

**KEYWORDS:** waiver of indebtedness; gross amount

**DIGEST:** An employee is liable for the gross amount of the debt, minus any deducted amounts which the Defense Finance and Accounting Service is able to recover on her behalf.

**CASENO:** 06022701

**DATE:** 3/21/2006

March 21, 2006

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In Re:

[Redacted]

Claimant

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Claims Case No. 06022701

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

An employee is liable for the gross amount of the debt, minus any deducted amounts which the Defense Finance and Accounting Service is able to recover on her behalf.

## DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 05071201, dated July 19, 2005, in which DOHA waived \$4,186.00 of the \$13,825.04 that the government erroneously overpaid to the employee.

**Background**The employee was deployed to Iraq during the periods August 30, 2003, through September 26, 2003, and October 13, 2003, through December 5, 2003. For the pay period ending November 1, 2003, she received a retroactive payment in the amount of \$6,697.60 for danger pay compensating her for the periods August 30, 2003, through September 26, 2003, and October 13, 2003, through October 18, 2003. However, it was later determined that the employee was only entitled to \$3,109.60. As a result, she was overpaid \$3,588.00.

The employee was correctly paid danger pay during the period October 19, 2003, through November 29, 2003. On December 5, 2003, the employee left Iraq. She was entitled to receive danger pay in the amount of \$598.00 for the period November 30, 2003, through December 5, 2003. However, due to an administrative error, she received \$1,196.00, causing an overpayment in the amount of \$598.00. In addition, the employee continued to receive danger pay until February 7, 2004, in the total amount of \$4,835.20. <sup>(1)</sup> Further, on May 29, 2004, she erroneously received a retroactive payment for danger pay in the amount of \$478.40. Therefore, the employee was overpaid danger pay in the total amount of \$9,499.60 (\$3,588.00 + 598.00 + 4,835.20 + 478.40).

In addition, the employee was overpaid overtime pay and holiday premium pay which she was not entitled to receive because she was at the top level of her pay grade. For the pay period ending February 21, 2004, she erroneously was paid overtime in the amount of \$3,368.80, and holiday premium pay in the amount of \$956.64. Therefore, she was overpaid \$4,325.44.

In the Settlement Certificate, this Office waived \$4,186.00 of the employee's debt. We denied waiver of \$9,639.04, the portion of the debt resulting from the employee's receipt of danger pay after she returned to the United States and overtime and premium pay. On appeal, the employee limits her waiver request to \$3,132.89, which she states represents the portion of the debt withheld for federal and state income tax. She states that she is unable to recoup this amount because of her salary level which subjects her to a "2.5% exclusion rule" applied to itemizing deductions on her tax return.

### Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous overpayments 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, misrepresentation, fault or lack of good faith on the part of the employee. If an employee knows or should know that she is receiving payments in excess of her entitlements, she does not acquire title to the

payments and should be prepared to return them. *See* DOHA Claims Case No. 03072812 (July 30, 2003).

Waiver was properly denied in the amount of \$9,639.04 because, as the employee states in her appeal, she was aware of the overpayments. However, she also states that as an issue of fairness, she should not have to pay \$3,132.89 out of her own pocket. She attaches an e-mail from an official of DFAS explaining that she may not recoup this amount characterized as her tax withholdings because she is subject to a 2.5% exclusion rule. First, the Comptroller General and our Office have consistently held that application of the tax laws to an employee's income is a matter solely within the jurisdiction of the taxing authority. *See* DOHA Claims Case No. 00073101 (August 21, 2000), *aff'd* by the Deputy General Counsel (Fiscal) December 21, 2001, B-261699, Dec. 2, 1996, and B-261699, Oct. 25, 1996. In addition, we have always maintained that an employee's debt equals the gross amount minus any deductions that DFAS is able to recover on the employee's behalf. *See* DOHA Claims Case No. 00081602 (November 22, 2000) and DOHA Claims Case No. 00073101, *supra*. However, the employee can file an amended tax return for refund of the federal tax withheld if the debt is repaid within three years of the overpayment. The employee should contact the Internal Revenue Service for information concerning adjusting her tax liability as a result of repaying her debt.

### **Conclusion**

We affirm the Settlement Certificate.

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/s/

Michael D. Hipple

Chairman, Claims Appeals Board

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/s/

Jean E. Smallin

Member, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
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Catherine M. Engstrom

Member, Claims Appeals Board

1. The employee was paid danger pay as follows: \$1,196.00 for the pay period ending December 27, 2003; \$1,196.00 for the pay period ending January 10, 2004; \$1,221.60 for the pay period ending January 24, 2004; and \$1,221.60 for the pay period ending February 7, 2004.