

## RIW Alert: Voters Say Yes to “Massachusetts Fair Share Amendment,” a.k.a. “Millionaires Tax”... What’s Next?

By Christopher R. Agostino on November 10, 2022



Proponents of the so-called “Millionaires Tax” won a hard-fought victory in their effort to enact a progressive state income tax for high earners. With this new tax slated to become law, taxpayers and their advisors are likely to take a fresh look at what income is subject to Massachusetts state income tax for both residents and non-residents. Those high earners and one-time millionaires tempted to simply pick up and leave may find that is not a viable option. Non-residents will continue to have their Massachusetts source income taxed no matter where they migrate. As proposed, the Millionaires Tax does not alter how Massachusetts taxable income is calculated, rather it would impose an additional 4% tax on any annual Massachusetts taxable income reported on a return in excess of \$1,000,000. Application of the Millionaires Tax is therefore straightforward, but given the potential cost for high earners and those that might receive a windfall from sale transactions, battle lines will likely be drawn over questions of residency and Massachusetts source income.

The Commonwealth of Massachusetts taxes all income earned by Massachusetts residents from sources inside and outside Massachusetts. Additionally, non-residents are taxed on income derived from sources within Massachusetts, which is known as “Massachusetts source income.” Since 1995 Massachusetts has determined residency status for state income tax purposes based on the common law concept of domicile as well as a statutory definition that takes into account time spent in Massachusetts regardless of domicile. The common law concept of domicile is traditionally based on the place that a person intends to return. This requires a totality of the circumstances analysis of a person’s social, family, and business ties. An individual might have several residences, but will always have only one domicile. The common law analysis accounts for such minutia as the location of a person’s primary care physician, social clubs, and religious gatherings. Since the domicile standard is fact-based, the Department of Revenue may take into account a person’s tax motivation for changing residency. The DOR will more closely scrutinize a newly claimed domicile for tax purposes where it is apparent that a person’s motivation for establishing a new domicile is to reduce tax liability. The burden of proof is on the taxpayer to establish that they have changed their domicile. The tax motivation factor to the domicile analysis will likely be relevant in the context of those one-time millionaire hopefuls that seek to relocate in anticipation of a valuable transaction or other windfall.

The statutory definition of “resident” for Massachusetts income tax purposes allows the Commonwealth to tax all income of a person who may not be considered domiciled in Massachusetts, but who maintains a permanent place of abode in Massachusetts and spends more than 183 days in the Commonwealth in the relevant tax year. This includes income from all sources inside and outside of Massachusetts. Since the domicile analysis focuses on where one intends to return, the statutory definition of resident is intended to capture those who migrate into Massachusetts and establish a permanent home here while

maintaining all of their strong family, personal, and social ties out of state. Consider the case of a young professional who has moved to Massachusetts from a neighboring state, but who maintains a permanent address at home and intends to return there at some point. The DOR might not be able to tax that individual's non-Massachusetts income based on the domicile analysis, but the statutory analysis would require inclusion of that individual's entire income based simply on time spent in the Commonwealth. The flip side of the statutory analysis in the context of the Millionaires Tax is that the *183-day* statutory definition of resident tends to presume that the domicile definition does not apply. Also, Massachusetts residents are only required to report non-Massachusetts income while the taxpayer was actually residing in Massachusetts; therefore, those individuals taxed under the statutory rule will have an easier time establishing that they have left the Commonwealth based simply on their moving day. This may be particularly relevant to potential one-time millionaires who anticipate a large sum of non-Massachusetts source income. An individual only covered under the statutory residency definition may change residency to avoid Massachusetts income tax on non-Massachusetts source income simply by moving their physical residence back to their original domicile on a date certain.

While an individual's Massachusetts taxable income may or may not include income derived from sources outside of the Commonwealth, it is important to remember that generally all income that originates in Massachusetts, i.e., Massachusetts source income, is taxable in Massachusetts. This non-resident income tax is described under 830 CMR 62.5A.1 and generally requires that any person who receives Massachusetts source income, wherever that person might be located, must self-report the income to the Department of Revenue and determine their individual Massachusetts taxable income. Deductions, credit for taxes paid in other jurisdictions, and exclusions under foreign tax treaties may apply; however, the general tax reporting obligation for Massachusetts source income remains. Massachusetts source income includes gains effectively connected to a trade or business conducted in Massachusetts, income derived from Massachusetts real estate, investment income from Massachusetts-based investments, gain on the sale of a business located in Massachusetts, and even pass-through income from a limited liability company or partnership based in Massachusetts. For example, a change in residency from Massachusetts to Florida prior to the sale of a Massachusetts-based business or real estate located in Massachusetts would serve no tax avoidance purpose since any gain on the sale would still be Massachusetts source income, would be included in that individual's Massachusetts taxable income and be subject to the Millionaires Tax to the extent the individual's total Massachusetts taxable income exceeds \$1,000,000 in the year of the sale.

The Massachusetts Millionaires Tax raises the stakes for the DOR to identify Massachusetts source income. Given the numbers involved and recent advances in mobility and remote work there are certain to be more cases at the Appellate Tax Board that test individuals' ability to relocate to low-tax states in order to avoid the tax surcharge imposed by the Millionaires Tax.

"A man cannot elect to make one place his home for the general purpose of life, and another place his home for the general purpose of taxation." *Commonwealth v. Davis*, 284 Mass. 41 (1933)

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