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CITATION: VAOPGCPREC 76-90
Vet. Aff. Op. Gen. Couns. Prec. 76-90

TEXT:

Subject: Income from Lands Held in Trust by Federal Government for Indian Tribes--
Countability for VA Pension Purposes

(This opinion, previously issued as General Counsel Opinion 8-87, dated October 2, 1987, 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:

(1) whether income from lands held in trust by the Federal Government for a veteran as a member of an Indian tribe should be counted as income for improved pension and section 306 pension purposes, and (2) whether such lands should be considered as part of the veteran's net worth for pension purposes.

COMMENTS:

For the following reasons, we believe income from such lands is countable as income for pension purposes, but that the value of such lands should not be considered in determining net worth.

Section 503(a) of title 38, U.S. Code, states in pertinent part: "In determining annual income under this chapter, all payments of any kind or from any source ... shall be included ..." Under the literal terms of this section, any payment is income unless expressly excluded by statute. Congress included this broad language in both the prior ("section 306") and improved pension statutes, indicating that section 503(a) of the improved pension statutes was intended to continue the prior requirement "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." (Emphasis added). S. Rep. No. 95-1329, 95th Cong., 2d Sess. 22 (1978) (Conference Report).

Chapter 15 also contains a provision requiring consideration of, but not defining, "the corpus of the estate of the veteran" for purposes of pension eligibility. Section 522(a) of title 38, U.S. Code, states in pertinent part: "The Administrator shall deny or discontinue the payment of pension to a veteran under section 521 of this title when the corpus of the estate of the veteran ... is such that under all the circumstances, ... it is reasonable that some part of the corpus of such estate be consumed for the veteran's maintenance." See also former 38 U.S.C. s 522, as in effect on December 31, 1978. As

defined in

VA regulations, corpus of estate for purposes of both the improved-pension and section-306 pension programs, means "the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant with certain enumerated exceptions." 38 C.F.R. §§ 3.263(b) and 3.275(b).

In the case of this veteran, an Indian who owns acreage held in trust by the Federal Government from which he receives rental income, none of the exceptions enumerated in section 503(a) applies. The General Counsel has indicated that rental income from land is not excludable from income for pension purposes. For example, in Op. G.C. 3-85, we distinguished income from disposition of nonrenewable resources, i.e., removal of minerals, from income from renewable resources, i.e., rental of land for grazing or planting. We concluded that payment of the former must be considered a conversion of the form of assets and thus a sale of property excludable for purposes of pension income computation, but that where the latter produces a perpetual source of income, such income is fully countable. Similarly, no provision in titles 38 of the U.S. Code or Code of Federal Regulations excepts the veteran's trust land from inclusion in the corpus of the veteran's estate within the meaning of section 522(a). The same is true of laws governing the section-306 pension program.

However, one non-title 38 statutory exclusion bears on this matter. Section 1408 of title 25, U.S. Code, states: "Interests of individual Indians in trust or restricted lands shall not be considered a resource in determining eligibility for assistance under the Social Security Act or any other Federal or federally assisted program." (Emphasis added.) Because the veteran owns Indian trust land and because he is applying for assistance under a Federal program (VA pension), the application of section 1408 to his claim must be considered.

The term "resource" is not defined in title 25, but the statutory context of its use sheds light on its meaning. Section 1407, enacted as part of Pub.L. No. 93-134, s 7, 87 Stat. 466 (1973), and amended by the same statute which enacted section 1408, Pub.L. No. 97-458, s 4, 96 Stat. 2512, 2513 (1983), mandates that all judgment funds distributed in satisfaction of certain judgments of the Indian Claims Commission and the U.S. Claims Court shall not be considered as income or resources for the purpose of eligibility for any Federal or federally assisted program. In contrast, section 1408 omits any reference to income. The fact that Congress distinguished income and resources in one section of this statute, i.e., section 1407, and omitted reference to income in another, i.e., section 1408, strongly suggests the omission was intentional and the latter section was not intended to apply to income computations. See 2A Sutherland Statutory Construction § 47.23 (4th ed. 1984). See also *id.* at s 46.05 ("each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole"). Reading section 1407 and 1408 together, it is apparent that Congress recognized a difference between income and resources and deliberately omitted income from section 1408. Thus, we conclude that section 1408 was not intended to exclude from income computation for Federal benefit purposes income from Indian trust

lands.

This conclusion is confirmed by the floor debate on H.R. 3731, which became Pub.L. No. 97-458. Senator Cohen, in offering an amendment which became s 1408, discussed the reason for the exception of resources in the bill. He explained Indian trust or restricted land cannot be alienated without the consent of the United States. 128 Cong. Rec. S15544 (daily ed. Dec. 19, 1982) (remarks of Senator Cohen). If such land is not readily disposable, it cannot be considered readily available for living expenses. The same rationale does not apply to rental income which is presumably paid in cash and as such is highly liquid.

HELD:

The veteran's rental income from land held in trust by the Federal government for the veteran as a member of an Indian tribe must be included as "income" under 38 U.S.C. § 503(a), but that trust itself, pursuant to 38 U.S.C. § 1408, is an excludable resource for purposes of determining the veteran's net worth under 38 U.S.C. § 522(a). In view of the similarity between the improved pension and section-306 pension statutes as they apply to this issue, and the unrestricted scope of section 1408, the same result would apply under the section-306 pension program.

VETERANS ADMINISTRATION GENERAL COUNSEL
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