Homestead, effect of rental of dwelling

Number: INFORMAL

Date: February 14, 2008

The Honorable Marsha M. Faux
Polk County Property Appraiser
255 North Wilson Avenue
Bartow, Florida 33830-3951

Dear Ms. Faux:

You ask whether a property owner who has moved from their permanent and legal residence and rented that residence – only as a necessity to care for a medically ill child – may continue to receive an allowance of homestead exemption during their absence.

The issue of homestead eligibility must be initially determined from all the facts and circumstances by the property appraiser and may not be undertaken by this office.[1] In an effort to be of assistance, however, this office would note the following.

Florida's tax exemption for homesteads 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."[2] Section 196.031, Florida Statutes, which substantially tracks the language of and implements the constitutional provision, states:

"(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][3] on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. . . ."

Based on the use of the conjunctive "and" in section 196.031(1), Florida, Statutes, this office has stated that entitlement to Florida's homestead exemption from taxation would appear to be 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.[4]

While a taxpayer must reside on the property on January 1 of the relevant tax year in order to satisfy the requirements of Article VII, section 6, Florida Constitution, and section 196.031, Florida Statutes, the Florida courts have held that the physical presence of the owner is not a requirement of either the Florida Constitution or the statute. In *Crain v. Putnam*,[5] the Fourth District Court of Appeal reviewed the denial of a homestead exemption because the property owner, who had not lived in her home since 1992, having been placed in a nursing home in a

vegetative state. In that case, the property owner had been involuntarily taken from her homestead to the hospital and, because of her physical and mental condition, could not have communicated any intention regarding her residence as she remained hospitalized in a vegetative state. Her furniture, clothing, and most of her other possessions remained in the residence, and her mail was delivered there. The appellate court recognized that all the evidence considered together indicated the intent that the home was the residence of the property owner and held that her physical presence on the property was not a requirement for the exemption.

Thus, the temporary absence from the homestead by itself does not constitute abandonment, but may be considered, in conjunction with all other available evidence, in determining whether abandonment of the homestead has occurred.[6]

Prior to the adoption of section 196.061, Florida Statutes in 1959,[7] the rental of the homestead property was only one factor to be considered in determining whether the homestead had been abandoned.[8] Section 196.061, Florida Statutes, however, provides:

"Rental of homestead to constitute abandonment.—*The rental of an entire dwelling previously claimed to be a homestead for tax purposes shall constitute the abandonment of said dwelling as a homestead, and said abandonment shall continue until such dwelling is physically occupied by the owner thereof*. *However, such abandonment of such homestead after January 1 of any year shall not affect the homestead exemption for tax purposes for that particular year so long as this provision is not used for 2 consecutive years.* The provisions of this section shall not apply to a member of the Armed Forces of the United States whose service in such forces is the result of a mandatory obligation imposed by the federal Selective Service Act or who volunteers for service as a member of the Armed Forces of the United States."[9] (e.s.)

Accordingly, the temporary absence from the homestead by itself does not constitute abandonment for purposes of the homestead tax exemption. In addition, while section 196.061, Florida Statutes, provides that the rental of the entire dwelling constitutes an abandonment of the homestead, if such abandonment by rental occurred after January 1 of any given year, such abandonment does not affect the homestead tax exemption for that particular year so long as this exemption is not used for two consecutive years.[10]

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] *See* s. 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).

[2] *Horne v. Markham*, 288 So. 2d 196, 199 (Fla. 1973).

[3] *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.

[4] *See, e.g.,* Ops. Att'y Gen. Fla. 05-60 (2005), 05-55 (2005), and 02-19 (2002). *And see* Op. Att'y Gen. Fla. 79-50 (1979) ("[i]t is necessary for all persons, including military personnel, who own real property, or those persons who are legally or naturally dependent upon such owners, to occupy the real property as a permanent home or place of residence in order for the owner thereof to be entitled to the constitutional homestead exemption from taxation"); and Rule 12D-7.007(1), Fla. Admin. C. ("[f]or 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"). *Cf.* s. 192.042, Fla. Stat., providing that all real property shall be assessed as of January 1, while s. 192.053, Fla. Stat., states that a lien for taxes, penalties, and interest shall attach to property on the date of assessment.

[5] 687 So. 2d 1325 ((Fla. 4th DCA 1997). For purposes of the homestead exemption from forced sale (Art. X, s. 4, Fla. Const.), *see In re Estate of Melisi*, 440 So. 2d 584, 585 (Fla. 4th DCA 1983) ("homestead character of the property is not abandoned when the owner involuntarily changes his residence, as in a case where an infirmity requires residence in a nursing home or hospital facility"); *Nelson v. Hainlin*, 104 So. 589 (Fla. 1925) (husband who spent the "latter years" of his life away from the homestead so that he could be cared for in a neighbor's home and his daughter's home, did not destroy the homestead nature of the property for purposes of devise); *Stokes v. Whidden*, 122 So. 566 (Fla. 1929) (property was still homestead after husband had become insane and had remained in a state institution).

[6] *See* Rule 12D-7.013(3), Fla. Admin. C., stating:

"Temporary absence, regardless of the reason for such, will not deprive the property of its homestead character, providing an abiding intention to return is always present. This abiding intention to return is not to be determined from the words of the homesteader, but is a conclusion to be drawn from all the applicable facts. (City of Jacksonville v. Bailey, 39 So.2d 529 (Fla. 1947)."

And see Op. Att'y Gen. Fla. 76-177 (1976) concluding that the rental of an apartment in an adjoining county in pursuit of employment did not constitute abandonment of homestead when the taxpayer returned on the weekends to the alleged homestead which was not rented and which was the sole property owned by the taxpayer.

[7] *See* s. 1, Ch. 59-27, Laws of Fla. Originally enacted in 1959 as s. 192.141, Fla. Stat., the statute was renumbered as s. 196.061, Fla. Stat., in 1969. *See* s. 2, Ch. 69-55, Laws of Fla.

[8] *Compare McCullough v. Forbes*, 47 So. 2d 780 (Fla. 1950), in which a majority of the Court affirmed without opinion a decree denying a homestead tax exemption claimed by an aged widow who rented out her home on a month-to-month basis and took a room in a private home, allegedly for reasons of health, with the declared intention of resuming the occupancy of the home as soon as her health permitted, with *City of Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529, 530 (Fla. 1947), in which the Court held that a temporary rental of the home for three months during the winter season did not constitute an abandonment of the homestead for tax

exemption purposes. *And see* Op. Att'y Gen. Fla. 58-229 (1958), which was issued prior to the enactment of s. 196.061 (originally enacted in 1959 as s. 192.141), which stated that there must be an intention, either express or implied from facts, to abandon premises as a homestead before owner should be denied homestead exemption from taxation, and a temporary renting of the homestead is not an abandonment thereof, if there is no intention to abandon the premises as a homestead, and no other homestead has been acquired.

[9] *Cf. Matter of Betancourt*, 154 B. R. 90 (Bankr. S.D. Fla.1993) (Florida statute regarding effect of renting homestead property on one's ability to get tax credit on homestead real estate tax exemption was directed solely to tax exemption on homestead property, and not to debtor's ability to claim homestead exemption on leased property upon her bankruptcy filing).

[10] *See generally* Op. Att'y Gen. Fla. 71-398 (1971) which cited to s. 196.061, in concluding that while the temporary absence of a person committed to a mental hospital does not of itself constitute an abandonment of homestead rights previously acquired by him, the rental of the homestead by his legal guardian would terminate the exemption; and Op. Att'y Gen. Fla. 63-08 (1963).