



13562 *PLM-II*

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

April 22, 1980

In reply refer to:
B-193608

H. Dudley Payne, Esq.
2701 North Pershing Drive
Arlington, Virginia 22201

Dear Mr. Payne:

We refer further to your correspondence, with enclosure, concerning your request on behalf of your client, Colonel Major T. Martin, USAF, ~~Retired~~, that we reconsider our decision in his case, B-193608, May 14, 1979, 58 Comp. Gen. 528. In that decision we held, in part, that where Colonel Martin's military records were corrected under 10 U.S.C. 1552 to show that a portion of his retired pay was tax exempt disability retired pay, he was entitled to payment of the money withheld for income taxes by the Air Force for the period that the applicable statute of limitations barred the Internal Revenue Service and the State of Virginia from making tax refunds. However, we also held therein that while 10 U.S.C. 1552(c), provides for certain types of payments incident to the correction of military records, it does not authorize payment for tax refunds beyond monies withheld for taxes by the military departments concerned. In addition, we disallowed his claim for interest on the basis that the pertinent statute, 10 U.S.C. 1552(c), does not provide for the payment of interest.

Our determination to disallow Colonel Martin's claim for payment in addition to the refund of money withheld for Federal income taxes by the Air Force was on the basis that to allow such tax relief would be to go beyond the intent of the holdings of Ray v. United States, 197 Ct. Cl. 1, 453 F. 2d 754 (1972), and 52 Comp. Gen. 420 (1973), and beyond the scope of 10 U.S.C. 1552(c).

(G. O. 1972)

You cite as authority to allow payment of Colonel Martin's claim the opinion of the Attorney General of

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the United States at 41 Op. A.G. 203, December 29, 1954, wherein the Attorney General considered the effect of the correction of a veteran's military record under what is now 10 U.S.C. 1552, on entitlement to adjusted service benefits. As that opinion did not involve the question as to the extent that tax benefits resulting from a correction of military records to show a disability retirement are payable under 10 U.S.C. 1552(c), it does not provide a basis for the reconsideration of Colonel Martin's claim.

In addition, you have cited Guyla S. Prince v. United States, 127 Ct. Cl. 612 (1954) and Strickland v. United States, 540 F. 2d 1196 (4th Cir. 1976), for the proposition that disability pay received by a retired member of the armed services should be exempt from taxation.

However, neither case is dispositive of the issue before us. In our decision of May 14, 1979, we did not dispute the fact that disability retirement pay is exempt from taxation. The issue, as stated above, is whether 10 U.S.C. 1552(c) authorizes payment for tax benefits beyond the money withheld by the military department concerned. This issue was not before the respective court in either Prince or Strickland so that neither decision provides a basis for allowing the claim for additional payment under 10 U.S.C. 1552(c). We note that in Prince the claim for a tax refund from the Internal Revenue Service was made on a timely basis. See Ray, supra, at 4.

We call to your attention that in Benjamin Hill Clark v. United States, 202 Ct. Cl. 1126 (1973), the court considered the claim of a former member of the United States Navy for the recovery of excess income taxes he paid for calendar years 1966 and 1967. The plaintiff had entered retired status in January 1966 and in October 1971 he applied to the Board for Correction of Naval Records to have his

records corrected. The excess payment of taxes resulted from the correction of his records in January 1972 to show that his retirement was for service-connected disability. In February 1972 he filed amended income tax returns for calendar years 1966 and 1967, which claims were disallowed.

The Court of Claims held in Clark that on the basis of its decision in Ray, the retired member was entitled to recover the sum of \$29.47, the amount withheld by the Department of the Navy for taxes in 1966 and 1967, but that all other claims were barred by the limitations found in the Internal Revenue Code at 26 U.S.C. 6511(a) and 7422(a).

Concerning the payment of interest, you have cited Harlton v. Secretary of the United States Air Force (U.S.D.C., N.D. Okla.) 69-C-152, May 16, 1972, and Prince, supra, as authority therefor. Both cases cited involved the correction of military records under 10 U.S.C. 1552 to show the member retired for disability rather than for length of service. While the court in each allowed plaintiff to recover interest, neither award of interest was made specifically pursuant to 10 U.S.C. 1552.

As stated above, Prince involved a timely request for a tax refund and we note that 28 U.S.C. 2411(a) provides in pertinent part that in any judgment of any court for overpayment of internal-revenue tax, interest shall be allowed. While it is not clear upon what authority the court in Harlton, supra, awarded interest, we note that 28 U.S.C. 2411(b) provides authority for the payment of interest on final judgments rendered against the United States under section 1346 of title 28.

It is a well settled rule of law that interest may be assessed against the Government only under an express statutory or contractual authorization, 45 Comp. Gen. 169 (1965); Fitzgerald v. Staats, 578 F. 2d 435 (D.C. Cir. 1978). As stated in our decision of May 14, 1979, 10 U.S.C. 1552 makes no provision for the payment of interest.

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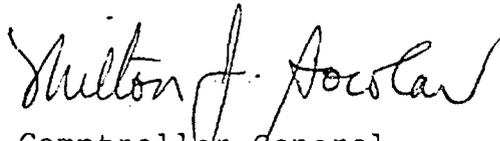
We call to your attention that in Economy Plumbing & Heating Co., Inc., v. the United States, 200 Ct. Cl. 31, 470 F. 2d 585 (1972), the Court of Claims stated at page 42 as follows:

"In the Ray case, the plaintiff waived any claim for interest. This is understandable because there is no authority for awarding him interest on a recovery of retirement payments from the Air Force."

Accordingly, upon review, we find no basis that would warrant a change in our holding in the May 14, 1979 decision.

The check from the Air Force Accounting and Finance Center in the amount of \$571.97 which you enclosed with your correspondence of July 25, 1979, is enclosed.

Sincerely yours,



Acting Comptroller General
of the United States

Enclosure