Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

May 30, 2003

GSBCA 15834-RELO

In the Matter of RICHARD C. ARMSTRONG

Richard C. Armstrong, Diamondhead, MS, Claimant.

Robert D. Brown, Deputy Director, Finance, United States Army Corps of Engineers Finance Center, Millington, TN, appearing for Department of the Army.

HYATT, Board Judge.

When determining the amount of a relocation income tax (RIT) allowance due to an employee, agencies may take into account only earned income, which is limited in the Federal Travel Regulation (FTR) to the amount of gross compensation reported on Internal Revenue Service (IRS) Form W-2, and, if applicable, the net earnings (or loss) from self-employment income as shown on Schedule SE of IRS Form 1040. Civil service retirement benefits, which were reported on IRS Form 1099 at the time the regulation was drafted, may not be included in the calculation.

Background

Claimant, Richard C. Armstrong, is a retired civilian employee of the United States Army Corps of Engineers. In November 1997, Mr. Armstrong was transferred, in the interest of the Government, from Washington, D.C., to Dallas, Texas. He was afforded the usual benefits associated with a permanent change of station move, including allowances designed to mitigate the tax consequences attributable to the payment of relocation benefits. The issue he presents concerns the proper determination of these allowances.

The statutory and regulatory framework applicable to the computation and payment of allowances to offset increased taxes incurred by relocated employees as a result of the reimbursement of certain moving expenses is described in detail in Robert J. Dusek, GSBCA 14325-RELO, 98-1 BCA ¶ 29,440 (1997); accord Robert Q. Allen, GSBCA 15486-RELO, 01-2 BCA ¶ 31,613; W. Don Wynegar, GSBCA 15602-RELO, 01-2 BCA ¶ 31,563; William A. Lewis, GSBCA 14367-RELO, 98-1 BCA ¶ 29,532. In essence, when an employee is transferred, in the interest of the Government, from one permanent duty station to another,

the agency reimburses the employee for many of the expenses incurred incident to the transfer. The amounts reimbursed are reported to the IRS as income to the employee and must be included in the gross income reported by the employee when filing a tax return. To the extent reimbursed expenses are not deductible, the employee incurs an increased tax liability. Dusek, 98-1 BCA at 146,172-73. By law, agencies are to reimburse transferred employees for "substantially all" taxes incurred as a result of reimbursed moving expenses. 5 U.S.C. § 5724b (2000). This statutory provision is implemented in the FTR, 41 CFR pt. 302-11 (1997),[1] and, for civilian employees of the Department of Defense, further explained and supplemented in chapter 16 of the Joint Travel Regulations (JTR).

The additional amounts paid for this purpose, collectively denominated a RIT allowance, are calculated and paid in two stages. Peggy A. Byers, GSBCA 15307-RELO, 01-1 BCA ¶ 31,336. First, the agency calculates and pays a withholding tax allowance (WTA), which is an estimate of the of the probable tax impact of the benefits; the second step is the final calculation of the RIT allowance. The formula for calculating the WTA is based upon a twenty-eight percent withholding rate. The WTA is paid in the year the expenses are reimbursed; the RIT allowance, which is intended to reimburse the employee for any added taxes not covered by the WTA, is determined the following year based upon the combined marginal tax rates for years one and two, the amount of taxable reimbursements made for moving expenses, and the amount of WTA paid in year one. The second year amount, based on financial information specific to the affected employee, more closely identifies the appropriate RIT allowance. That amount may be either positive or negative, depending on the circumstances of the particular employee. See Byers; Catherine S. Cunningham, GSBCA 15035-RELO, 00-1 BCA ¶ 30,807; Dusek, 98-1 BCA at 146,172.

Claimant was granted a one-year extension for the sale of his residence in the Washington, D.C. area, making him eligible for reimbursement of real estate transaction expenses until October 2000. He sold the house and went to settlement on September 22, 2000, and submitted an expense voucher on September 27, 2000. The agency approved approximately $15,000 in allowable expenses related to the sale of the residence. Mr. Armstrong's WTA was calculated to be $5877.67, using the twenty-eight percent rate established under the FTR, and paid in the year 2000. Meanwhile, Mr. Armstrong had retired in January 1999 and was receiving civil service retirement annuity benefits.

In 2002, the Corps calculated the actual RIT allowance benefit to which claimant was entitled, using information submitted by him for that purpose. This calculation was performed using only income reported on IRS Form W-2, and without including income reported on IRS Form 1099. Under this approach, using the formulas and tables set forth in the FTR, the Corps determined that the RIT allowance should be based on a fifteen percent rate. The Corps then notified claimant that his WTA had been overpaid in the amount of $2281.41 and requested that he refund that amount to the agency.

Discussion

[1] The relocation income tax allowance provisions are now set forth in part 302-17 of the FTR. 41 CFR 302-17 (2002).

Mr. Armstrong has requested the Board's review, relying on our precedent in Marion D. Taylor, GSBCA 15500-RELO, 01-2 BCA ¶ 31,607; accord Robert G. Jennings, GSBCA 15663-RELO, 01-2 BCA ¶ 31,633. He contends that in calculating the RIT allowance the Corps failed to take into account his income from his civil service retirement annuity, which, he points out, is taxable and, if treated as earned income, would eliminate the WTA overpayment. He further suggests that the failure to include his retirement benefits in the calculation results in his not being reimbursed for "substantially all" of the increased taxes incurred as a result of moving expenses paid for by the agency. The Corps responds simply that the civil service annuity benefits are reported on IRS Form 1099 and not includable in the calculation of earned income.

The issue arises because of the definition of "earned income" under the FTR, which provides that for the purpose of determining the RIT allowance "appropriate earned income shall include only the amount of gross compensation reported on IRS Form W-2, and, if applicable, the net earnings (or loss) from self-employment income as shown on Schedule SE of IRS Form 1040." 41 CFR 302-11.8(d); see also id. 302-11.5(h); JTR C16008-D. On various occasions, this limited definition of "earned income" has prompted employees to seek relief, arguing that inequities result from the exclusion of certain types of income that cause them to owe a partial refund of the WTA paid by the agency. E.g., Cunningham (Subchapter S income); Elizabeth Atkeson, GSBCA 15093-RELO, 00-1 BCA ¶ 30,656 (social security benefits); Linda R. Drees, GSBCA 14436-RELO, 99-1 BCA ¶ 30,198 (social security benefits); Lewis (social security benefits). Additional examples of potential shortfalls in RIT allowances, resulting from the lack of flexibility inherent in the formulas and definitions prescribed by the regulations, are enumerated in Wynegar.

In Taylor, the Board, following the rationale articulated by the General Accounting Office (GAO) in James P. Lenahan, B-256731 (Nov. 8, 1994), held that military pensions, although currently reported on Form 1099, should continue to be included as "earned income" in the RIT allowance calculation. In Lenahan, GAO reasoned that because these benefits were reported on a Form W-2 when the RIT regulation was written, the rule should be read to encompass this kind of compensation, even though the IRS reporting requirement had changed. Mr. Armstrong notes that in reaching this conclusion GAO points out that the "basic characterization of retired pay as earned income [had] not changed." Claimant argues that the rationale of Taylor should apply to permit the inclusion of his civil service annuity in the calculation of earned income despite the fact that these benefits are reported on a Form 1099. That is, civilian retirement benefits, like military pension distributions, are "retired pay" and should be treated in the same manner.[2]

Because predicated on the fact that military pensions were reported on Form W-2 at the time the regulations implementing the RIT allowances were promulgated, the rationale articulated in Taylor has proven to be the exception to the rule. Other categories of

[2] As discussed further herein, we have been informed by the Office of Personnel Management (OPM) that, in contrast to military pension payments, civilian retirement benefits were in fact reported on Form 1099 at the time the RIT allowance regulations were implemented.

retirement type benefits have not qualified for inclusion as earned income. Prior to our decision in Taylor, the Board was confronted with an analogous circumstance involving the exclusion of a spouse's social security benefits, also reported on Form 1099, from earned income for the purpose of calculating the RIT allowance. Lewis. The Board declined to extend the reasoning of Lenahan in that case, pointing out that at the time the regulation was promulgated, social security benefits were reported on Form 1099. Accord Atkeson; Drees. In addressing Mr. Lewis's contention that the application of this rule was "unfair" in his circumstances, the Board observed:

> Neither the statute nor the regulation is designed to reimburse every employee for every dollar of tax liability he incurs as a result of having received relocation benefits and allowances. The statute requires only that the WTA and RIT allowances cover "substantially all" of the increased liability. "Substantial," in this sense, means less than the whole -- "that specified to a large degree or in the main." Webster's Third New International Dictionary 2280 (1986). To satisfy the statute's mandate, the regulation writers might have included Social Security benefits among the forms of income counted in calculating RIT allowances. The writers might also have included interest, or dividends, or capital gains, or rent, or any other form of income. They did not do any of these things, though, and their decisions not to include any one of them undoubtedly affect many transferred employees in many different ways. That does not make the regulation necessarily unfair or in any other way inconsistent with the statutory requirement, however. [Claimant] has not demonstrated that the WTA and RIT amounts he received did not cover a large degree or the main part of the increased taxes he had to pay on account of having received benefits and allowances related to his relocation. In any event, neither the [agency] nor this Board may deviate from the precise directives of the law in calculating [claimant's] RIT allowance.

Lewis, 98-1 BCA at 146,421.

Lewis established that the decisive factor is how the benefits were reported when the pertinent regulations were implemented. The Office of Personnel Management (OPM) has confirmed that, like social security benefits, civil service annuity benefits were reported on Form 1099 when the regulations pertaining to the RIT allowance were promulgated. Thus, they were not then encompassed by the FTR's definition of "earned income." As a result, under the rationale adopted in Lewis and the cases that followed it, the Board cannot find that the RIT allowance calculation should be altered in this case. We note, however, that the agency has the authority and discretion to waive collection of the overpayment in this case. 5 U.S.C. § 5584(a)(2)(A). As we have previously recognized, an agency is not required to

collect the amount owed by the claimant if it believes that collection would not be equitable and in the best interest of the United States. Cunningham; Dusek, 98-1 BCA at 146,173.

CATHERINE B. HYATT
Board Judge