

LETTER OPINION
95-L-129

May 24, 1995

Honorable Rolland W. Redlin
State Senator
1005 21st Street N.W.
Minot, ND 58701-1724

Dear Senator Redlin:

Thank you for your letter concerning the effect of Senate Bill No. 2527 on a person who resides on a military installation in North Dakota and votes in a North Dakota election.

Senate Bill No. 2527 amended subsection 6 of N.D.C.C. ? 57-38-01 as follows:

"Resident" applies only to natural persons and includes, for the purpose of determining liability for the tax imposed by this chapter upon or with reference to the income of any income year, any person domiciled in the state of North Dakota and any other person who maintains a permanent place of abode within the state and spends in the aggregate more than seven months of the income year within the state. A full-time active duty member of the armed forces assigned to a military installation in this state, or the spouse of such a person, is not a 'resident' of this state for purposes of this chapter simply by reason of having voted in an election in this state.

N.D.C.C. ch. 57-38 governs North Dakota state income tax. Two questions arise from the language of this statute as amended. First, does the amendment to this statute change the eligibility requirements for voting in elections in North Dakota? Second, does the amendment serve to create an exemption from state income taxes for North Dakota residents who are full-time active duty members of the armed forces assigned to military installations in this state and their spouses?

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Qualifications for voter eligibility in North Dakota are established by the North Dakota Constitution and other North Dakota statutes. The North Dakota Constitution states in pertinent part:

Every citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector. When an elector moves within the state, he shall be entitled to vote in the precinct from which he moves until he establishes voting residence in another precinct. The legislative assembly shall provide by law for the determination of residence for voting eligibility, other than physical presence. No elector shall lose his residency for voting eligibility solely by reason of his absence from the state.

N.D. Const. art. II, ? 1 (emphasis supplied). Therefore, in order to vote in North Dakota, one must be a resident of the state. N.D.C.C. ? 16.1-01-04 states the qualifications for electors and specifies that every qualified elector of the state may have only one voting residence which must be determined in accordance with the rules provided in N.D.C.C. ? 54-01-26. In interpreting section 54-01-26, the North Dakota Supreme Court has concluded that every person can have only one legal residence. Burshiem v. Burshiem, 483 N.W.2d 175 (N.D. 1992).

Because the North Dakota Constitution requires a person to be a resident of the state to be eligible to vote in North Dakota, the amendment to N.D.C.C. ? 57-38-01 contained in Senate Bill No. 2527 cannot serve to authorize a nonresident of North Dakota to vote in an election in this state.

The second question, then, is does the amendment to N.D.C.C. ? 57-38-01 create an exemption from North Dakota state income taxes for North Dakota residents who are members of the armed forces assigned to military installations in North Dakota and their spouses? Although in North Dakota residency is a requirement to vote, residency is not required for tax liability. North Dakota statutes provide for income taxation

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of both residents and nonresidents.

N.D.C.C. ? 57-38-02 provides that North Dakota income tax must be paid annually on the entire net income not exempted received by every resident individual. N.D.C.C. ? 57-38-31 requires all state resident individuals who are required to file a federal income tax return to file a state income tax return. N.D.C.C. ? 57-38-03 provides that North Dakota income tax must be paid annually on all income derived from property owned and from every business, trade, profession, or occupation carried on in this state by nonresident individuals.

Pursuant to federal law, military income of individuals who are not residents of the state or domiciled within the state cannot be treated as income earned within the state. 50 U.S.C. ? 574. Therefore military income of an individual who is not a resident of North Dakota is not subject to North Dakota income tax. No similar federal or state exemption exists for nonmilitary income.

Based strictly upon a plain reading of N.D.C.C. ? 57-38-01, it is my opinion that this section does not create an exemption from North Dakota state income taxes for North Dakota residents who are military personnel assigned to a military installation in North Dakota or for their spouses. The pertinent language of N.D.C.C. ? 57-38-01 as amended is: "A full-time active duty member of the armed forces assigned to a military installation in this state, or the spouse of such a person, is not a 'resident' of this state for purposes of this chapter simply by reason of having voted in an election in this state." The language, therefore, does not purport to exempt all military base personnel from being residents for purposes of state income taxes. Rather, the language only purports to avoid including them as residents for income tax purposes solely on the basis that they voted in a North Dakota election.

The difficulty in giving any effect to this statutory language is the constitutional provision discussed above which requires voters in North Dakota to be residents. Since this amendment is insufficient to authorize nonresidents to vote in this state, and it does not exempt from income tax all military personnel who are residents of the state and who are assigned to bases in North Dakota, it is my opinion that the language has a very limited effect on resident military personnel or their spouses.

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Legal residence is a question of fact. Burshiem, 483 N.W.2d at 180. The act of voting does not make a person a resident. Rather, a person must be a resident prior to voting. By the very act of voting, therefore, individuals represent that they are residents of the state. It is a class A misdemeanor for any person to knowingly vote when not qualified to do so. N.D.C.C. ? 16.1-01-12. If a person is believed to have voted in violation of state law, a referral should be made to the appropriate law enforcement officials to determine the appropriateness of bringing misdemeanor charges.

All persons living in North Dakota who, by statement or act, declare themselves residents of the state are subject to state income taxation as residents. If an individual later claims not to be a resident, the burden is on that individual to prove a change of residence. Dietz v. City of Medora, 333 N.W. 2d 702 (N.D. 1983). "A person's declaration of intent is significant, however, inconsistent acts can negate declared intent." Id. at 705, (citations omitted).

In my opinion, therefore, the only reasonable interpretation of the amendment to N.D.C.C. ? 57-38-01 by Senate Bill No. 2527 is that the Tax Commissioner cannot use the act of voting in a North Dakota election by a full-time active duty member of the armed forces assigned to a military installation in North Dakota or that person's spouse as the sole evidence that the person is a resident of North Dakota. This change in the statute does not eliminate the use of voting lists as a beginning point for an investigation into residency. Nor does it prevent the Tax Department from contacting persons who voted in North Dakota elections and who have not submitted state income tax returns for an explanation, including the basis on which they determined they were residents and eligible to vote. We must assume that all military personnel voting in North Dakota are, or were at the time of voting, residents of the state. To assume otherwise would be to assume that they have committed a crime. To defend any action in which a member of the armed forces or the spouse of a member of the armed forces challenges the determination of the Tax Commissioner regarding the failure to file a tax return as a North Dakota resident, the Tax Commissioner would need to provide other evidence of the residency of the individual rather than relying solely on the fact that the person voted in North Dakota.

Sincerely,

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