

DATE: March 31, 2004

In Re:

[Redacted]

Claimant

Claims Case No. 03121101R

CLAIMS APPEALS BOARD DECISION

DIGEST

Although a military member had retired and was no longer receiving active duty pay, the Defense Finance and Accounting Service erroneously continued sending income tax withholding amounts to the Internal Revenue Service (IRS) on the member's behalf. Waiver of the debt is not appropriate, since the member is able to request refund of the excess withholding from the IRS and restitution therefore is not against equity and good conscience.

DECISION

The Deputy General Counsel (Fiscal) remanded to the Defense Office of Hearings and Appeals (DOHA) the waiver request of a retired military member whose debt arose when the Defense Finance and Accounting Service (DFAS) continued to send amounts of income tax withholding to the Internal Revenue Service (IRS) in his name, as if he were still on active duty, after he ceased to earn active duty pay. In DOHA Claims Case No. 03121101 (December 18, 2003), this Office decided that the resulting debt could not be considered for waiver because it did not represent military pay and allowances. On February 20, 2004, the Deputy General Counsel (Fiscal) remanded the case to us for consideration under the waiver statute. We have now considered the member's debt under the waiver statute, and we deny waiver.

Background

The member retired from active duty on August 31, 2002. As of that date, DFAS had paid \$3,352.74 to the IRS in tax withholding in his name. As of December 31 of the same year, the amount paid to the IRS for the member had increased

to \$7,809.70, even though the member had earned no more active duty pay that year. The record shows that the member received an active duty pay W-2 from DFAS at the close of Tax Year 2002 showing total wages at \$43,273.12 and total withholding at \$7,809.70, but while this was corrected later in 2003 to reflect total wages of only \$32,692.72, the withholding remained the same. DFAS calculated the member's debt arising from the erroneous tax withholding as \$4,123.14.⁽¹⁾ The member states that he was unaware of the continuing submission of tax withholding to the IRS on his behalf. The member points out serious, continuing errors by DFAS in the calculation of his pay and allowances during 2002 and requests waiver of his debt based at least in part on those errors. The member broadly challenges the accuracy of all government documentation, including the original and revised W-2s, and disputes that the additional withholding was sent to the IRS. The member does not offer an alternative accounting or documentation to support an alternative.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of military pay and allowances if there is no indication of fraud, fault, misrepresentation, or lack of good faith and if collection would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). Tax withholding amounts are paid to the IRS on a member's behalf, and the member can request refund from the IRS of any such amounts in excess of his tax liability. The Comptroller General consistently held that a member's tax liability is a matter between the member and the IRS, and we have followed the same principle. *See* DOHA Claims Case No. 00073101 (August 21, 2000), *aff'd* by the Deputy General Counsel (Fiscal) December 21, 2001; and B-261699, Oct. 25, 1996.⁽²⁾ To the extent that the amounts withheld are refunded to the member by the IRS, waiver would result in a windfall to the member. *See* DOHA Claims Case No. 00073101, *supra*. If a member knows or should know of erroneous payments made to or for him, he does not acquire title to the payments and should be prepared to return them. *See* DOHA Claims Case No. 01070905 (December 31, 2001).

Waiver decisions involving erroneous income tax withholding, including DOHA Claims Case No. 00073101, *supra*, and B-261699, *supra*, generally involve an erroneous overpayment of pay and allowances to a member or employee, from which a portion is withheld for taxes and sent to the IRS on his behalf. In those cases, the waiver statute is applied to the gross amount of the erroneous payment. Waiver of the gross amount is denied if the member or employee does not meet the waiver standards, *e.g.*, if he was aware that the payment he received was erroneous. In that case, he is indebted for both the amount paid to him and any amount paid to the tax authorities on his behalf.

The case before us is factually different from the cases cited above in that no payment was made directly to the member. We are not aware of any case with similar facts. Here, DFAS made payments of unearned funds to the IRS on the member's behalf without any corresponding payments to the member. We agree with the member that he would have had no reason to expect that DFAS would continue to send tax withholding to the IRS on his behalf after he retired. However, with his waiver request, the member submitted documentation that on November 28, 2002, he visited the "myPay" website and printed leave and earnings statements for September, October, and November, 2002. There is no indication in the record as to why he accessed his pay records at that time. Once he accessed them, however, he knew or should have known that the \$100 in additional withholding that he had requested to be sent to the IRS on his behalf while he was still on active duty was still being sent each month. While the largest amount of erroneous withholding did not occur until December 2002, the member was on notice as of November 28, 2002, that additional amounts were still being sent to the IRS in his name. Moreover, when the member received the first W-2 in late 2002 or early 2003, before DFAS had discovered the error, it indicated tax withholding of more than twice the amount withheld by the date of his retirement. At this point, if not before, he should have questioned this excessive credit in his favor and his entitlement to retain the resulting refund from the IRS. *See* DOHA Claims Case No. 99070516 (August 18, 1999), *aff'd* by the Deputy General Counsel (Fiscal), February 9, 2001. While the member challenges the accuracy of the government documentation, unsupported assertions are no substitute for evidence. *See* DOHA Claims Case No. 04031102 (March 22, 2004). It is well-established that we accept the agency's presentation of the facts in the absence of clear and convincing contrary evidence. *See* DOHA Claims Case No. 97011407 (June 6, 1997) and decisions cited therein.

We appreciate the member's frustration with DFAS's accounting inaccuracies and recognize that multiple errors occurred in the member's pay account. Nevertheless, it is a long-standing principle that administrative error by itself does not provide a basis for relief under the waiver statutes. *See* B-193550, Feb. 15, 1979. Moreover, even apart from

the particular facts in the member's case, the Board believes that it is not against equity and good conscience to require a member, like the member here, to repay DFAS or a similar paying office when the paying office simply forwards erroneous withholding payments to the tax authorities without a corresponding payment to the member. The waiver statutes were designed to relieve members and employees of the duty to make restitution of a debt when collection would be against equity and good conscience and not in the interest of the United States. The Board does not view collection of debts like this member's as inequitable. If the paying office cannot recover this erroneous payment from the tax authority, the member receives a W-2 with all withholding (correct and erroneous) included, and the member then files his return that includes all of the withholding. The member then recovers the amount that was erroneously forwarded to the tax authority and returns that amount to the paying office. When the member files his return, he has the ability to request refund of the excess withholding or use it to pay the tax on other income. If waiver were granted and the member were able to retain the refund or use the excess withholding to pay taxes on other income, it would result in a windfall to the member, who was not otherwise harmed financially. *See* DOHA Claims Case No. 00073101, *supra*.

Conclusion

Waiver is denied.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

1. Our Office previously waived an overpayment of \$355.18, which arose from miscalculation of the member's final separation payment. That amount is not at issue here.
2. The cited cases involve civilian employees and therefore are governed by the civilian waiver statute, 5 U.S.C. § 5584. The waiver standards are the same for the military waiver statute 10 U.S.C. §2774. We note that both decisions state that the ability of the employee to obtain a refund from tax authorities is not an appropriate factor to consider in granting waiver.