DATE: 07-18-90

CITATION: VAOPGCPREC 71-90
Vet. Aff. Op. Gen. Couns. Prec. 71-90

TEXT:

Subject: Treatment of Tribal Per Capita Payments for Improved Pension Purposes

(This opinion, previously issued as General Counsel Opinion 2-88, dated March 1, 1988, 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:

Whether tribal per capita payments or dividends, received by a veteran, should be considered income for improved pension purposes.

COMMENTS:

Per capita payments or dividends, up to a maximum of $2,000, received by the veteran from funds held in trust by the Secretary of the Interior for an Indian tribe, are excludable from income for improved pension purposes. The veteran, who has elected benefits under the improved pension program, has reported receiving income in the form of per capita payments based on a tribal lease.

The veteran has not indicated that such lease payments are attributable to conversion of nonrenewable resources. As a result of the veteran's report, an overpayment of pension benefits has been established. The veteran contends the payments in question are exempt from inclusion as income for pension purposes by operation of Pub.L. No. 98-64.

Section 503(a) of title 38, U.S. Code, governing income computation for improved pension purposes, provides that "all payments of any kind or from any source" shall be included in annual income, with the exception of certain specified categories. The history of this provision indicates Congress' purpose "that a pensioner's total annual non-pension income shall be included in determining the amount of pension payable, unless a specific exclusion from such income is authorized by law." S. Rep. No. 95-1329, 95th Cong., 2d Sess. 22 (1978).

This office has on several occasions discussed pension-income computation in the context of claims by Indian veterans or related matters. In a series of unpublished opinions involving the improved pension program and prior pension programs, this office indicated that payments to Indians which are in the nature of compensation for relinquishment of property interests may be considered a conversion of assets and

excludable from income. See current 38 U.S.C. § 503(a)(6) regarding the improved pension program. In Op. G.C. 3-85, we explored the distinction between conversion of assets and mere rental payments for the use of renewable interests. We concluded that mineral-lease royalties are proceeds from the sale of property and as such are excludable from income, while payments not associated with diminution of assets are not so excludable. That opinion, however, addressed only the general issue of mineral leasing and did not reach the possible applicability of laws relating to income and assets of Indians or Indian tribes.

In Op. G.C. 8-87, we interpreted one such statute, 25 U.S.C. § 1408, based on its terms and legislative history, as exempting certain rental income from Indian trust lands from net-worth determinations for pension purposes, but not from pension-income computation. Indians may derive income from trust lands either directly or through a trust arrangement with the Federal government. See, e.g., 25 C.F.R. § 162.5(f) (governing payment of rentals on leases of Indian lands). In Op. G.C. 8-87, as there was no suggestion that the veteran had received per capita payments from rental proceeds held in trust by the Federal government, the effect of Pub.L. No. 98-64 was not addressed. However, in the instant matter, the veteran, in an April 25, 1986, statement submitted in support of the veteran's claim, asserts having received income from "tribal trust funds" which is "not countable income under public law 98-64." Thus, this claim presents us for the first time with the issue of interpretation of Pub.L. No. 98-64.

The two principal provisions codified in title 25, U.S. Code, dealing with payments to Indians are the so-called Per Capita Distributions Act, Pub.L. No. 98-64, 97 Stat. 365 (1983), at 25 U.S.C. §§ 117a through 117c, and the Indian Tribal Judgment Funds Use and Distribution Act, Pub.L. No. 93-134, 87 Stat. 466 (1973), as amended, at 25 U.S.C. § 1401 et seq. The latter statute, which provided for the use and distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission and the U.S. Claims Court in favor of Indian tribes, contained a provision, section 7 of Pub.L. No. 93-134, 87 Stat. 466, 468, that none of the funds distributed per capita under that statute would be considered as income or resources in determining the extent of eligibility for assistance under the Social Security Act. This provision was amended in 1983 by Pub.L. No. 97-458, § 4, 96 Stat. 2512, 2513, to provide, inter alia, that none of the funds distributed per capita pursuant to a plan approved under that statute shall be "considered as income or resources ... under the Social Security Act or, except for per capita shares in excess of $2,000, any Federal or federally assisted program." See 25 U.S.C. s 1407. Pub.L. No. 97-458 also added 25 U.S.C. s 1408 exempting interests of individual Indians in trust or restricted lands from consideration as a resource in determining eligibility under the Social Security Act "or any other Federal or federally assisted program."

The other key statute containing an exemption provision, Pub.L. No. 98-64, applies by its terms to "funds which are held in trust by the Secretary of the Interior ... for an Indian tribe ... distributed per capita to members of that tribe." Pub.L. No. 98-64, s 1, 97 Stat. 365 (1983); 25 U.S.C. s 117a. Section 2(a) of that statute, codified as 25 U.S.C. s

117b(a), states in pertinent part that "distributions of such funds shall be subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended", i.e., 25 U.S.C. s 1407. As noted above, section 7, as amended, exempts per capita distributions not in excess of $2,000 from consideration as income or resources under "any Federal or federally assisted program."

The purpose of Pub.L. No. 98-64, as explained in the House report on S. 419, 98th Cong., 1st Sess., "is to provide that per capita payments to Indians out of tribal trust revenue may be made by either the Secretary of the Interior or by tribal governments and to repeal two obsolete laws which provide that only the Secretary may make such payments." H.R. Rep. No. 98-230, 98th Cong., 1st Sess. 1, reprinted in 1983 U.S. Code Cong. & Ad. News 629, 630. The reference in section 2 of the legislation to the 1973 statute was apparently little noticed in consideration of the measure and was the subject of only passing reference in the legislative history. The terms of § 117b(a), however, clearly indicate Congress' intention that the provisions of 25 U.S.C. § 1407 govern distributions authorized by Pub. L. No. 98-64.

The legislative history of the section 1407 exemption provision referenced in Pub.L. No. 98-64 sheds little light on the intended scope of that provision. Congressional debate on the measure includes reference only to eligibility under the Food Stamp Act. Discussion of the analogous exemption provision simultaneously added at 25 U.S.C. § 1407 references Aid to Families with Dependant Children and Medicaid eligibility. 128 Cong. Rec. S15544 (daily ed. Dec. 19, 1982) (statement of Senator Cohen). Nonetheless, the broad language chosen by Congress referring to "any Federal or federally assisted program" (emphasis added) leaves little doubt that section 1407 was intended to be all encompassing in terms of the Federal programs to which it applies.

The broad scope of the section 1407 exemption, made applicable to per capita trust fund payments by 25 U.S.C. s 117b(a), creates a conflict with section 503(a) of title 38, U.S.Code, to the extent that per capita payments of $2,000 or less are of a nature not otherwise excludable from income under the latter statute. In an unpublished opinion dated September 1, 1983, concerning Public Law No. 97-458, we informed the Chief Benefits Director that an apparent conflict between the scope of the section 1407 and section 503(a)(6) exclusion provisions, as they apply to funds derived from the disposition of property, could be resolved by giving effect to the, in that case, more liberal veterans' benefit statute. We reasoned that the amendment to section 1407 was a liberalizing statute and that both measures were intended to provide relief to persons in receipt of such funds. However, in the instant claim, section 503(a) provides no relief to persons who may receive per capita trust fund payments not representing a conversion of assets. The generally applied rule of construction in cases of irreconcilable conflict between a new provision and an existing statute is that the new provision will control as the later expression of legislative intent. E.g., 2A Sutherland Statutory Construction § 51.02 (4th ed. 1984). Application of this principle requires that we give full effect to the liberalizing provisions of the later enacted statutes, Pub.L. No. 98-64 and Pub.L. No. 97-458.

HELD:

Congress' purpose in enacting Public Law Nos. 98-64 and 97-458 was clearly that per capita distributions within the terms of those statutes are not to be counted in determining income or resources in any Federal or federally assisted program, except where such payments exceed $2,000. Accordingly, if the veteran has received per capita distributions of funds held in trust by the Secretary of the Interior for an Indian tribe and not otherwise excludable from income under section 503(a) of title 38, such distributions, not exceeding $2,000, are excludable from income for improved pension purposes pursuant to Pub.L. No. 98-64.

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