



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2000-1015

To: Vernon Lewis, Esq.
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West Texas Legal Services
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Date: July 20, 2000

Subject: **Income Eligibility and Deductibility of Current Income Taxes**

This responds to your recent inquiry regarding the application of LSC's regulations on income eligibility. Specifically, you have inquired about the deductibility of current (as opposed to past) income taxes from gross income when making determinations related to income eligibility for prospective clients whose income exceeds the national eligibility level.

As you know, LSC grant recipients may only provide representation to persons who are deemed eligible on the basis of income. 42 U.S.C. § 2996(f); 45 C.F.R. Part 1611. Income is defined in the regulations as "total cash receipts before taxes" 45 C.F.R. § 1611.2. Thus, income eligibility determinations are to be based on gross income. The regulations, however, provide some flexibility for recipients to take into account factors related to the prospective client's ability to afford legal services as a basis for exceeding the gross income limits in determining eligibility for those persons whose gross income is less than 150% of the national eligibility level. See 45 C.F.R. §§ 1611.4 and 1611.5. Whether current income taxes may be considered in making an eligibility determination is a question whose answer has changed over time.

Prior to 1983, the then prevailing regulation allowed for the deduction of current taxes from gross income in determining eligibility. However, in 1983, amendments to the regulations were adopted which changed this policy. With the 1983 amendments, the word "unpaid" was inserted before "taxes" in § 1611.5(b)(1)(C). In the preamble to the final rule, LSC explained that it was making this change, notwithstanding the objection of several commenters, "because the 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, and thus are distinguishable from such factors as medical expenses or expenses associated with age or infirmity. Unpaid taxes, however, are a special circumstance and an indicator of financial distress."

48 Fed. Reg. 54201, at 54203. Accordingly, the intent and effect of this amendment was to specifically change the prior policy which permitted recipients to consider current paid taxes as a fixed debt or obligation in making eligibility determinations.

Notwithstanding this explanation, you argue that the regulation as written is “inclusive rather than exclusive” and, presumably therefore, may be read to include current taxes as a fixed debt or obligation. See 45 C.F.R. § 1611.5(b)(1)(C). We disagree. We believe that the current language of that provision of the regulation (“Fixed debts and obligations, including unpaid Federal, state and local taxes from prior years”) is clear on its face. The term “including” in this clause is used to indicate that fixed debts other than just unpaid taxes should be considered. Such fixed debts might include mortgage payments and educational loans. However, to read the term “including” so broadly as to encompass current taxes as well as unpaid taxes would, in addition to ignoring the express intention of LSC in adopting the 1983 amendment, render the words “unpaid” and “from prior years” superfluous.

LSC also continues to believe that a debt of unpaid taxes is more likely than not to be an indicator of financial distress. While there may be some individuals who choose to not pay their taxes, with the prospect of interest, penalties and possible criminal prosecution, we do not believe that most people with delinquent tax bills have voluntarily incurred these debts. Rather, delinquent tax bills are likely to arise because an individual owes additional taxes over the amount already automatically deducted from his or her paycheck which that individual is not able to pay.

You also inquire about whether the “other significant factors” clause in §1611.5(b)(1)(F) could provide a basis for deducting taxes from gross income in making eligibility determinations. While this provision does not provide the basis for routinely deducting taxes from gross income, it could, in extraordinary circumstances, provide a recipient with the flexibility to serve a particular client who might otherwise be ineligible.

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 taxes affect one’s disposable income. However, to the extent that § 1611.5(b)(1)(F) provides a mechanism for recipients to consider other factors not otherwise listed, it still must be read in the context of the basic regulatory scheme. As noted above, the basic measure of eligibility is gross income, i.e., income before taxes. Use of § 1611.5(b)(1)(F) to routinely deduct taxes would be inconsistent with the basic eligibility measure of gross income.

However, this is not to say that there are never any circumstances in which a current tax bill could properly be considered a “significant other factor” for income eligibility purposes. For example, if a person was self-employed or a small business owner who incurred an extraordinary tax bill for one year through the application of a new IRS interpretation, such unusual circumstances might provide the basis for the exercise of the §1611.5(b)(1)(F) catchall clause. Such determinations would, necessarily,

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have to be made on a case-by-case basis and we would anticipate that they would be relatively rare events.

Very truly yours,

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