DATE**:** 03-11-91

CITATION: VAOPGCPREC 45-91
Vet. Aff. Op. Gen. Couns. Prec. 45-91

TEXT:

SUBJECT: Automobile Allowance under 38 U.S.C. § 1902(a) for a Leased Automobile.

(This opinion, previously issued as Opinion of the General Counsel 2-86, dated November 25, 1985, 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.)

To: Chief Benefits Director

QUESTION PRESENTED:

Under what circumstances, if any, does 38 U.S.C. § 1902(A) permit payment of the automobile allowance where an automobile is leased, rather than sold, to a person eligible for the benefit?

COMMENTS:

The facts presented in this case are as follows: The veteran has a qualifying disability and proposes to obtain a vehicle under a contract which requires him to pay in advance an amount equal to or greater than the automobile allowance. A copy of the proposed contract discloses that upon signing same he would have to pay $5,600, most of which amount, viz.. $5,022, would constitute a (non-refundable) "capitalized cost reduction." The proposed contract further discloses he would be liable for monthly rental payments of $278 over 48 months or $13,344 in all. .Also, he would have to pay all official fees and taxes and would have to purchase and keep in force car insurance at certain prescribed levels. At the end of the 48-month period, if he had fulfilled all of his obligations, he would have the right to buy the car by paying (in cash) the "purchase option price," stated to be $7,372.68. Near the top of the preprinted contract are these words, in boldface type:

THIS IS NOT A PURCHASE AGREEMENT. YOU WILL NOT BECOME THE OWNER OF THE CAR. YOU MAY ELECT TO BUY IT AT THE END OF YOU LEASE.....

Section 1902(a) of title 38, United States Code, provides as follows:

The Administrator, under regulations which the Administrator shall prescribe, shall provide or assist in providing an automobile or other conveyance to each eligible person by paying the total purchase price of the automobile or other conveyance (including all State, local, and other taxes) or $5,000, whichever is the lesser, to the seller from whom the eligible person is purchasing under a sales agreement between the seller and the eligible person.

The procedures governing VA assistance in the purchase of an automobile are set forth at 38 C.F.R. § 3.808.

The automobile assistance program had its inception in 1946 with the passage of Public Law 663, 79th Congress, 60 Stat. 915. Over the years since then, its evolution has been marked by the enactment of several amendments liberalizing coverage and benefits. Currently, the program provides an eligible person not only with the one-time financial assistance referred to in the above-quoted section 1902(a), but also with adaptive equipment (and services thereto) necessary for the operation of any vehicle "acquired" by that person. See 38 U.S.C. § 1902(b) and (c). Because of the broad meaning of the word "acquired," as used in section 1902(c)(2), the provisions concerning adaptive equipment have been recognized as applying to either a purchased or leased vehicle that is presently being operated. Memorandum from General Counsel to Chief Medical Director dtd. February 13, 1981. The immediate question here, then, is whether section 1902(a) could likewise be construed to encompass leased vehicles.

It is axiomatic that statutory construction must begin with the language of the lstatute itself. Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 187 (1980). Absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language, United States v. Apfelbaum, 445 U.S, 115, 121 (1980), and that language should ordinarily be regarded as conclusive, Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980). The plain language of section 1902(a)-- which contains terms such as "purchase price," "seller," and "sales agreement"--speaks solely of the sale of a vehicle as being a prerequisite for entitlement. A "sale" has been defined as "a contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title, as distinguished from a special interest falling short of complete ownership." Black's Law Dictionary 1200 (rev. 5th ed. 1979). The word "lease," on the other hand, when used in reference to tangible personal property, means "a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent." Id. at 800. A lease, then, unlike a sale, does not entail a transfer of ownership. It thus appears from the plain language of section 1902(a) that a lease is beyond the scope of its coverage.

Be that as it may, we need to consider whether there is of record a clearly expressed legislative intention dictating a more expansive construction. See Bread Political Action Committee v. Federal Election Committee, 455 U.S. 577, 581 (1982). Departure from a literal reading of statutory language occasionally is indicated by relevant internal evidence of the statute itself and is necessary in order to effect the legislative purpose. Malat v. Riddell, 383 U.S. 569, 571-572 (1966). Significantly, though, a review of the legislative history pertaining to the automobile allowance discloses no evidence of a congressional intent to authorize the award in cases wherein a vehicle is leased rather than purchased. Over the years legislative reports issued in conjunction with proposed amendments to the program have referred strictly to the sale of a vehicle as the basis of eligibility for the allowance. See, e.g., S.Rep. No. 1233, 91st Cong., 2d Sess., reprinted in 1970 U.S.Code Cong. & Ad.News 5999 et seq.; H.R.Rep. 1494, 93rd Cong., 2d Sess., reprinted in 1974 U.S.Code cong. & Ad.News 6592 et seq. Notwithstanding this consideration, an argument might be fashioned that Congress' use of the broad term "acquired" in section 1902(c) should be construed liberally to encompass acquisitions by purchase and by lease. In our view, however, such an argument carries little weight. When Congress includes particular language in one part of a statue but omits it in another part of the same statue, the presumption is that Congress has acted intentionally and purposely in the disparate inclusion or exclusion. See Russello v. United States, --- U.S. ----, 104 S.CT. 296, 300, 78 L.Ed.2d 17, 24 (1983); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C.Cir.1984); United States v. Martino, 681 F.2d 952, 954 (5th Cir.1982); United states v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir.1972).

We thus believe there is no basis for imputing to congress an intention to make the automobile allowance available to persons who lease a vehicle rather than purchase it. The plain language of section 1902(a) controls its construction. Had Congress intended to include leased vehicles within the scope of this statute, it could easily have done so by incorporating appropriate language therein.

Focusing on the contract proposed in the instant case, we note that it clearly bears the characteristics of a lease. That the veteran would have the option to purchase the vehicle after the 48-month rental period (for a substantial price) does not alter the fact that it is, at the outset, a rental arrangement in which he neither obtains title nor commits himself to buy the vehicle. Hence, in respect to the transaction contemplated here, payment of the automobile allowance would not be in order, unless and until the veteran actually contracts to purchase.

We recognize that some contracts involving the transfer of possession of a vehicle may be difficult to categorize. Certain elements of both a sale and a lease may be present therein. Hybrid arrangements, such as a conditional sale or bailment lease, must be scrutinized closely when evaluating a claim for the automobile allowance. In a conditional sale, the seller transfers possession to the buyer but retains title in the property as security for payment of the purchase

installments. The buyer is committed to make all the payments, and the seller is bound to transfer title upon final payment. A bailment lease is similar, except that the lessee is not committed to buy, but only to pay rent, then has the option of either returning the property to the lessor or purchasing it at the end of the lease term. Business practices vary widely, however, and the labels used on particular documents can be misleading. Whether a transaction is a sale or a lease depends on its real character and not on the labels used by the parties. The question must be determined from all of the facts and circumstances. See generally 8 C.J.S. Bailments §§ 3(1)- (3), (6) (1962); 8 Am.Jur.2d Bailments §§ 39-44 (1980). The key distinction, of course, is that a sale contemplates a transfer of ownership whereas a lease does not. In that regard, what might be termed a lease may be substantially equivalent to a sale if, for example, the transferee is bound to pay rent substantially equal to the vehicle's value and is to become its owner after all the "rent" is paid (notwithstanding that an additional payment is required at the end of the lease period). Such an installment contract would generally qualify as a sale.

Since contractual circumstances may vary widely, it is not possible to offer guidance that will cover every situation. As a general rule, however, we believe the principal criterion for determining whether a given arrangement is a purchase of an automobile and not merely a lease is whether the veteran and vendor are absolutely bound, at the outset, to a purchase and sale at some time. If the veteran retains the option of considering the payments as rent and is not obligated to purchase the vehicle at the end of the lease period, or if the dealer retains the right to take the car back even after the veteran meets all the payments due, then the agreement should be regarded as a lease rather than a purchase contract.

HELD:

The transfer of possession of a vehicle under a contract amounting to a lease does not qualify for the automobile allowance under 38 U.S.C. § 1902(a).

VETERANS ADMINISTRATION GENERAL COUNSEL
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