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Vet. Aff. Op. Gen. Couns. Prec. 23-90

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TEXT:

Subject: Income for Improved Pension Purposes

(This opinion, previously issued as General Counsel Opinion 1-82, dated November 23, 1981, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:

Under section 503 of title 38, United States Code, should a payment received as a result of a pensioner's withdrawal of his or her contributions to a retirement fund be considered as income?

COMMENTS:

For the reason set forth below, we conclude that the answer to this question is in the affirmative, regardless of whether the payment received under such circumstances represents the entire amount of such contributions, includes or does not include interest, or is received in installments.

In these cases, the veterans were awarded improved pension benefits on the basis of applications indicating no assets and ineligibility for retirement benefits from any source. Subsequently, each veteran reported the receipt of a substantial lump-sum payment as a return of contributions to an employee retirement fund. In one case, interest was added.

In both cases, the amounts contributed to the retirement fund were automatically and regularly deducted from the veterans' pay and deposited in the retirement funds. Under ordinary circumstances, both veterans, upon reaching retirement age, would have become entitled to retirement payments based on factors such as the longevity of their employment, the amount of their contributions, and the portion contributed by their employers. By withdrawing their contributions prior to reaching retirement age, each veteran gave up any claim to such retirement payments.

Under section 503 of title 38, United States Code, determinations of annual income for purposes of the improved pension program require the inclusion of "all payments of any kind or from any source," except as specifically excluded by that section. None of the exclusions is apropos here. Although 38 C.F.R. § 3.271, providing for the computation of income for improved pension purposes, does not expressly so state, it is clear that, had either veteran reached retirement age and begun to receive annuity payments from their respective funds, all such payments would be counted as income even through based in part on the veterans' contributions during employment.

The statutory language governing what is to be considered income for purposes of the improved pension program is all inclusive: all payments of any kind or from any source are to be included.

The term "payment" includes the refunds at issue here. Retirement funds generally are sums held in trust for the eventual benefit of the retirees. Legal title to the amounts regularly deducted from the employees' pay passes to the trustees or other holders of the retirement fund. Employees cannot withdraw these funds during the period of their employment. Accounting procedures can be used to determine the amount each employee has contributed, but the amounts are commingled in the fund and not separately invested. A disbursement from such a fund to one of its contributors is a payment from the trustees or other holders of legal title to the fund, and the payee's receipt discharges the trustees from any future liability of the fund for the payee's retirement.

This construction is consistent with Congress' purpose in restructuring the need-based pension program under Public Law No. 95-588, as evidenced by the severe limitations on exclusions from income now contained in section 503(a) of title 38 and, most particularly, by the elimination of the partial exclusion of a pensioner's retirement income.

Formerly, section 503(a)(6) of title 38 provided for the exclusion of 10 percent of "the amount of payments to an individual under public or private retirement annuity, endowment, or similar plans or programs." This exclusion, added in 1964 by Public Law No. 88-664 in recognition of an inequitable situation in existence at that time, was one of the major anomalies bringing about the reform of the pension program. As noted in the comprehensive VA study "Analysis and Evaluation of the Non-Service-Connected Pension Program" submitted to Congress in January 30, 1978 (Senate Committee Print No. 13, 95th Congress, 2d Session, 341), "the current 10 percent exclusion does not count money which is, indeed, available to meet everyday needs. Though relatively more equitable than the prior recoupment provisions, excluding 10 percent of retirement income continues to dilute the needs concept of the pension program." Those recoupment provisions, as contained in Public Law No. 86-211, by providing that retirement income would not be

considered countable income for pension purposes until the pensioner had recouped his or her own contributions to the retirement fund, "in effect created a fictitious period of entitlement during which no need actually existed." Id. at 341. Following the recoupment period, pension might be substantially reduced or terminated by reason of excess income, but for the period of the recoupment, Federal Taxpayers' dollars were being used to support the fictitious "need" of such retirees. This was an inequity to pensioners not in a position to take advantage of such a situation and also distorted the objectives of the need-based pension program. By supplanting the recoupment provisions with the 10 percent exclusion, Congress sought to provide all pensioners with retirement income the same advantage. However, this in turn created its own anomaly; a portion of cash income-- proportionately higher for those with higher retirement incomes--was in fact available to meet the pensioner's income-security needs but was never "counted." In more than a few cases, "need" thus rested on a fiction. Moreover, because these amounts were not considered as income, there was great discrepancy in the actual aggregate incomes of pensioners. The aggregate annual incomes of a single pensioner with little or no outside income might be as little as half the aggregate income of a single pensioner with considerable retirement income. As noted in S. Rep. No. 1016, 95th Cong., 2nd Sess. 69 accompanying the Senate version of pension reform (S. 2384, 95th Cong.2nd Sess. (1978)), " certain exclusions ... do not comport with the essential principle that dollars available for ordinary living expenses should be counted in determining improved pension entitlement and are not continued under the new program." An important objective of pension reform was to treat similarly circumstanced pensions equally (id. at 18); the elimination of the 10-percent exclusion supported that objective.

In view of Congress' comprehensive effort in Public Law No. 95-588 to remove the various anomalies that had crept into the program over the years and to provide for a program in which the limited resources available could be shared equitably among pensioners truly in need of such assistance, we see no basis for holding that refunds of retirement-fund contributions should not be regarded as income in the year received, regardless of whether interest is included, and regardless of whether received in a lump-sum or in installments. To hold otherwise would distort the purposes of this need-based program; the dollars available from such refunds are as available to reduce need as are dollars from any other source. To hold otherwise would also be to discriminate without justification against those pensioners in receipt of monthly retirement income, all of which is countable to reduce improved-pension entitlement, and against veterans whose retirement incomes preclude the receipt of pension.

Both veterans contend that the refund of their contributions is a repayment of "their own money." Upon proper application, they were entitled to it at any time after discontinuance of employment. Moreover, the Federal Government does not levy income tax on such amounts, which have already been reported as taxable earnings for the years during which the contributions were deducted from

the veteran's pay. The fact that these payments had their ultimate source in the veterans' earnings is, however, not the test as to whether they should be regarded as “payments ... from any source." Rather, as we have discussed above, Congress intended to include as "payments" all monies received by the pensioner unless expressly excluded under the law.

We do not regard as persuasive the pensioners' contention that the VA is essentially counting these monies twice. This contention has its basis in the assertion that, had either pensioner reported earnings from which retirement contributions had been deducted, the VA would have counted the gross, not the net, amount as income, in accordance with 38 C.F.R. § 3.271(b). We do not regard this as inconsistent with the basic principle that payments "from any source" are to be considered as income in the year received unless expressly excludable.

HELD:

A payment received as a result of a pensioner's withdrawal of his or her contributions to a retirement fund should be considered as income in the year received for purposes of the improved pension program regardless of whether interest is included or the payment is received in a lump sum or in installments.

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