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B-147153, Nov. 21, 1961

Number: B-147153

Date: 1961-11-21

B-147153, NOV. 21, 1961

TO MR. HARLAN A. JUDD:

REFERENCE IS MADE TO YOUR LETTERS OF AUGUST 30, WITH ENCLOSURES, AND OCTOBER 24, 1961, CONCERNING THE PROPRIETY OF THE ACTION TAKEN BY THE DEPARTMENT OF THE ARMY IN WITHHOLDING FOR INCOME TAX PURPOSES THE SUM OF $951.75, REPRESENTING 18 PERCENT OF THE NET AMOUNT OF READJUSTMENT PAY PAID TO YOU UPON SEPARATION FROM THE UNITED STATES ARMY ON DECEMBER 19, 1960.

OUR FILE SHOWS THAT PURSUANT TO GOVERNING LAWS AND APPLICABLE DEPARTMENT OF THE ARMY REGULATIONS YOU WERE RELIEVED ON DECEMBER 19, 1960, FROM ACTIVE DUTY IN THE UNITED STATES ARMY IN WHICH YOU WERE SERVING IN THE GRADE OF LIEUTENANT COLONEL. UNDER THE AUTHORITY OF SECTION 265 OF THE ARMED FORCES RESERVE ACT OF 1952, AS ADDED BY THE ACT OF JULY 9, 1956, 70 STAT. 517, 50 U.S.C. 1016, YOU WERE ENTITLED AT THE TIME OF SUCH RELIEF TO A LUMP-SUM READJUSTMENT PAYMENT TO BE COMPUTED ON THE BASIS OF ONE-HALF OF ONE MONTH'S BASIC PAY ($745) AS LIEUTENANT COLONEL FOR EACH YEAR OF YOUR 15 YEARS' ACTIVE FEDERAL SERVICE, LESS A $300 MUSTERING-OUT PAYMENT WHICH YOU HAD PREVIOUSLY RECEIVED. CONSEQUENTLY, THE DEPARTMENT OF THE ARMY UPON DETERMINING THAT YOU WERE DUE $5,287.50, AS NET READJUSTMENT PAY, WITHHELD 18 PERCENT OF THAT AMOUNT ($951.75) FOR INCOME TAX PURPOSES, AND EFFECTED PAYMENT TO YOU OF THE BALANCE ($4,335.75). ON FEBRUARY 14, 1961, YOU WROTE TO OUR CLAIMS DIVISION REQUESTING "REIMBURSEMENT" OF THE AMOUNT OF $951.75, WHICH WAS WITHHELD BY THE DEPARTMENT OF THE ARMY. THE CLAIMS DIVISION BY LETTER OF AUGUST 25, 1961, ADVISED YOU THAT THE INTERNAL REVENUE SERVICE HAS JURISDICTION OVER REFUND OF ANY EXCESS INCOME TAX WITHHELD AND, THEREFORE, ANY FURTHER INQUIRY IN THE MATTER SHOULD BE ADDRESSED TO THE DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT IN WHICH YOU LIVE.

YOU CONTEND THAT THE SUM OF $5,587.50 WAS NOT READJUSTMENT PAY, BUT WAS "FORCE OUT" PAY AND THEREFORE NOT SUBJECT TO THE 18 PERCENT INCOME TAX DEDUCTION.

THE PROVISION OF LAW WHICH REQUIRES ALL EMPLOYERS, INCLUDING THE DEPARTMENT OF THE ARMY, TO WITHHOLD SPECIFIC AMOUNTS OR A PERCENTAGE FROM WAGES OF EMPLOYEES WILL BE FOUND IN SECTION 3402 (A) OF THE INTERNAL REVENUE CODE OF 1954, 26 U.S.C. 3402 (A). THE DEFINITION OF THE TERM "WAGES" IN SECTION 3401 (A) OF THAT CODE PROVIDES FOR INCOME TAX WITHHOLDINGS OF REMUNERATION PAID BY THE UNITED STATES FOR SERVICES RENDERED BY AN OFFICER OF THE ARMED FORCES. TO DEFINE WHAT PAY AND ALLOWANCES ARE SUBJECT TO THE WITHHOLDING OF INCOME TAXES THE DEPARTMENT OF THE ARMY PROMULGATED IMPLEMENTING REGULATIONS FOR GUIDANCE OF FINANCE OFFICERS AND OTHERS CONCERNED. THOSE REGULATIONS WILL BE FOUND IN CHAPTER 12, ARMY REGULATIONS NO. 37-104; PARAGRAPH 12 2 OF CHANGE 12, DATED FEBRUARY 13, 1959, OF THOSE REGULATIONS PROVIDES AS FOLLOWS:

"12-2 WAGES SUBJECT TO WITHHOLDING

INCOME TAX WITHHOLDING WILL BE EFFECTED, AS REQUIRED, FROM WAGES FOR THE PERFORMANCE OF ACTIVE DUTY, ACTIVE DUTY FOR TRAINING, AND INACTIVE DUTY TRAINING, INCLUDING WAGES FOR SERVICE PERFORMED IN POSSESSIONS OF THE UNITED STATES. THE FOLLOWING ITEMS CONSTITUTE TAXABLE WAGES AND INCOME TAX WILL BE WITHHELD THEREFROM:

"7. SEVERANCE PAY, EXCEPT DISABILITY SEVERANCE PAY.

"8. READJUSTMENT PAY. * * *"

HENCE, IT IS CLEAR THAT UNDER THE ABOVE-QUOTED REGULATIONS THE READJUSTMENT OR SEVERANCE PAY WHICH YOU HAVE REFERRED TO AS "FORCE OUT PAY" IS ALSO SUBJECT TO WITHHOLDING ACTION FOR INCOME TAX PURPOSES. OTHER WORDS, UNDER THE REGULATION ONLY DISABILITY SEVERANCE PAY, AS DISTINGUISHED FROM SEVERANCE OR "FORCE OUT" PAY, IS NOT SUBJECT TO INCOME TAX WITHHOLDING.

THIS OFFICE LACKS JURISDICTION TO PASS UPON THE QUESTION WHETHER THE NET AMOUNT OF THE READJUSTMENT PAY WHICH WAS DUE YOU WAS SUBJECT TO INCOME TAX AND WHETHER THE REGULATIONS OF THE DEPARTMENT OF THE ARMY PROVIDING THAT SUCH PAY IS SUBJECT TO WITHHOLDING ACTION FOR INCOME TAX PURPOSES ARE IN CONFORMITY WITH THE INTERNAL REVENUE CODE OF 1954. HOWEVER, THE ACTION TAKEN BY OUR OFFICE DOES NOT PREJUDICE YOUR RIGHT TO PRESENT THE MATTER DIRECTLY TO THE DISTRICT DIRECTOR OF INTERNAL REVENUE WITH WHOM YOU HAVE FILED YOUR INCOME TAX RETURN REFLECTING THE RECEIPT OF THE READJUSTMENT PAY, IF YOU STILL BELIEVE THAT THE ACTION TAKEN BY THE DEPARTMENT OF THE ARMY IN WITHHOLDING 18 PERCENT OF THE NET AMOUNT INVOLVED WAS IMPROPER.