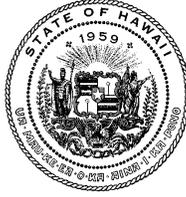


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March 3, 1997

## **TAX INFORMATION RELEASE NO. 97-1**

RE: Determination of Residence Status

This Tax Information Release (TIR) is intended to provide taxpayers with further guidance in determining their residency status, and is based on section 235-1, Hawaii Revised Statutes (HRS) and section 18-235-1, Hawaii Administrative Rules (HAR) (1982).

### **I. In General**

For Hawaii State income tax purposes, a resident is defined as:

- (1) Every individual domiciled in Hawaii, and
- (2) Every other individual whether domiciled in Hawaii or not, who resides in Hawaii for other than a temporary or transitory purpose.

A nonresident is defined as every individual other than a resident.

The status of an individual as a resident or nonresident is determined by all of the factual circumstances.

### **II. Establishing Residence by Domicile**

An individual who is domiciled in Hawaii is considered a resident. Domicile is the place of the 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. An individual can have several residences or dwelling places, but an individual can only have one domicile at a time. An individual's domicile may change where there is a concurrence of: (1) an abandonment of the old domicile with a specific intent to abandon the old domicile, (2) an intent to acquire a specific new domicile, and (3) an actual physical presence in the new domicile.

An individual can acquire a domicile by birth, choice, or operation of law.

**A. Domicile by Birth**

“Domicile by birth” is acquired by every individual at birth and continues until replaced by the acquisition of another domicile. A child is given the domicile of the child's parents at the time of the child's birth. A domicile by birth, however, may not be the same place where the child is born. If the domicile of the parents is other than where the child is born, the parents' domicile is the domicile of the child.

If a child is born to parents who have different places of domicile, the child's domicile will generally be the same as the domicile of the parent who is able to claim the child as a dependent.

**Example 1:** A, a domiciliary resident of Hawaii, married a domiciliary resident of Oregon. Their first child was born in Hawaii and their second child was born in Texas. A files a separate Hawaii resident income tax return. A is able to claim both children as dependents.

Conclusion: Both children are deemed to be domiciliary residents of Hawaii since A, a domiciliary resident of Hawaii, is able to claim both children as dependents.

**B. Domicile by Choice**

“Domicile by choice” is a domicile chosen by an individual to replace the individual's former domicile. An individual can acquire a domicile by choice when (1) the individual is no longer eligible to be claimed as a dependent on another person's federal or Hawaii income tax return, and (2) the individual has reached the legal age of majority in Hawaii. The individual may then voluntarily establish the place of the individual's domicile wherever he or she may be. In doing so, however, the individual must meet all the requirements of law for the purpose of establishing a new domicile.

**Example 2:** B was born in Honolulu to domiciliary residents of Hawaii, attended grade school and high school here, then lived on the mainland while attending college for 4 years. During this period, B did not own any property in Hawaii, did not vote in Hawaii, had no bank or savings accounts in Hawaii, and did not belong to any church, social or business groups or associations. Upon B's graduation from college, B decided to make his home in California and B did, in fact, establish permanent domicile there. B bought a home, voted in California elections, became active in community affairs, and joined various school and business clubs. After working for several years in California, B departed for the Trust Territory on a 2-year contract where B is presently working for a mainland contractor.

Conclusion: B is deemed to be a domiciliary resident of Hawaii at birth. During the 4-year period that B lived on the mainland while attending college, B remained a resident of Hawaii. A Hawaii domiciliary resident who attends school outside of Hawaii remains a Hawaii domiciliary resident unless the individual establishes a domicile outside of Hawaii. B abandoned B's

**Tax Information Release No. 97-01**

**Page 3**

**March 3, 1997**

domicile in Hawaii when a permanent domicile was established in California upon B's graduation from college. B is now deemed to be a nonresident of Hawaii.

**Example 3:** C, a resident of Hawaii, attended college on the mainland. While there, C traveled to a foreign country to perform mission work. Upon returning to the mainland, C completed college. C then returned to Hawaii and got married. C secured employment with an agency of the United States government and moved to Japan to work. In C's applications for employment, transportation agreement, passport, and other formal documents and papers pertaining to employment in Japan, C stated that C's legal residence was in Honolulu, Hawaii. C continued to make deposits in C's bank and savings and loan company in Hawaii. C also opened a bank account in Japan and made some investments through Japan companies. It was not C's intention to make Japan C's permanent and indefinite home. Accordingly, C made no effort to establish a new domicile in Japan nor to abandon the old domicile in Hawaii.

Conclusion: C is deemed to be a resident of Hawaii during the period that C attended college on the mainland, traveled to a foreign country to perform mission work, and worked in Japan. A Hawaii domiciliary resident who attends school outside of Hawaii remains a Hawaii domiciliary resident unless the individual establishes domicile outside of Hawaii. It is apparent that C did not establish the foreign country or Japan as a permanent home. C was in the foreign country only for the purpose of performing mission work and is in Japan only for the purpose of employment and has not acquired a new domicile. Nor has C abandoned the domicile in Hawaii. Under the facts presented, the same answer would apply if C was working in Korea, Germany, on the mainland United States, or elsewhere.

**Example 4:** D, a resident of Hawaii, contracts to work for a company in Japan. The contract is a renewable 3-year contract. D is married and D's spouse and children accompany D to Japan. D rents a home and opens bank accounts in Japan. D's children attend local schools in Japan. D does not own any property in Hawaii and has not voted in Hawaii since moving to Japan. At the end of the 3-year contract, D renews D's contract with the company in Japan for another 3 years. At the renewal period, D's applications for employment, transportation agreement, passport, and other formal documents and papers pertaining to employment in Japan stated that D's legal residence was in Honolulu, Hawaii. It was not D's intention to make Japan D's permanent and indefinite home. Accordingly, D made no effort to establish a new domicile in Japan nor to abandon the old domicile in Hawaii.

Conclusion: D is deemed to be a resident of Hawaii during the period that D worked in Japan. It is apparent that D did not establish Japan as a permanent home. D is there only for the purpose of employment and has not acquired a new domicile. Nor has D abandoned the domicile in Hawaii. Under the facts presented, the same answer would apply if D was working in Korea, Germany, on the mainland United States, or elsewhere.

**C. Domicile by Operation of Law**

“Domicile by operation of law” is one which is assigned or attributed to an individual by law independently of the individual’s residence or intention. In the usual case, domicile by operation of law is applied to those individuals, who, because of certain disabilities, are unable to acquire a domicile by choice. These would include such individuals as minor children and incompetents.

If a child becomes a dependent, for tax purposes, of someone with a different domicile, the child’s domicile will generally be the same as the domicile of the individual who is able to claim the child as a dependent.

**Example 5:** E, a Hawaii domiciliary resident, has one child from an earlier marriage to another Hawaii domiciliary resident. E subsequently marries F, a domiciliary resident of Utah. F provides all of the support for both E and E’s child (F’s stepchild). F is able to claim the child as a dependent.

Conclusion: The child is deemed to be a nonresident of Hawaii since F, a domiciliary resident of Utah, claims the child as a dependent.

The question of domicile is one of law and fact. A change of domicile will depend upon the acts and declarations of the individual concerned in order to ascertain whether or not the individual possessed the required intention which the law says the individual must have to effect a change of domicile. The status of an individual as a resident or nonresident is determined by all the factual circumstances. No single factor, such as an individual’s oral declarations of intention or the marriage of a resident and a nonresident, is controlling. Some of the relevant factors include the length of time spent in Hawaii; leasing, buying, negotiating for or building a home; ownership of a motor vehicle; place of issuance of license to drive a motor vehicle; place where the motor vehicle is registered; place of marriage; where the residence of one spouse is in issue, the place of residence of the other spouse; residence of the family of the individual; place of schools attended by the individual’s children; the presence of bank accounts; club memberships; place of voting; place of business interests, profession, or employment; contributions to local charities; declarations regarding residence made to public authorities, friends, relatives or employers, or in documents such as deeds, leases, mortgages, contracts, and insurance policies; proposed place of burial or acquisition of burial place for the individual or members of the individual’s family; and the place to probate a will. See TIR No. 90-3 which discusses these factors in the context of the income taxation and eligibility for credits of an individual taxpayer whose status changes from resident to nonresident or from nonresident to resident.



**Tax Information Release No. 97-01**

**Page 5**

**March 3, 1997**

**III. Establishing Residency by Residing in Hawaii**

An individual who is not domiciled in Hawaii may acquire the status of a resident by virtue of being physically present in Hawaii for other than temporary or transitory purposes. See section 235-1, HRS (Definition of "Resident").

Whether or not the purpose for which an individual is in Hawaii will be considered temporary or transitory in character will depend upon the facts and circumstances of each particular case.

If an individual is simply passing through Hawaii to another state or country, or is here for a brief rest or vacation, the individual is in Hawaii for temporary or transitory purposes. Also, if an individual's presence in Hawaii is required for a short period to complete a particular transaction or perform a particular contract, the individual will be deemed to be in Hawaii for a temporary or transitory purpose and will not be deemed a resident.

If, however, an individual is in Hawaii to improve the individual's health and the individual's illness is of such a character as to require a long or indefinite period to recuperate, or the individual is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to Hawaii with no definite intention of leaving shortly thereafter, the individual is in Hawaii for other than a temporary or transitory purpose and will be deemed a resident.

If an individual has been in Hawaii more than 200 days of the taxable year in the aggregate (not consecutive), the individual is presumed to have been a resident of Hawaii from the time of the individual's arrival. The presumption may be overcome if the individual rebuts the presumption with evidence satisfactory to the Department of Taxation that the individual maintains a permanent place of abode outside of Hawaii and is in Hawaii for a temporary or transitory purpose.

**Example 6:** G, a civil engineer, is domiciled in New York where G owns a house in which G's family lives. G votes in New York, maintains a bank account there and returns to his home in New York whenever possible. G is employed by a company as supervising engineer of its projects. In 1995, the company enters into a contract for construction work in Hawaii which will require G to spend 18 months in Hawaii. G comes to Hawaii and spends nearly the whole of 1995 here, living in a rented apartment. G's spouse and family remain in New York except for a summer visit to Hawaii. Upon completion of the project, G will return to New York to await another assignment.

Conclusion: Since G has been in Hawaii more than 200 days of the taxable year in the aggregate, G is presumed to have been a resident of Hawaii from the time of G's arrival. G, however, rebuts the presumption under the above circumstances showing that G maintains a

permanent place of abode outside Hawaii and is in Hawaii for a temporary or transitory purpose. Accordingly, G is deemed to be a nonresident of Hawaii.

**Example 7:** H, a civil engineer, is domiciled in California. H is employed by a company in California. In 1991, H was transferred to Hawaii with the same company. H did not request the transfer to Hawaii. The transfer was made for the convenience of H's employer and H was required to work indefinitely in Hawaii or lose H's position with the company. H's spouse and children accompanied H to Hawaii. H has always considered California to be H's permanent home and always intended to return to California. No affirmative steps were taken either to abandon the domicile in California or to establish a permanent domicile in Hawaii.

Conclusion: H is deemed to be a resident of Hawaii. Although H is domiciled in California, H is in Hawaii for other than a temporary or transitory purpose since H's employment in Hawaii is for an indefinite period.

Since each state's definition of "resident" may be different, it is possible for an individual to be considered a resident of more than one state.

#### **IV. Individual's Presence or Absence in Compliance with Military or Naval Orders, While Engaged in Aviation or Navigation, or While a Student**

An individual's status as a resident or nonresident shall not change **solely because of** the individual's presence or absence in compliance with military or naval orders of the United States, while engaged in aviation or navigation, or while a student at any institution of learning. See section 235-1, HRS.

A nonresident individual who is in Hawaii (1) on military duty, (2) while engaged in aviation or navigation, or (3) while attending school is not a Hawaii resident unless the individual establishes domicile in Hawaii. Similarly, a Hawaii domiciliary resident who (1) enters the military and is stationed outside of Hawaii, (2) is outside of Hawaii while engaged in aviation or navigation, or (3) attends school outside of Hawaii remains a Hawaii domiciliary resident unless the individual establishes domicile in the other state or foreign country.

Spouses of nonresident service members, crew members, or students who came to Hawaii will remain nonresidents of Hawaii if their principal reason for moving to Hawaii was to accompany their spouse, and if it is their intention to leave Hawaii when their spouse is transferred, discharged, or, in the case of the student spouse, graduates.

**Example 8:** J is employed by an interstate airline as a crew member. J has no family. J votes in Pennsylvania, where J was born and raised, and which J regards as J's domicile. J lays over in Hawaii between flights and for rest periods, using hotel accommodations. In 1994, J is physically present in Hawaii for more than 200 days during the calendar year.

**Tax Information Release No. 97-01**

**Page 7**

**March 3, 1997**

Conclusion: J is deemed to be a nonresident of Hawaii. This example falls under the provision of the statute which provides that a person shall not be deemed to have gained a residence in Hawaii simply because of the presence in Hawaii while engaged in aviation.

**Example 9:** Mr. and Mrs. K are residents of Michigan. Their daughter, L, also is a Michigan resident. L came to Hawaii to attend college and took action to become a permanent resident of Hawaii. L closed her bank account in Michigan and opened a bank account in Hawaii. L also became a member of a local church in Hawaii. Although L works part-time, more than half her support comes from her parents. Her parents are able to claim her as a dependent.

Conclusion: L is deemed to be a nonresident of Hawaii. Although L took action to become a permanent resident of Hawaii, her principal reason for being in Hawaii is to attend college. This example falls under the provision of the statute which provides that a person shall not be deemed to have gained a residence in Hawaii simply because of the presence here while attending school. A nonresident individual who is in Hawaii while attending school will not be deemed to be a resident of Hawaii unless the individual establishes domicile in Hawaii. L cannot establish a new domicile in Hawaii since L is still eligible to be claimed as a dependent on L's parents' federal income tax return.

**Example 10:** M, who was born and educated in Hawaii, enlisted in the military and was stationed outside of Hawaii. M has the intention of returning to Hawaii after discharge from the military. Accordingly, M made no effort to establish a new domicile outside of Hawaii nor to abandon M's old domicile in Hawaii.

Conclusion: M is deemed to be a resident of Hawaii regardless of the length of M's absence from Hawaii while stationed at bases outside of Hawaii.

See TIR No. 90-10 for a discussion on the 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.

**V. Aliens**

In the past, the Department of Taxation has treated an alien (an individual who is not a U.S. citizen) as a nonresident of Hawaii if the alien did not have permanent resident alien status (green card) in Hawaii. After consideration of this issue, it is concluded that although an alien who does not have a green card cannot be domiciled in Hawaii, the alien may nevertheless be resided in Hawaii. The Department, therefore, will consider an alien a resident of Hawaii if the alien (1) has permanent resident alien status (green card), or (2) resides in Hawaii for other than a temporary or transitory purpose. Thus, like all other individuals, the status of an alien as a resident or nonresident for Hawaii income tax purposes is determined by all of the factual circumstances.

**Tax Information Release No. 97-01**

**Page 8**

**March 3, 1997**

Hawaii has not adopted the federal provisions of Internal Revenue Code (IRC) section 7701(b) (with respect to the definition of resident alien and nonresident alien). In addition, income tax treaties between the United States and a foreign country do not apply to sub-nation states' taxing authority and therefore do not control for Hawaii income tax purposes.

In certain situations, a taxpayer may be considered a nonresident alien for federal income tax purposes and a resident for Hawaii income tax purposes. In these situations, the special rules applicable to individuals who are considered nonresident aliens for federal income tax purposes will apply when the individual files a Hawaii resident income tax return. See TIR No. 92-3 for a discussion of certain income tax issues affecting nonresident aliens.

**Example 11:** N, a Hawaii resident, married O, a citizen of Australia, while both were attending college in Hawaii. Upon their graduation from college, they both found employment in Hawaii. After their marriage, O filed the required documents and became a permanent resident alien.

Conclusion: O is deemed to be a resident of Hawaii. O acquired a new domicile in Hawaii when O became a permanent resident alien.

**Example 12:** P is a Japanese national who is domiciled in Japan. In 1995, P came to Hawaii to work. P was admitted by the U.S. Immigration and Naturalization Service as a nonimmigrant alien. P's authorized stay can be extended periodically. During 1995, P was physically present in Hawaii for more than 200 days during the taxable year.

Conclusion: P is deemed to be a resident of Hawaii. Although P is a nonimmigrant alien who is domiciled in Japan, P is in Hawaii for other than temporary or transitory purposes.

**Example 13:** Q accepted a tenure track position at the University of Hawaii, and arrived to begin employment on August 1, 1996. Q is in the U.S. on an H visa for now, but Q eventually wants to get tenure at the UH and remain in the U.S. as a permanent resident alien.

Conclusion: Although Q was not in Hawaii for more than 200 days in 1996, Q is in Hawaii for other than a temporary or transitory purpose. Therefore, Q should file as a part-year resident even though the 200 day test of the presumption of residency is not met.

**Example 14:** Mr. and Mrs. R and their son are citizens of Brazil and are in Hawaii on J visas. Mr. R is a teacher and does not meet the substantial presence test under IRC section 7701(b)(3) and is, therefore, a nonresident alien for federal income tax purposes. Mr. R files a federal Form 1040NR on which his filing status is required to be married filing a separate return. IRC section 6013(a)(1) does not allow the filing of a joint return if either spouse was a nonresident alien at any time during the taxable year. Mrs. R also works part-time in Hawaii. Mr. and Mrs. R and their son were in Hawaii for more than 200 days in 1996 and will be filing as Hawaii residents. Can Mr. and Mrs. R file a joint Hawaii resident tax return?

**Tax Information Release No. 97-01**

**Page 9**

**March 3, 1997**

Conclusion: Section 235-93, HRS, provides that a husband and wife, having that status for purposes of the IRC and entitled to make a joint federal return for the taxable year, may make a single return jointly of taxes under this chapter for the taxable year. Hawaii has adopted the provisions of IRC section 6013(a)(1) through section 18-235-93(a)(2), HAR. IRC section 6013(a)(1) provides that no joint return shall be made if either the husband or the wife at any time during the taxable year is a nonresident alien. Accordingly, Mr. and Mrs. R cannot file a joint Hawaii tax return. Mr. and Mrs. R must each file separate Hawaii resident tax returns.

**Example 15:** The facts are the same as stated in Example 14. Can Mr. R claim his son as his dependent on his Hawaii resident tax return?

Conclusion: Section 235-54, HRS, provides that the number of personal exemptions an individual may claim is in part determined by ascertaining the number of personal exemptions that the individual may lawfully claim under IRC section 151. IRC section 873(b)(3), limits a nonresident alien individual to claim, under IRC section 151, a single deduction for personal exemption unless the taxpayer is a resident of a contiguous country or a national of the United States. IRC section 152(b)(3) further states that the term "dependent," for purposes of determining personal exemptions under IRC section 151, does **not** include any individual who is not a citizen or national of the United States unless such individual is a resident of the United States of country contiguous to the United States. For federal income tax purposes, Mr. R cannot claim his son as a dependent since his son is not a U.S. citizen, U.S. national, resident alien or resident of a country contiguous to the United States. Accordingly, Mr. R cannot claim his son as a dependent on his Hawaii resident tax return.

**Example 16:** The facts are the same as stated in Example 14. Can Mr. R claim the standard deduction on his Hawaii resident tax return?

Conclusion: IRC section 63(c)(6), which Hawaii adopts through section 235-2.4(a), HRS, provides that a nonresident alien individual cannot claim the standard deduction. Accordingly, Mr. R cannot claim the standard deduction on his Hawaii resident tax return. Mr. R must itemize any allowable deductions.

**Example 17:** Mr. and Mrs. S are in Hawaii on H visas. Mr. S is a college professor. Mr. S meets the federal substantial presence test but files a federal Form 1040NR to claim the treaty benefits which exclude his wages as a professor from federal taxation for two years. Mr. and Mrs. S were in Hawaii for more than 200 days in 1996 and will be filing as Hawaii residents. Will the treaty also exclude Mr. S's wages from Hawaii taxation?

Conclusion: The provisions of income tax treaties are between the United States and the foreign country. Income tax treaties are designed to protect taxpayers from double and discriminating taxation by either treaty country, and normally do not preempt state tax laws. Accordingly, the treaty has no effect on Hawaii Income Tax Law and Mr. S's wages as a professor are subject to Hawaii income tax.

**VI. Amendment Pursuant to Act 187, SLH 1996**

Section 235-55, HRS, allows a resident individual taxpayer to claim a credit for income tax paid to another state or to a foreign country when the taxpayer is taxed by Hawaii on worldwide income and is also subject to income tax in such other jurisdiction. Section 235-93, HRS, provides that a husband and wife who are entitled to file a joint federal return may file a joint Hawaii resident return whether or not both husband and wife are Hawaii residents, however, they will be taxed on worldwide income.

Act 187, SLH 1996, amended section 235-55, HRS, to clarify that the credit for income tax paid to another state or to a foreign country is allowed to a husband and wife filing a joint Hawaii resident return (whether or not both are Hawaii residents) since section 235-93, HRS, provides that they are taxed by Hawaii on worldwide income. The discussion in TIR Nos. 90-3 and 90-10 relating to the credit under section 235-55, HRS, not being allowed for the nonresident spouse even if a joint Hawaii resident return is filed is superseded by Act 187, SLH 1996.



RAY K. KAMIKAWA  
Director of Taxation

HRS Sections Explained: HRS 235-1, 235-2.4(a), 235-54, 235-55, 235-93

Rules Sections Explained: 18-235-1, 18-235-93(a)(2)

TIR Nos. 90-3, 90-10, and 92-3 are all supplemented.

TIR Nos. 90-3 and 90-10 are superseded in part.

**Notes from Tir97-1.pdf**

**Page 5**

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*Note 1; Label: Department of Taxation; Date: 12/15/99 3:57:10 PM*

Grayed text made obsolete per HAR §18-235-1.01 through 18-235-1.17, dated July 27, 1998, effective August 28, 1998.