

DATE: October 28, 2013

In Re:)

[REDACTED])

) Claims Case No. 2012-WV-101905.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, waiver is not proper when a waiver applicant is aware or should be aware that she was overpaid. Partial waiver of the debt is not an appropriate remedy to reimburse a waiver applicant when the applicant is no longer able to recover tax withholdings from the taxing authority on amounts erroneously overpaid even though she is liable to refund the gross amount (including withholding taxes paid) of the overpayment.

DECISION

The former spouse of a retired member of the U.S. Navy requests reconsideration of the July 22, 2013, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-101905. In that decision, DOHA denied the former spouse's application for a waiver of an indebtedness which resulted when she was erroneously issued a retroactive refund for Survivor Benefit Plan (SBP) premiums deducted from her portion of the member's retired pay.

Background

On September 9, 1999, the former spouse and the member divorced. Under the terms of the Final Judgment of Divorce, the former spouse became entitled to receive 50% of the member's disposable retired pay. In addition, the member agreed to continue to provide SBP coverage for his former spouse. As a result, within one year of their divorce, the member's SBP beneficiary should have changed from spouse to former spouse. However, her status was not changed, and although SBP premiums were deducted from his retired pay, the Defense Finance and Accounting Service (DFAS) later determined that the member did not have a valid SBP

beneficiary. As a result of the former spouse's status not being changed to former spouse, her portion of the member's retired pay was miscalculated from December 1, 1999, through November 30, 2001, resulting in an overpayment of \$2,189.76. This amount was waived by the DOHA adjudicator in her decision, and is no longer at issue in this case. The former spouse was paid correctly from December 1, 2001, through July 31, 2009.

In addition, DFAS was not made aware of the member's divorce nor of the member's election of his former spouse as his SBP beneficiary until February 27, 2009. Since DFAS determined that the member's pay account did not reflect a valid SBP beneficiary, DFAS also determined that SBP premiums which had been deducted from the former spouse's portion of the retired pay were erroneous. As a result, on September 1, 2009, the former spouse received a retroactive payment in the amount of \$10,899.70, which represented a refund of the premiums her former spouse had paid for the period February 27, 2003, through July 31, 2009. The member and his former spouse subsequently petitioned the Board of Correction of Naval Records (BCNR) to change his SBP election from spouse to former spouse. On December 1, 1999, the BCNR granted their petition retroactive to December 1, 1999. As a result of this action, DFAS determined that the former spouse was in debt for the retroactive refund payment she received in the amount of \$10,899.70.

Finally, the former spouse's portion of the member's retired pay was miscalculated during the period August 1, 2009, through May 31, 2010, causing an overpayment in the amount of \$1,579.80. However, this amount was also waived by the DOHA adjudicator, and is no longer at issue in this case.

The DOHA adjudicator determined that it would not be against equity and good conscience to collect the retroactive refund payment in the amount of \$10,899.70 from the former spouse. In making her determination, the adjudicator found that since the member stated it was his intent for his former spouse to be his SBP beneficiary and they both petitioned the BCNR to change his SBP election so she could be listed as his beneficiary, the former spouse should have been aware that she was not entitled to the retroactive payment. In this regard, prior to receiving the retroactive payments from DFAS, the former spouse wrote a letter to DFAS dated June 29, 2009. In the letter, she requested that she be the beneficiary for the member retroactive to the date of their property settlement. In addition, both the member and the former spouse sent a letter to DFAS dated October 14, 2009, stating that the retroactive refund payment was secured in a bank account to remain untouched until their case was heard by the BCNR. Under the circumstances, the adjudicator found that the former spouse was aware of the possibility that repayment of the retroactive refund would be required, especially since she had petitioned the BCNR to be named the member's former spouse SBP beneficiary.

In her request for reconsideration, the former spouse agrees that she should pay back the \$10,899.70 sent to her by DFAS when they erroneously closed the SBP annuity set up for her by the member. However, she states that when the refund was dispersed to her in 2009, she included it as income on her joint tax return with her current husband. Therefore, she states that she already paid taxes on this money. She requests that the taxes she has paid be deducted from the \$10,899.70 so that she will not be double taxed if the member predeceases her and she is required to pay taxes on the SBP annuity. The former spouse also requests information on where

and how she should return the money to DFAS. She states that DFAS advised her that the money would be collected in 10 monthly payments from her monthly allotment of the member's retired pay. However, this did not occur. She requests that she be allowed to pay back the money in 10 monthly payments made directly to DFAS.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances to or on behalf of service members if collection would be against equity and good conscience, not in the best interests of the United States, and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the waiver applicant. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government, even if the government fails to act after such notification. *See* Department of Defense Instruction 1340.23 ¶ E4.1.4.

In this case, the waiver applicant is a former spouse of a service member who received an erroneous payment from the member's retired pay account. The former spouse acknowledges that she should repay the \$10,899.70 to DFAS. However, she requests that the taxes she already paid be deducted from the \$10,899.70. We have always maintained that the applicant's debt equals the gross amount minus any deductions DFAS is able to recover on the applicant's behalf. Further, application of the tax laws to an applicant's income is a matter solely within the jurisdiction of the taxing authority, and an applicant's tax liability on an overpayment does not permit partial waiver of an amount otherwise appropriate for waiver. *See* DOHA Claims Case No. 09031701 (March 26, 2009); and DOHA Claims Case No. 08091801 (September 23, 2008).

Finally, the former spouse should direct any questions she has concerning repayment of the debt to DFAS, U.S. Military Retirement Pay. *See* DFAS's website at <http://www.dfas.mil/retiredmilitary.html>.

Conclusion

The former spouse's request for relief is denied, and we affirm the July 22, 2013, decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board