Eligibility of alien for homestead exemption

Number: INFORMAL

Date: August 24, 2000

The Honorable Wayne G. Weeks
Clay County Property Appraiser
Post Office Box 38
Green Cove Springs, Florida 32043-0038

Dear Mr. Weeks:

You have asked this office's opinion as to whether an applicant for a homestead exemption has sufficiently met the criteria necessary to establish permanent residence as required by section 196.031, Florida Statutes. Attorney General Butterworth has asked me to respond to your letter.

You state that the applicant in question is not a United States citizen and does not have a resident alien card. According to your letter, the applicant's passport was stamped as temporary evidence of lawful admission for permanent residence, valid until June 12, 2001. However, a more recent letter from the United States Department of Justice, Immigration and Naturalization Service (INS), dated April 8, 2000, states that the applicant is a conditional resident whose status expired on May 8, 2000. The letter indicates that the applicant has filed to remove the conditions on her residence.

In order to qualify for the benefit of a tax exemption, the person seeking the exemption must clearly come within the requirements and scope of the law granting the exemption.[1] While ambiguous language in taxing statutes should be resolved in favor of the taxpayer, the reverse is generally true when construing exceptions and exemptions from taxation.[2]

Florida's tax exemption for homestead is provided by Article VII, section 6, Florida Constitution, and section 196.031, Florida Statutes. The constitutional provision does not establish an absolute right to a homestead exemption; rather, the exemption may be granted to an applicant only "upon establishment of right thereto in the manner prescribed by law."[3] However, interpretation of the homestead exemptions under Florida law is entitled to consideration in the "liberal and beneficent spirit in which they were enacted to protect the family home."[4]

Section 196.031, Florida Statutes, which substantially tracks the language of and implements the constitutional provision states in pertinent part:

"(1) Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of [$25,000] on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. . . ."[5]

The use of the conjunctive "and" in section 196.031(1), Florida, Statutes, indicates that entitlement to Florida's homestead exemption from taxation is determined by the simultaneous existence of three factors on January 1 of the tax year: 1) possession of legal or equitable title to the property, 2) residence on the property, *and* 3) the intention of the taxpayer to make the property their permanent residence.[6]

Section 196.012(17) and (18), Florida Statutes, respectively define the terms "permanent resident" and "permanent residence" in pertinent parts, as follows:

(17) "'Permanent resident' means a person who has established a permanent residence as defined in subsection (18).

(18) "'Permanent residence' means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning."

The administrative rules adopted by the Department of Revenue to implement section 196.031, Florida Statutes, seek to clarify such requirements. Rule 12D-7.007, Florida Administrative Code, relating to the residence requirement for homestead exemptions, provides in pertinent part:

"(1) For one to make a certain parcel of land his permanent home, he must reside thereon with a present intention of living there indefinitely and with no present intention of moving therefrom.

(2) A property owner who, in good faith, makes real property in this state his permanent home is entitled to homestead tax exemption, notwithstanding he is not a citizen of the United States or of this State. (Smith v. Voight, 28 So. 2d 426 (Fla. 1946).

(3) A person in this country under a temporary visa cannot meet the requirement of permanent residence or home and, therefore, cannot claim homestead exemption."

The Supreme Court of Florida in *Juarrero v. McNayr*[7] considered the homestead ad valorem tax exemption application of a Cuban refugee, who had applied for political asylum. The refugee's application for the homestead ad valorem tax exemption had been denied. The Court held that because Juarrero was in this country on a "temporary" visa he could not "'legally', 'rightfully' or in 'good faith' make or declare an intention which he has no assurance he can fulfill or carry out because of the temporary nature of the visa."[8]

Subsequently, however, in *Department of Health and Rehabilitative Services v. Solis,*[9] the Supreme Court of Florida held that an alien residing in the United States pending her application for political asylum was eligible for Aid to Families with Dependent Children benefits as one "permanently residing in the United States under color of law" within the meaning of section 409.026, Florida Statutes. In analyzing the word "permanent," the Court distinguished it from the word "temporary" as used in federal statutes. The Court stated:

"Unlike the word 'permanent,' Congress has not defined the word 'temporary.' 'Temporary' and 'temporarily,' however, are used in 8 U.S.C. Sec. 1101(a)(15) in reference to students, tourists,

business visitors, and specific workers. As stated in the dissent to [*Sudomir v. McMahon,* 767 F.2d 1456 (9th Cir. 1985)]: 'The common characteristics of all these temporary relationships is that they exist for a defined purpose with a defined end, and there is never any intention of abandoning the country of origin as home.'"[10]

More recently, the Third District Court of Appeal in *Lisboa v. Dade County Property Appraiser,* [11] rejected the property appraiser's claim that an applicant for political asylum "permanently residing [in the United States] under the color of law" (PRUCOL) could not be eligible for an ad valorem homestead exemption. The court stated:

"Lisboa is seeking asylum in this country and has no intention of returning to Brazil. As the Supreme Court noted in *Solis,* 'an asylum applicant is present in [this country] with *no* defined end or defined purpose as set out by Congress regarding temporary aliens.' *Id.* (emphasis added). As in *Solis,* 'the status of [Lisboa] will not change until [he] chooses to leave this country or INS acts on the application for asylum.' *Id.* Accordingly, like Mrs. Solis, we find that Mr. Lisboa fits more appropriately within the definition of 'permanent.'"[12]

The Property Appraiser argued that the *Lisboa* court was bound by the decision of the Supreme Court of Florida in *Juarrero v. McNayr*.[13] Based on the testimony of an expert witness, however, the court concluded that the immigration policies of the United States have changed considerably since *Juarrero* was decided and therefore concluded that its decision was not in conflict with *Juarrero.* Thus, the court concluded that an applicant for political asylum whose application is pending as of the relevant taxing date is a "permanent resident" for purposes of the state's homestead exemption from ad valorem taxation.

The question of residence and its permanency must be determined from all the facts and circumstances by the property appraiser in the first instance and should not be delegated to this office.[14] You may, however, wish to seek additional information from the applicant regarding her status since the material submitted indicates that she was lawfully admitted for permanent residence while a more recent letter from the INS states that the applicant is a conditional resident. You may also wish to discuss this matter with Mr. Steve Keller with the Department of Revenue. Mr. Keller can be reached at (850) 488-0712.

I trust that the above informal advisory comments may be of assistance to you in resolving this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

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[1] *See Green v. Pederson*, 99 So. 2d 292 (Fla. 1957).

[2] *United States Gypsum Company v. Green*, 110 So. 2d 409 (Fla. 1959); *Straughn v. Camp*, 293 So. 2d 689 (Fla. 1974); *Capital City Country Club, Inc. v. Tucker*, 613 So. 2d 448 (Fla. 1993), and *Florida Dept. of Revenue v. James B. Pirtle Const. Co., Inc.*, 690 So. 2d 709 (Fla. 4th DCA 1997).

[3] *Horne v. Markham*, 288 So. 2d 196, 199 (Fla. 1973). *And see Reinish v. Clark,* Case No. 1D98-3973 (Fla. 1st DCA, July 20, 2000), upholding the constitutionality of the constitutional and statutory homestead ad valorem exemption.

[4] *See, e.g.*, Op. Att'y Gen. Fla. 71-398 (1971); *and cf. In re Estate of Skuro*, 467 So. 2d 1098 (Fla. 4th DCA 1985), *aff'd*, 487 So. 2d 1065 (Fla. 1986) and *Cain v. Cain*, 549 So. 2d 1161 (Fla. 4th DCA 1989) (homestead exemption is to be construed liberally for benefit of those whom it is designed to protect).

[5] *See* s. 196.031(3)(e), Fla. Stat., changing the assessed valuation from $5,000 to $25,000 for levies of taxing authorities other than school districts.

[6] *See* s. 196.015, Fla. Stat., setting forth relevant factors that may be considered by the property appraiser in making his or her determination regarding the establishment of permanent residency in this state.

[7] 157 So. 2d 79 (Fla. 1963).

[8] *Id.* at 81.

[9] 580 So. 2d 146 (Fla. 1991).

[10] *Id.* at 149.

[11] 705 So. 2d 704 (Fla. 3d DCA 1998), *cert. dismissed,* 737 So. 2d 1078 (Fla. 1999). The Property Appraiser, however, acknowledged that aliens with "lawfully admitted permanent resident" status (LAPR) were entitled to apply for the homestead exemption.

[12] 705 So. 2d at 707.

[13] 157 So. 2d 79 (Fla. 1963). *And see Alcime v. Bystrom,* 451 So. 2d 1037 (Fla. 3d DCA 1984), which the property appraiser argued also controlled. The *Lisboa* court stated that in *Alcime*, it held that because Mr. Alcime was an alien without a permanent visa he was ineligible for a homestead exemption from ad valorem taxes. However, Mr. Lisboa has a "permanent" status. The fact that his status can be "dissolved eventually at the instance either of the United States or of the individual" does not detract from its permanency.

[14] *See* ss. 196.141 and 196.151, Fla. Stat. *And see* Ops. Att'y Gen. Fla. 82-99 (1982), 79-50 (1979), 74-115 (1974), 72-154 (1972), and 58-329 (1958).