DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

10,168

FILE: B-193608 DATE: May 14, 1979

MATTER OF: Colonel Major T. Martin, USAF, Retired

DIGEST: Where military records are corrected under 10 U.S.C. 1552 to show a portion of taxable retired pay as tax exempt disability retired pay, the claimant may be paid, under 10 U.S.C. 1552(c), the amounts of pay withheld for income taxes by the Air Force in years for which the Internal Revenue Service is barred from making tax refunds by the applicable statute of limitations. However, while 10 U.S.C. 1552(c) provides for certain types of payments pursuant to correction of military records, it does not authorize payment for tax refunds in derogation of the Internal Revenue Code statute of limitations beyond monies withheld for taxes by the military department concerned.

This action is in response to a letter from Mr. H. Dudley Payne, attorney for Colonel Major T. Martin, USAF, Retired, appealing the April 14, 1978 settlement of our Claims Division which disallowed Colonel Martin's claim for recovery of amounts ~~he~~ paid in ~~State and~~ ~~Federal~~ income taxes as a result of ~~his~~ military retired pay being incorrectly classified as nondisability during 1960 through 1973. His claim results from correction of his military record under 10 U.S.C. 1552 (1976) to show that he was retired for disability rather than for length of service. On the basis of the following, we sustain the settlement action.

On March 10, 1977, the Secretary of the Air Force, based on the recommendation of the Air Force Board for Correction of Military Records, corrected Colonel Martin's military records to show a disability retirement from the Air Force with a compensable rating of 60 percent retroactive to March 30, 1960. Because of the tax advantage of disability retirement, Colonel Martin received income tax refunds from the Internal Revenue Service for Federal taxes and from the State of Virginia, his residence for State taxes, retroactive through 1974. However, applicable Federal and State statutes of limitations on refunds barred additional tax refunds for the years 1960 through 1973.

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Since he is precluded from receiving further tax refunds, he claims the amounts he indicates he paid in excess taxes during the years 1960-1973 as "pecuniary benefits" payable pursuant to 10 U.S.C. 1552(c). The amounts claimed are $9,022.47 paid in Federal taxes, and $1,523.62 paid in State taxes, plus interest at the rate of 6 percent.

The Air Force has proposed to pay Colonel Martin $571.97, representing the amount the Air Force withheld for Federal income tax from his retired pay during the period 1960-1973. State taxes were not withheld by the Air Force.

The Air Force bases its computation of the amount due Colonel Martin on Ray v. United States, 197 Ct. Cl. 1, 453 F. 2d 754 (1972), and 52 Comp. Gen. 420 (1973), as the amount actually withheld for taxes. Our Claims Division agreed.

Colonel Martin argues that repayment of the withholding will not adequately compensate him for the excess income taxes he paid as a result of his retired pay being subject to taxation which placed him in a higher tax bracket. He was therefore taxed at a higher rate on his total income (including income other than retired pay) than he would have been had his retired pay been properly sheltered from taxes. His claim for refund of a portion of State and Federal taxes paid is based on the difference between what he paid at the higher tax rate resulting from his retired pay not receiving the disability shelter, and the amount he would have paid if more of his earnings had been tax exempt. He states that the Ray case supports his request.

Neither Ray nor our decision 52 Comp. Gen. 420 ruled on the issue of whether a tax refund claim barred by the Internal Revenue Code statute of limitations could be granted by applying 10 U.S.C. 1552(c).

The question in this case is, in essence, whether the exposure to increased tax liability when not adequately compensated by refund of the withholding is claimable under 10 U.S.C. 1552.

Under 10 U.S.C. 1552(a) the Secretary of a military department, acting through a civilian board, may correct a

military record to correct an error or remove an injustice. Upon such a correction under 10 U.S.C. 1552(c) the department concerned may pay "from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits * * *".

In Ray the court noted that the withholding refunded to the claimant approximated the money he would have been entitled to had the records been corrected initially. The court stated that the case was, "simply a matter of correcting the pay account between the serviceman and the United States." The claim was not one for a tax refund, but for "pecuniary benefits" wrongfully denied. Ray v. United States, 197 Ct. Cl. 1, 9.

The "pecuniary benefits" were limited to a refund of the withholding. Overall recalculation of income tax liability, which Colonel Martin requests in his claim, was not an issue before the court. Ray, supra, p. 10. The court expressly cautioned against unlimited application of 10 U.S.C. 1552 to provide relief from any perceived wrong flowing from correction of erroneous records. It did not intend to "intimate any roving delegation to us or anyone else, to remedy the indirect consequences of an erroneous record." Ray, supra, p. 9. The Ray decision focused only on the relationship of the withholding to the retired pay, not to other income sources. Ray, supra, p. 8. The court appears to suggest that the overall tax liability problem is an Internal Revenue Service tax matter, not germane to effectuating an administrative remedy under 10 U.S.C. 1552.

In agreeing to follow the holding in Ray, we stated in part that we:

> "* * * have no objection to following the rule in the Ray case to the effect that claims for amounts withheld for income tax purposes will be treated as 'pecuniary benefits' due the individual within the meaning of 10 U.S.C. 1552(c) rather than a claim for tax refund. However, claims for such amounts should be limited to amounts withheld for income taxes in years for which the Internal Revenue Service is barred from making refunds by the applicable statute of limitations. * * *" 52 Comp. Gen. 420, 424. (Emphasis added.)

To grant the claimant the tax relief he requests would be to extend the holdings of Ray and 52 Comp. Gen. 420 beyond their original intent, and beyond the scope of 10 U.S.C. 1552(c). Therefore, Colonel Martin is entitled only to the money withheld for Federal income taxes by the Air Force for the years 1960-1973. Since no money was withheld for State taxes, he has no valid claim for State tax overpayment from the Air Force.

The 6 percent interest claimed on the money recoverable also may not be allowed. No interest may be allowed in a settlement pursuant to 10 U.S.C. 1552(c) since the statute makes no provision for payment of interest. 52 Comp. Gen. 420, 424.

The settlement by the Claims Division is, therefore, sustained.

R.F. Keller

Deputy Comptroller General
of the United States