

Opinion No. 64-24

March 6, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General James V. Noble, Assistant Attorney General

TO: Mrs. Martha Wolfe, County Assessor /- Sierra County, Truth or Consequences, New Mexico

QUESTION

QUESTIONS

1. Is a nonresident property owner entitled to claim the \$ 200.00 head of a family exemption on property assessed for taxes within this state?
2. Is a nonresident property owner entitled to claim the \$ 2000.00 Veterans' exemption on property assessed for taxes within this state?
3. How long must a person reside elsewhere before becoming a nonresident of this state?
4. Is a widow of a veteran who has remarried eligible to claim the Veteran's exemption after obtaining a divorce from such subsequent husband?
5. Is a widow of a veteran who has remarried eligible to claim the Veteran's exemption after obtaining an annulment from such subsequent husband?
6. What are the penalties, if any, for illegally obtaining a head of household or Veterans' exemption?

CONCLUSIONS

1. No.
2. No.
3. See Analysis.
4. No.
5. Yes.
6. \$ 100.00 fine or 30 days in jail or both, but see Analysis as to false claim of Veteran's exemption.

OPINION

ANALYSIS

Our Constitution (Article VIII, Section 5) authorizes the legislature to grant head of family and Veterans' exemptions. The constitutional provision is not self-executing and exemptions are granted by means of enabling legislation. The constitutional provision, in and of itself, does not set forth any requirements as to residency in order for one to qualify.

The legislature in the New Mexico Session Laws of 1921, Chapter 133, as amended (Sections 72-1-4, N.M.S.A., 1953 Compilation (P.S.)) did pass enabling legislation. The pertinent part of the section reads as follows:

"There is exempted from taxation property of each head of a family, **resident in New Mexico**, to the amount of two hundred dollars (\$ 200.) . . ." (Emphasis added).

The conclusion is inescapable that a head of a family **must be a resident of this State** in order to claim the \$ 200.00 exemption. No rule of statutory construction would appear applicable which would lead to any other conclusion.

The second question similarly refers to residency of a Veteran claiming a Veteran's exemption. The pertinent enabling legislation was enacted by Chapter 130, New Mexico Session Laws 1923, as amended (Section 72-1-11, N.M.S.A., 1953 Compilation, et seq.). In the main these sections are silent as to whether or not one claiming a veteran's exemption must be a resident of this state at the time the exemption is claimed although the statutes give fairly complete requirements as to residency in order to have originally become eligible for the exemption. Section 72-1-11, supra, refers to **resident** unmarried widows and requires otherwise eligible veterans living within properties over which the Federal government had formerly exercised jurisdiction, subsequently ceded to this state, to continue to be residents of this state in order to claim the exemption. The applicable laws, as amended, now require a veteran to obtain and present a certificate of eligibility in order to claim the exemption. The section (72-1-20, N.M.S.A., 1953 Compilation) commences:

"Each **resident** soldier or unmarried widow thereof, as provided for in 72-1-11 New Mexico Statutes Annotated, 1953 Compilation, **in New Mexico** entitled to claim a soldier's exemption shall obtain from the veterans service commission a certificate of eligibility which shall show: the name and **current** address of the veteran; . . ." (Emphasis added).

It is a rule of statutory construction that taxation is the rule and exemption is the exception; exemptions are never presumed and the burden is on the claimant to establish clearly his right to the exemption; that the intention to make an exception must be expressed in clear and unambiguous terms, and that these principles of interpretation apply to statutes and to constitutional provisions. " **Cooley on Taxation**, II

4th Ed., 1403 et seq." **Flaska v. State**, 51 N.M. 13. At the time of this decision, the statute being construed was differently written and specifically applied only to resident veterans.

It was held by our Supreme Court in **Dillard v. Tax Commission**, 53 N.M. 12, the constitutional provisions not being self-executing, that it was the prerogative of the legislature to adopt reasonable regulations as to the entitlement of a claimant to the veterans' exemption.

Keeping in mind the rule of statutory construction that all parts of a statute are to be construed together and to be harmonized when possible, and in view of our court decisions, the intent of the legislature, as it appears from the statutes and the language of the various portions of the applicable statutes, the veteran's exemption is limited to qualified veterans who are residents of the State of New Mexico at the time the exemption is claimed. This is in accord with Opinion No. 57-271 appearing at page 405, 409, Report of the Attorney General, 1957-58, which is affirmed.

You next ask how long a person must reside outside the state before he or she lose his status as a resident of New Mexico. There is no requirement or limitation as to absence from this state insofar as the losing of New Mexico residency or the acquiring of a new residency is concerned. Residency is a matter of intent coupled with physical facts calculated to put the intent into effect and must, in each case, be ascertained from the particular facts present. It is assumed in connection with this question that it has been satisfactorily proven that the claimant was a resident of this state during such period as necessary to qualify for the head of a household or veteran's exemption and has since physically removed from the state.

Our court in the case of **Allen v. Allen**, 52 N.M. 174 had occasion to discuss the elements to be considered in arriving at a decision as to the place of residence of a person. In particular it was there concerned with the constitutional provision providing in substance that an employee of the United States or a student shall not lose his residence while absent as a result of such. However, applicable principles were laid down which will be of help to you. It was there stated that for the purposes of our divorce statutes residence and domicile are synonymous and meant a residence of a permanent and fixed character. The court then went on to say:

"In one of our most recent pronouncements in this respect, we said that to effect a change from an old and established domicile to a new one, there must be the absence of any present intention of not residing in the latter permanently or indefinitely. Or, stated differently, there must be a fixed purpose to remain in the new location permanently or indefinitely. For domicile once acquired is presumed to continue until it is shown to have been changed, and to show the change two things are indispensable, -- First, residence in the new locality; and, second, the intention to remain there."

It can thus be seen that each case stands squarely on its own facts. It is presumed that a residence once acquired, continues. A change of residence requires both intent to

acquire a new residence and a physical presence at such intended new residence. The intent must be to remain in a particular place indefinitely or permanently. It is the place to which, when away, one intends always or indefinitely to return. The actions of the individuals are some evidence of intent, such as the place where voting takes place and voting residence is usually accorded considerable weight in determining the residence or domicile of the individual under consideration. Other factors that may be considered involve the conduct of the individual's business; his ownership of a home; the location of his family; any declaration made and the severing or failure to sever other ties. A person could, therefore, lose his residence in this state in one day upon moving to some other state or retain it for many years although physically present much or most of the time in some other state.

This office has previously held that a widow of a veteran who remarries and is subsequently divorced is not entitled to a veterans' exemption. Opinion No. 5187 dated January 15, 1949 and affirmed in Opinion No. 61-35 dated April 27, 1961. Opinion No. 5187 is again affirmed. A widow of a veteran who remarries and is then divorced is **not** entitled to the veteran's exemption.

This office has likewise passed on the question of annulment and in Opinion No. 61-35, supra, held that a widow of a veteran who remarries and whose re-marriage **is annulled, is entitled** to claim the Veteran's exemption. This opinion is affirmed.

Finally, you inquire as to penalties for falsely demanding an exemption. The demand, of itself, would mean no penalty. However, a false claim of entitlement to a head of a family exemption could subject the claimant to a penalty of a fine of not more than \$ 100.00 or imprisonment of not more than 30 days or both. Sections 72-1-4.1, N.M.S.A., 1953 Compilation.

One who falsely claims a veteran's exemption could be subject to a payment of triple the taxes that would otherwise have been levied together with interest thereon at the rate of 12% per annum compounded annually.