children and A can claim none of the children as dependents. A provided only 1/3 of the support for the children. Moreover, A cannot claim any credits for the children.

C. Credits

If a resident spouse files a separate resident income tax return, the child must qualify as a dependent under the guidelines set forth in Part VI B of this TIR and meet all of the requirements for the credits before the resident spouse may claim credits for the child on the spouse's income tax return. If the child is not a dependent of the resident spouse, the resident spouse cannot claim any of the credits.

For example, A, the resident spouse, and B, the nonresident military individual, have one child, C. A has \$40,000 of income from Hawaii sources and she provides over 1/2 the yearly support for C. B has income of \$20,000, but none of it is from Hawaii sources. A may file a separate resident return and claim C as a dependent. A may also claim credits for both herself and C if all the requirements to claim the credits are met.

The requirements for the credits vary. See TIR No. 90-3. To claim the food/excise tax credit, the resident spouse and the dependents, among other things, must be residents and have physically resided in the State for more than 9 months during the taxable year. To claim the general income tax credit, the spouse and dependents, among other things, must be

Tax Information Release No. 90-10
Page 6
October 9, 1990

residents for at least 9 months, regardless of whether or not they were physically in the State for 9 months. To claim the low-income household renter's credit, and the medical services excise tax credit, the spouse and dependents, among other things, must be resident taxpayers. To claim the dependent care credit, the resident spouse must be married and file a joint resident return.


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