

This decision was affirmed by the Deputy General Counsel (Fiscal), Department of Defense, on December 21, 2001.

August 21, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 00073101

CLAIMS APPEALS BOARD DECISION

DIGEST

When an employee receives an overpayment of salary, waiver is not appropriate if he was aware of the overpayment. The amount of the employee's debt to the government is the gross amount of the payment, including amounts such as insurance premiums, retirement contributions, and federal and state income tax withholding which are withheld and submitted to the proper authorities on the employee's behalf. If the Defense Finance and Accounting Service (DFAS) cannot recoup the deducted amounts from those authorities, the employee must repay those amounts to DFAS unless the entire debt is waived.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate No. 00060106, June 21, 2000, which denied the waiver request of a civilian employee who was overpaid when he received an extra paycheck from one agency after he transferred to another agency.

Background

The employee transferred from the Department of the Army to a Veterans Affairs facility effective December 4, 1999. The Army erroneously paid him a gross amount of \$2,096 for an additional pay period (the pay period ending December 18, 1999). Of that amount, he received \$1,228.87 by direct deposit to his bank account. The balance was made up of deductions made on the member's behalf for Medicare, health insurance, Social Security, retirement, Thrift Savings, and federal and state income tax withholding. The employee returned the \$1,228.87 which had been deposited in his bank account, and the Defense Finance and Accounting Service (DFAS) was able to retrieve the amounts deducted for Medicare, health insurance, Social Security, retirement, and Thrift Savings--deductions totaling \$419.77. DFAS was unable to retrieve the \$447.36 deducted for federal and state income tax withholding. The employee requested waiver of the entire debt. His request was denied on the grounds that he was aware of the overpayment when he received it. The

employee questions his liability to repay any amount beyond \$1,228.87, the net amount deposited in his bank account. He asks for the regulatory basis for the collection of the gross rather than the net amount of the overpayment.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive repayment of erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. Waiver is not proper if the employee was aware that he had received an overpayment. *See Amadeo Martinez, Jr.*, B-261628, June 13, 1996.

The Comptroller General consistently held that the amount of an employee's debt is the gross amount of the payment rather than the net amount deposited to his bank account. *See Martinez*, B-261628, *supra*, and the cases cited therein. In *Martinez*, the Comptroller General pointed out that the amounts withheld for taxes, insurance, etc. are withheld and forwarded to the appropriate agencies for the benefit of the employee. In the case of income tax withholding, *e.g.*, the amounts withheld are forwarded to the Internal Revenue Service (IRS) and the appropriate state agency so that the employee will be able to pay his federal and state income tax. If the amounts withheld exceed the employee's tax liability, the employee can elect to receive a refund of the excess.

The Comptroller General has also consistently held that the application of the tax laws to an employee's income is a matter solely within the jurisdiction of the taxing authority⁽¹⁾ and that an employee's tax liability on an overpayment does not permit partial waiver of an amount not otherwise appropriate for waiver. *See Fort Polk Employees*, B-261699, Oct. 25, 1996, and the cases cited therein. In *Fort Polk*, waivers of the tax withholdings were denied even though the overpayments had occurred more than three years earlier, and the employees would not be able to file amended returns and obtain refunds. In the case before us, the debt arose late in 1999. The employee repaid the net amount of the overpayment in 2000 and received an amended W-2 form from DFAS. It appears that he filed an amended return for 1999. To the extent that the amount withheld was refunded to the employee by the IRS, waiver would result in a windfall to the employee.⁽²⁾ Whether or not the employee was able to recover the withheld amount, waiver is not appropriate. *Id.*

In the case before us, waiver was properly denied. Although the erroneous payment was the result of administrative error, waiver was not appropriate because the employee was aware that he had received an overpayment. *See Sandra L. Geer*, B-243686, July 2, 1991. The employee properly returned the net amount he had received directly and requested that DFAS attempt to recoup the amounts withheld on his behalf. DFAS indicates that it was unable to recoup the amounts withheld for federal and state income tax. The employee remains liable for those amounts. *See Fort Polk Employees*, B-261699, *supra*, and *Martinez*, B-261628, *supra*.

The agency which carries out a statute is generally responsible for interpreting the statute and issuing regulations for the administration of the statute, and deference is generally given to that agency's interpretation. Until December 1996, the authority to waive repayment of erroneous payments of pay and allowances made to civilian employees rested with the Comptroller General. For DoD employees, waiver authority now rests with this Office. The Comptroller General based waiver decisions on his interpretation of the waiver statute (for civilian employees, 5 U.S.C. § 5584) as implemented in 4 C.F.R. Parts 91 and 92 and his prior waiver decisions. This Office bases decisions on the same regulations and the Comptroller General's decisions.⁽³⁾ We are aware of no IRS regulation dealing with waiver. Since the IRS does not administer 5 U.S.C. § 5584, it is very unlikely that such a regulation exists.

Conclusion

We affirm the settlement.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. For federal income tax, this is the IRS. Under 26 U.S.C. § 7801, title 26 (which sets forth the tax code) is to be administered and enforced by the Secretary of the Treasury and his employees.
2. The employee mentions paying \$70 and \$12.93 for filing amended 1999 tax returns. It is not clear whether these are amounts were charged by a tax preparer and whether the employee is claiming reimbursement for them. If they are fees charged by a tax preparer, reimbursement is not proper in the absence of a specific statute providing for reimbursement, and we are aware of no such statute.
3. Pending the issuance of DOHA waiver regulations, this Office has indicated that we follow the practices and procedures of the Comptroller General. *See* 62 Fed. Reg. 5387-04 (1997).