

Military Spouses Residency Relief Act

The federal Military Spouses Residency Relief Act (Public Law 111-97) (hereinafter, the Act), which amends the Servicemember Civil Relief Act (SCRA), was signed into law on November 11, 2009. The Act provides certain tax relief for spouses of servicemembers (military spouses) who are present in a state solely to be with the servicemember when the servicemember is in that state in compliance with his or her military orders. The application of this Act to the New York State, New York City, and Yonkers personal income taxes and the Metropolitan Commuter Transportation Mobility tax is explained below. The Act applies to tax years 2009 and after.

New York State, New York City, and Yonkers personal income taxes

Rules relating to the domicile or residence of a military spouse

New York Tax Law provides that an individual who is not domiciled in New York State can be treated as a resident for income tax purposes if the individual maintains a permanent place of abode in New York and spends more than 183 days in the state during the tax year.

However, the Act provides that a military spouse cannot lose or acquire residence or domicile in a state when the military spouse is located in New York State solely to be with the servicemember and the servicemember is located in New York State in compliance with his or her military orders. The SCRA had previously protected only the servicemember from losing or acquiring domicile or residence when the servicemember was in the state solely to comply with his or her military orders.

Accordingly, a military spouse will not be treated as a resident of New York State for tax purposes (that is, the spouse will be treated as a nonresident) if the following conditions are met:

- the military spouse is located in New York State solely to be with the servicemember and the servicemember is located in New York State in compliance with his or her military orders, and
- the servicemember and his or her spouse were residents or domiciliaries in a state other than New York State before being located in New York.

These rules apply regardless of how much time the military spouse spends in New York State or whether or not a permanent place of abode is maintained in New York State. However, the exclusion from being considered a resident for tax purposes does not apply to a military spouse who was domiciled in New York State at the time he or she marries the servicemember.

Transfers and relocations. If a military spouse has met the conditions for relief under these rules, and the servicemember is subsequently assigned outside the United States or to another state, and the military spouse remains in New York State, the rules will continue to apply

as long as New York State remains the servicemember's permanent United States duty station. However, the rules will no longer apply if the servicemember's permanent United States duty station is no longer in New York State and the military spouse remains in New York State.

Exemption from taxes for certain income of a military spouse

In general, New York Tax Law provides that a nonresident individual who has New York source income (for example, wages or business income earned in New York) will be subject to personal income tax on that income.

However, under the Act, a military spouse's income that is earned in New York State will not be treated as New York source income and will therefore be exempt from any personal income tax if:

- the military spouse is a nonresident of New York State, and
- the military spouse is in New York State solely to be with the servicemember and the servicemember is in New York State in compliance with his or her military orders.

For purposes of the exemption, *income earned in New York State* includes:

- wages, salaries, and other compensation for services performed by a military spouse in New York State as an employee, and
- any business income or loss (other than a capital gain or loss from the sale of real property located in New York State) a military spouse has from a sole proprietorship carried on in New York State or from a partnership, including an LLC treated as a partnership, where the partnership or the LLC carries on business in New York State, if the income or loss or any part of the income or loss is required to be included in the computation of net earnings from self-employment for purposes of the federal Self-Employment tax (SE tax).

The income exemption only applies to the military spouse. It **does not apply** to non-military income earned in New York State **by a servicemember**.

Transfers and relocations. If a military spouse has met the conditions for the income exemption under these rules, and the servicemember is subsequently assigned outside the United States or to another state, and the military spouse remains in New York State, the income exemption will continue to apply as long as New York State remains the servicemember's permanent United States duty station. However, the income exemption will no longer apply if the servicemember's permanent United States duty station is no longer in New York State and the military spouse remains in New York State.

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Exemption from withholding

For tax years beginning on or after January 1, 2010, a military spouse whose wages, salaries, and other compensation for services performed in New York State as an employee is exempt from New York tax under the Act can present a properly completed Form IT-2104-E, *Certificate of Exemption from Withholding*, to his or her employer to claim exemption from withholding for New York State personal income tax (and New York City and Yonkers tax, if applicable).

An employer can accept a completed certificate without requiring any further documentation from the employee. However, the employer must reject a certificate and continue to withhold if the employer has actual knowledge or reason to know that the certificate being presented is not valid because the employee presenting the certificate does not meet the conditions to be exempt.

Employers may be required to send to the Tax Department a copy of Form IT-2104-E that has been submitted by an employee who is exempt under the Act. The form must be submitted using the same rules and at the same time that the employer is required to submit Forms IT-2104-E filed by other employees. For more information as to which Forms IT-2104-E need to be submitted and on how to submit them, see Publication NYS-50, *Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax*.

A military spouse must submit a written revocation of the exemption certificate to his or her employer if he or she no longer qualifies for exemption under the Act (for example, the military spouse is divorced from the servicemember, but continues to work in New York State).

Special rules for 2009 tax year

For tax year 2009, if a nonresident military spouse had New York State, New York City, or Yonkers personal income tax withheld from wages or other compensation and the wages or other compensation are now exempt under the Act, the taxpayer must file a Form IT-203, *New York Nonresident and Part-Year Personal Income Tax Return*, to claim a refund. In addition, a military spouse who made estimated tax payments because he or she had business income that is now exempt from New York tax must also file Form IT-203 to claim a refund.

In completing Form IT-203, a military spouse who has income which is exempt under the Act must include the amount of the exempt income in the *Federal amount* column of Form IT-203. However, the military spouse should not include the exempt income in the *New York State amount* column of Form IT-203.

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Note: The military spouse's exempt income should not be included in the amount of the subtraction for a servicemember's military income that is made in the *Federal amount* column of the Form IT-203.

In addition, a military spouse who is completing Form IT-203 and has income which is exempt under the Act is required to enter the special condition code "M2" in the box at item F on the front of Form IT-203. This will allow the Tax Department to properly process the return. Failure to enter the special condition code on the return could result in unnecessary delays in processing the return and issuing a refund.

If the servicemember and his or her spouse are filing a joint Form IT-203, Form IT-203-C, *Nonresident or Part-Year Resident Spouse's Certification*, should not be completed or attached to Form IT-203 if, as a result of the Act and the SCRA, neither spouse has any New York source income.

New York City and Yonkers income taxes

The rules relating to domicile or residence of a military spouse also apply in determining whether or not a military spouse is a resident of New York City for purposes of the New York City resident income tax or a resident of Yonkers for purposes of the Yonkers resident income tax surcharge. In addition, if the income of a military spouse is exempt from New York State personal income tax, it is also exempt from the Yonkers nonresident earnings tax.

Special rules for employers in 2010

Because of the timing of the federal law, it is possible that employers will withhold some New York State, New York City, or Yonkers taxes from a military spouse in 2010 before the spouse can submit Form IT-2104-E to the employer. In this situation, once the employer receives Form IT-2104-E from the military spouse, the employer may refund to the military spouse any New York tax withheld in 2010. For this rule to apply, the tax withheld must be refunded on or before March 31, 2010.

New York State resident military spouses who are subject to New York income tax

A military spouse who is a domiciliary or resident of New York State should be aware that the new federal law could affect the amount of New York tax he or she has to pay if he or she:

- is required to file a New York State resident personal income tax return;
- is in another state solely to be with the servicemember when the servicemember is in that state in compliance with his or her military orders; and
- is employed or operates a business in that state.

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This is because, under the prior rules, the spouse's income earned in the other state would be taxed by that state, and the military spouse would receive a credit on his or her New York State return for the taxes paid to that other state. However, under the new rules, the spouse's income may be exempt under the Act from the other state's income tax and, accordingly, the credit for taxes paid to that other state will no longer apply. This could result in an increase in the tax owed to New York State.

Military spouses who are employees and who are in the situation described above should determine whether or not their employer will withhold New York State personal income tax from their wages. If the employer does not withhold New York State taxes, the military spouse may be required to make estimated personal income tax payments to New York State to ensure that they are not underpaid for the year and to avoid being subject to the underpayment penalty.

Additionally, resident military spouses who are self-employed and who are in the situation described above should also determine if they are required to make or increase the amount of estimated personal income tax payments to New York State to ensure that they are not underpaid for the year and avoid being subject to the underpayment penalty.

Metropolitan Commuter Transportation Mobility Tax (MCTMT)

MCTMT for self-employed individuals

Individuals (including partners in partnerships and members of limited liability companies (LLCs) that are treated as partnerships) who have net earnings from self-employment from a business operated in the Metropolitan Commuter Transportation District (MCTD) may be subject to the MCTMT. However, under the Act, a military spouse's net earnings from self-employment attributable to a trade or business carried on in the MCTD are exempt from the MCTMT if:

- the military spouse is a nonresident of New York State, and
- the military spouse is located in New York State solely to be with the servicemember and the servicemember is located in New York State in compliance with his or her military orders.

For 2009, a military spouse who has made an estimated MCTMT payment and who is now exempt under the Act must file Form MTA-6, *Metropolitan Commuter Transportation Mobility Tax Return*, to request a refund of the estimated tax paid.

MCTMT for employers

The Act has no effect on the MCTMT imposed on employers that have payroll expense within the MCTD. The payroll expense of a military spouse who is a covered employee for

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purposes of the MCTMT must still be included in the payroll expense for all employees when computing the MCTMT.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.