

Date: March 18, 1993

O.G.C. Precedent 4-93

From: Acting General Counsel (022)

Subject: Treatment of Alaskan Native Corporation
Dividend Distributions

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

A. Must the holdings of O.G.C. Prec. 12-89 concerning the countability of dividend distributions from Alaskan Native Corporations in income and net-worth determinations for improved-pension purposes be modified in light of amendments to the Alaskan Native Claims Settlement Act (ANCSA)?

B. Do the conclusions of O.G.C. Prec. 12-89 concerning the countability of dividend distributions from Alaskan Native Corporations in income and net-worth determinations for improved-pension purposes apply in the same manner to other VA income-related benefits?

COMMENTS:

1. The ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (1971), as amended, is codified in chapter 33 of title 43, United States Code. The relationship between other programs and benefits provided under the ANCSA is governed by 43 U.S.C. § 1626, which was added to the ANCSA by section 4 of Pub. L. No. 94-204, 89 Stat. 1145, 1147 (1976). Section 15 of the ANCSA Amendments of 1987, Pub. L. No. 100-241, § 15, 101 Stat. 1788, 1812 (1988), added the exclusion, now codified in 43 U.S.C. § 1626(c)(A), of the first \$2000 per individual per year of cash received from a Native Corporation (including cash dividends on stock received from a Native Corporation) from asset or resource determinations under need-based Federal or Federally-assisted programs.

2. In O.G.C. Prec. 12-89, we considered the countability of dividend distributions from Alaskan Native Corporations in income determinations for VA improved-pension purposes under 38 U.S.C. § 503(a)(6) (later renumbered § 1503(a)(6)). In paragraph 5 of that opinion, we concluded that Native Corporation dividend distributions representing distributions from the Alaskan Native Fund were compensation for relinquish-ment of land claims and therefore qualified under what is now section 1503(a)(6) for exclusion from income determinations for improved-pension purposes as profit realized from the disposition of property other than in the course of a business. However, in paragraph 7 of that opinion, we stated that taxable dividend distributions (those from revenues earned by Alaskan Native Corporations) by Native Corporations do not represent compensation for relinquishment of land claims and therefore cannot be excluded from income under what is now section 1503(a)(6). In paragraphs 10 through 14 of O.G.C. Prec. 12-89, we considered the effect of section 15 of Pub. L. No. 100-241 on the countability of dividend distributions from Alaskan Native Corporations in income and net-worth determinations for improved-pension purposes. We determined that section 15 does not authorize the exclusion of taxable dividend distributions from Alaskan Native Corporations from income for

improved-pension purposes, but does require exclusion, to the extent they did not exceed \$2000, of dividend distributions from Alaskan Native Corporations, whether taxable or not, from net-worth determinations for improved-pension purposes.

3. You attached to your opinion request a June 29, 1992, letter from the Chairman of the Board of Sealaska Corporation which mentioned "'1991 Amendments'" to the ANCSA. There have been no amendments, in 1991 or otherwise, to 43 U.S.C. § 1626, as amended by section 15 of Pub. L. No. 100-241, pertaining to the countability of dividend distributions from Alaskan Native Corporations for purposes of need-based Federal programs. Further, there have been no amendments to 38 U.S.C. § 1503(a)(6) which would change our conclusions regarding the status of Native Corporation dividends in income determinations for improved-pension purposes. We have learned informally from the staff of the House Committee on Natural Resources that the term "1991 Amendments" refers to the amendments to the ANCSA made by Pub. L. No. 100-241, which amended certain provisions of Pub. L. No. 92-203 restricting until 1991 alienation of stock in Native Corporations. See Pub. L. No. 92-203, § 7(h), 85 Stat. at 692; Pub. L. No. 100-241, §§ 5 and 8, 101 Stat. at 1792, 1797. Since the impact of Pub. L. No. 100-241 was fully addressed in O.G.C. Prec. 12-89, the conclusions stated in that opinion remain unchanged.

4. O.G.C. Prec. 12-89 concerned determinations for purposes of improved pension, a need-based benefit authorized by the Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, 92 Stat. 2497. Other income-related benefits administered by VA include section-306 pension, old-law pension, and parents' dependency and indemnity compensation (DIC). The holding of O.G.C. Prec. 12-89 concerning the countability in improved-pension determinations of Alaskan Native Corporation dividends was based on our interpretation of 38 U.S.C. § 1503(a)(6) and section 15 of Pub. L. No. 100-241. As to the former statute, in deciding whether the same result applies in the case of other VA income-related benefits, we must consider whether the same or a similar statutory provision applies to them.

5. In addition to establishing the improved-pension program, Pub. L. No. 95-588 provided, at section 306(a)(2), that persons already entitled to receive pension under 38 U.S.C. §§ 521, 541, or 542 who did not elect to receive improved pension would continue to receive what came to be called section-306 pension at the monthly rate being paid on December 31, 1978, "subject to all provisions of law applicable to basic eligibility for and payment of pension . . . as in effect on December 31, 1978." 92 Stat. at 2508. The payment of such pension remained subject to an annual-income limitation, and annual income was to be "determined in accordance with section 503 of title 38, United States Code, as in effect on December 31, 1978." Pub. L. No. 95-588, § 306(a)(2)(A), 92 Stat. at 2508.

6. Effective January 1, 1965, section 503 had been amended to include among its exceptions to the kinds of payments to be included in determining income "profit realized from the disposition of real or personal property other than in the course of a business." Pub. L. No. 88-664, §§ 1(b) and 11(a), 78 Stat. 1094, 1096 (1964). As of December 31, 1978, section 503 still excepted from annual-income computations profit realized from the disposition of property. See 38 U.S.C.A. § 503 note (West Supp. 1979). Therefore, under section 306(a)(2) of Pub. L. No. 95-588, an exclusion identical to that currently found at 38 U.S.C. § 1503(a)(6) applies to section-306 pension. See also 38 C.F.R. § 3.262(k)(5). Since a statutory provision identical to that interpreted in O.G.C. Prec. 12-89 with reference to improved pension applies to section-306 pension, the conclusions reached in that opinion regarding the exclusion from income determinations of Native Corporation dividends representing distributions from the Alaskan Native Fund and the absence of a title-38 exclusion for taxable dividend distributions from such corporations also apply to section-306 pension.

7. The situation with regard to so-called old-law pension is somewhat more complicated. The Veterans' Pension Act of 1959, Pub. L. No. 86-211, 73 Stat. 432, which authorized what came to be called section-306 pension, included at section 9(b), 73 Stat. at 436, a saving provision applicable to persons receiving pension under title 38 on June 30, 1960 (so-called old-law pension). That section provided, in pertinent part:

Nothing in this Act shall affect the eligibility of any person receiving pension under title 38, United States Code, on June 30, 1960, for pension under all applicable provisions of that title in

effect on that date for such period or periods thereafter with respect to which he can qualify under such provisions.

Section 306(b) of Pub. L. No. 95-588 repealed section 9 of Pub. L. No. 86-211, effective January 1, 1979, and substituted a new saving provision, section 306(b) (3), very similar to that applicable to section-306 pension. 92 Stat. at 2509. Under the section-306(b) (3) saving provision of Pub. L. No. 95-588, the receipt of old-law pension by those not electing to receive improved pension is "subject to all provisions of law applicable to basic eligibility for and payment of pension under section 9(b) of the Veterans' Pension Act of 1959, as in effect on December 31, 1978." 92 Stat. at 2509. An annual-income limitation applies to old-law pension, and, under section 306(b) (3), annual income is to be "determined in accordance with the applicable provisions of law, as in effect on December 31, 1978." Id. Under these successive saving provisions, the law in effect on December 31, 1978, applicable to old-law pension recipients, was the law in effect on June 30, 1960, subject to any applicable amendments which took effect between those dates.

8. Section 1(b) of Pub. L. No. 88-664, 78 Stat. at 1094, which added the exclusion from pension-income determinations of profit realized from the disposition of real or personal property other than in the course of a business, did not refer to old-law pension and apparently was not intended to apply to eligibility under that program. Cf. Pub. L. No. 88-664, § 10, 78 Stat. at 1096 (which specifically referred to old-law pension in amending rules applicable to that program); see also 38 C.F.R. § 3.262(k) (3) and (5) (reflecting VA's application of the section 1(b) amendment to section-306 pension but not to old-law pension). However, the statutory exclusion of profit realized from the disposition of real or personal property constituted an expansion of a prior administrative interpretation dating from the old-law-pension era under which VA counted as income resulting from the sale of property only so much of the net sale proceeds as exceeded the value of the property as of the date entitlement to pension arose. See Digested Opinion, 12-4-64 (8-25 Income); Op. G.C. 23-56 (5-2-56). This interpretation is reflected in 38 C.F.R. § 3.262(k) (3). Thus, under the old-law-pension statutes, as interpreted by VA, a pensioner could recover the value of property as of the date on which pension entitlement arose, without affecting income for pension purposes.

9. Consistent with VA's interpretation concerning the treatment of proceeds from the sale of property for old-law pension purposes, the General Counsel held in Digested Opinion (4-25-58) (8-25 Income) that a per capita distribution to tribal members

of compensation for relinquishment of land rights would be considered a conversion into cash of an interest in property and therefore would not be considered income for old-law pension purposes. Excluding from income for purposes of old-law pension Alaskan Native Corporation dividends that represent Alaskan Native Fund distributions, while including taxable Alaskan Native Corporation dividends, would be consistent with VA's interpretations of the old-law-pension statutes, since the former represent the conversion of a property interest into cash, while the latter represent revenue from business operations. In light of the foregoing, the conclusions reached in O.G.C. Prec. 12-89 regarding the status for income-determination purposes of Alaskan Native Fund distributions and Alaskan Native Corporation dividends also apply for purposes of old-law-pension eligibility.

10. Section 1315 of title 38, United States Code, governs parents' DIC, which is also a need-based benefit. In determining income under that section, "profit realized from the disposition of real or personal property other than in the course of a business" is excepted. 38 U.S.C. § 1315(f) (1) (K); see also 38 C.F.R. § 3.262(k) (5). Because this statutory exclusion from income determination for purposes of parents' DIC is identical to the statutory exclusion from income determination for improved-pension purposes interpreted in O.G.C. Prec. 12-89, the conclusions reached in that opinion regarding the status for income-determination purposes of Native Corporation dividends also apply to parents' DIC.

11. Turning to the effect of section 15 of Pub. L. No. 100-241, our holding in O.G.C. Prec. 12-89 that that provision did not authorize the exclusion from income for improved-pension purposes of taxable dividend distributions from Alaskan Native Corporations, but did exclude Native Corporation dividend distributions, whether taxable or not, from net-worth determinations for pension purposes, was based on the reference in section 15 to exclusion of certain payments from consideration as "an asset or resource." The opinion drew a distinction between computation of income on the one hand and determinations concerning assets or resources, i.e., net worth, on the other, finding that section 15 only applied to net-worth-type determinations. This exclusion applies to determinations of eligibility to "receive financial assistance or benefits, based on need, under any other Federal program or federally-assisted program." 43 U.S.C. § 1626(c). VA improved pension, section-306 pension, old-law pension, and parents' DIC are all need-based Federal programs. Therefore, section 15 of Pub. L. No. 100-241, as codified at 43 U.S.C. § 1626(c), is potentially applicable to each of them.

12. Sections 3(b) and 4 of Pub. L. No. 86-211, 73 Stat. at 434, 435, established a net-worth limitation applicable to section-306 pension. Those provisions remained in effect on December 31, 1978, see 38 U.S.C.A. §§ 522 and 543 notes (West Supp. 1979), and thus remained applicable to section-306 pension under section 306(a)(2) of Pub. L. No. 95-588. Section 15 of Pub. L. No. 100-241, which was enacted in 1988, applies by its terms to eligibility determinations "under any other Federal program or federally-assisted program" and exempts certain sums from asset and resource determinations under those programs. 101 Stat. at 1812 (emphasis added); see also S. Rep. No. 201, 100th Cong., 1st Sess. 39 (1987), reprinted in 1987 U.S.C.C.A.N. 3269, 3289-90 (describing the provision "as including all Federal or federally-assisted programs" (emphasis added)). The rationale for our conclusion in O.G.C. Prec. 12-89 that the statutory reference to assets and resources refers to net-worth-type determinations and not to income determinations was based on analysis of the terms and history of the ANCSA and thus is equally applicable in the case of section-306 pension.

13. The exclusion of certain payments from net-worth determinations by section 15 of Pub. L. No. 100-241 creates a conflict with section 306 of Pub. L. No. 95-588, which provides for determination of pension eligibility for certain individuals under laws in effect on December 31, 1978. When two such statutory provisions conflict and cannot be harmonized, the later-enacted provision is generally considered to control to the extent of the conflict. See United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1870); In re Glacier Bay, 944 F.2d 577, 581-82 (9th Cir. 1991); Tennessee Gas Pipeline Co. v. FERC, 626 F.2d 1020, 1022 (D.C. Cir. 1980). Applying this principle, we conclude that section 15 of Pub. L. No. 100-241 applies to net-worth determinations for section-306-pension purposes, section 306(a)(2) of Pub. L. No. 95-588 notwithstanding. Under section 15, Alaskan Native Corporation dividend distributions of up to \$2000, whether taxable or not, are excluded from net-worth determinations for purposes of section-306 pension.

14. As to old-law pension, when Pub. L. No. 86-211 replaced old-law pension with section-306 pension and protected the eligibility of certain persons qualifying for old-law pension under laws in effect on June 30, 1960, old-law pension was not subject to a net-worth limitation. Further, no subsequent legislation has added a net-worth requirement applicable to old-law pension. Therefore, section 15 of Pub. L. No. 100-241, which, as discussed above, applies only to net-worth-type determinations, has no applicability to old-law pension.

15. Parents' DIC is also not subject to a net-worth limitation. When Congress authorized parents' DIC in 1956, dependency on the part of the parent was a prerequisite for eligibility for that benefit. Pub. L. No. 84-881, § 201, 70 Stat. 857, 862 (1956). Under former 38 C.F.R. § 3.57 (1956) (forerunner to current § 3.250), as then in effect, the corpus of a parent's estate could be considered in determining dependency. However, Congress eliminated dependency as a prerequisite for parents' DIC in 1958. Pub. L. No. 85-857, §§ 1 and 14(114), 72 Stat. 1105, 1127, 1268, 1274 (1958). Further, while a parent's income has always been for consideration in determining DIC eligibility, a net-worth provision comparable to those applicable to the section-306 and improved-pension programs has never been included in the laws governing parents' DIC. Again, since section 15 of Pub. L. No. 100-241 applies only to net-worth determinations, as opposed to income determinations, it is not applicable to the parents' DIC program.

HELD:

A. There has been no amendment to the Alaskan Native Claims Settlement Act which changes the conclusions stated in O.G.C. Prec. 12-89 concerning the countability of dividend distributions from Alaskan Native Corporations in income and net-worth determinations for improved-pension purposes.

B. Dividends from Alaskan Native Corporations representing distributions from the Alaskan Native Fund are excluded from income determinations for the purposes of section-306 pension (pension payable under Pub. L. No. 86-211, as amended), old-law pension (pension payable under laws in effect on June 30, 1960), and parents' dependency and indemnity compensation; however, taxable dividend distributions derived from earnings of such corporations are not excluded from income determinations under those programs. Dividends from Alaskan Native Corporations, whether taxable or not, to the extent they do not exceed \$2000, are excluded from net-worth determinations for purposes of section-306 pension. Net worth is not a factor in determination of eligibility for old-law pension and parents' DIC.

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