



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2001-1002

To: Henry L. Woodward, Esq.
General Counsel
Legal Aid Society of Roanoke Valley
416 Campbell Avenue, S.W.
Roanoke, VA 24016-3627

Date: February 2, 2001

Subject: **Current Income Taxes and Client Income Eligibility under 45 CFR Part 1611**

You have requested an opinion from this office regarding the Legal Services Corporation's Office of Legal Affairs External Opinion EX-2000-1015 (dated July 20, 2000). Specifically, you seek clarification of the conclusion expressed in that Opinion that current income taxes may not be routinely deducted from gross income under 45 CFR §1611.5 in determining client income eligibility.

As we noted in EX-2000-1015, and as you do not dispute, §1611.5(b)(1)(C) cannot be used to justify deducting withheld present taxes from gross income.¹ Where you appear to disagree with OLA, is as regards that portion of the Opinion that states that §1611.5(b)(1)(F) may also not serve as a justification for the routine deduction of current withheld income taxes from gross income. You argue that the change in the regulations made in 1983 only affected the definition of "fixed debt" and was not intended to affect the ability of a grantee to use §1611.5(b)(1)(F) as a basis for excluding withheld present taxes from a potential client's income in making eligibility determinations. We disagree.

As we noted in EX-2000-1015, the preamble to the final rule making the change to §1611.5(b)(1)(C), states:

[T]he general scheme of the regulation is to consider gross income and then use *special circumstances* as a basis for exceeding the gross income limits. *Taxes, in general, are not a special circumstance*

48 Fed. Reg. 54201, 54203 (November 30, 1983) (emphasis added). On its face, this language suggests that the change was not merely intended to affect the definition of

¹ Your letter expresses some confusion about why we addressed the issue of current taxes in the context of §1611.5(b)(1)(C) at all. We did so in direct response to a query about this issue, posed in this manner, from the recipient of the External Opinion, West Texas Legal Services.

“fixed debts” in subparagraph (C), but, rather, was intended to preclude the routine exclusion of current taxes from gross income. This interpretation is bolstered by the explanation of this change as contained in the preamble to the proposed rule which led to the amended final rule. In that preamble, LSC noted:

There have been two substantive changes made in these [§1611.5(b)] factors. The first is that only unpaid taxes from prior years may be considered under the proposed regulation. This change is consistent with previous General Counsel’s opinions confirming the general concept that gross income is the eligibility criterion. Prior year unpaid taxes are a special circumstance and are in addition to any current taxes.

48 Fed. Reg. 39086, 39087 (August 29, 1983). Again, the plain reading of the explanation is that LSC had come to consider current taxes a standard expense, not unlike other standard expenses such as rent, food, or utilities. These other standard expenses surely affect a client’s disposable income and, consequently, ability to afford legal assistance. Yet, these expenses are not subject to exclusion from gross income on a routine matter under subparagraph (F).

If LSC were to adopt your proposed reasoning, and interpret (F) to allow the routine exclusion of any expenses that have a non-negligible effect on a potential client’s available funds, we would essentially be eliminating the gross income standard in favor of a net income standard. This is not supportable under the clear language and intent of the regulation.² Rather, subparagraph (F) is intended, as we noted in EX-2000-1015, to provide a mechanism for recipients to consider other factors not otherwise listed, within the context of the basic regulatory scheme. That is, for other extraordinary or special expenses not otherwise listed, not for any expenses not otherwise listed. Thus, it might be that a current tax bill could properly be considered a “significant other factor” for income eligibility purposes, but such a determination would, necessarily, have to be made on a case-by-case basis and we would anticipate that it would be a relatively rare event.

You further argue that recipients must “routinely” consider the listed factors, and, therefore, should “routinely” consider other expenses, such as withheld taxes. Again, the distinction here is between standard and special expenses. While recipients are instructed by the regulation to “routinely” consider *special* expenses, they are neither required, nor permitted, to “routinely” consider *standard* expenses. As noted above, the regulatory change made in 1983 moved current taxes from being considered a special to a standard expense.

² Again, as noted both above and in EX-2000-1015, we do not disagree that the level of one’s disposable income has an effect on one’s ability to afford legal services and that many standard and non-discretionary expenses, such as taxes, affect one’s disposable income. However, the regulation is based on a gross income standard and such a standard simply does not allow for the deduction of standard expenses on a routine basis. We note also that your letter states that you “do not now propose to disregard gross income as the basic eligibility standard.”

Very truly yours,

Mattie C. Condray
Senior Assistant General Counsel
Office of Legal Affairs

Victor M. Fortuno
General Counsel
Office of Legal Affairs

mcondray@lsc.gov
(202) 336-8817