

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
JOHN C. SCHULLER,
PROTEST TO SELF ASSESSMENT OF TAX.

NO. 96-07

DECISION AND ORDER

This matter came on for decision upon the Motion for Summary Judgment filed herein on October 23, 1995 by the Taxation and Revenue Department. John C. Schuller (hereinafter "Taxpayer") represented himself in this matter. The Taxation and Revenue Department (hereinafter "Department") was represented by Frank D. Katz, Chief Counsel. Pursuant to Regulation TA 24:12, parties are given 20 days after the mailing of a motion to respond to the motion or they shall be deemed to have consented to the granting of the relief asked for in the motion. Mr. Schuller filed no response to the Department's motion. The Taxpayer's position on the legal issues presented was quite well set forth in the Taxpayer's protest, however, and so rather than simply ruling against the Taxpayer for failing to respond, the Taxpayer's protest will be treated as the Taxpayer's response and the matter will be determined upon that basis. It does appear that there are no material facts in dispute and that this matter is thus appropriate for determination on the legal issues presented by way of summary judgment.

Based upon the uncontested facts and the legal arguments presented by the parties, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was a resident of New Mexico throughout the 1994 tax year.
2. For the 1994 tax year the Taxpayer received of military retirement income.
3. On April 17, 1995, the Taxpayer filed a 1994 New Mexico Personal Income Tax return which took the Taxpayer's military retirement income into account in calculating the Taxpayer's income tax due to the Department.

4. The Taxpayer's 1994 New Mexico Personal Income Tax return indicated that the Taxpayer owed the Department \$42 in tax. Although the Taxpayer filed his return with the Department, effectively self-assessing \$42 in tax, the Taxpayer did not include payment of the \$42, but included a letter with his return protesting the inclusion of his military retirement income in the calculation of tax due.

5. The Taxpayer's entire active duty in the military service was served as a non-resident of New Mexico.

DISCUSSION

The issue to be determined is whether the Taxpayer's military retirement income may properly be included as income for New Mexico personal income tax purposes. The Taxpayer contends that it cannot on the basis that it is a payment of a previously earned benefit and the Taxpayer was a non-resident during his military service career when the benefit was earned. The Department contends that the military retirement pay is deferred pay for past services and as such it is current income subject to tax if the recipient is a New Mexico resident.

What apparently has the Taxpayer upset is what he believes to be inconsistent treatment of his military retirement pay. In 1993, the District Court for Curry County awarded one half of the Taxpayer's military retirement pay to his former wife. New Mexico treats military retirement pay as compensation for services rendered in the past and it treats the portion earned during marriage as community property subject to division in divorce proceedings. *See, LeClert v. LeClert* 80 N.M. 235, 453 P.2d 755 (1969) and Section 40-3-8(C) NMSA 1978. The Taxpayer argues that it is inconsistent for New Mexico to now take the position that it can tax the income since he asserts that it was earned while the Taxpayer was a non-resident of New Mexico.

Recently, the United States Supreme Court clarified the nature of military retirement pay. In *Barker v. Kansas*, 112 S.Ct. 1619 (1992), the Court ruled that military retirement pay for retired military personnel is deferred pay for past services. Thus, the right to military retirement

pay arises as military service is rendered, but payment of the retirement pay is deferred until a date after the service has been rendered.

The Taxpayer's argument confuses when the right to receive future income accrues with when that income becomes taxable. The Taxpayer's confusion is understandable because usually, income is both earned and taxable at the same time and there is no differential in tax treatment. That, however, is not the case with respect to the Taxpayer's military retirement pay.

For federal income tax purposes, and for New Mexico income tax purposes as well¹, income becomes taxable when it is *realized*. In this case, the Taxpayer earned the right to receive future retirement pay during the period of time he was rendering service to his country in the military. The actual payment of that retirement pay was deferred, however, until he met all of the criteria for military retirement and he actually retired. It was only at the point that he actually received the payments of military retirement pay that he realized the income. It was only then that it became subject to income taxation. Thus, the military retirement pay that the Taxpayer received during 1994 was current income of the Taxpayer in 1994 and since the Taxpayer was a resident of New Mexico in 1994, the income was subject to tax by the Department.

CONCLUSIONS OF LAW

1. The Taxpayer self-assessed income tax for the tax year 1994 when he filed his 1994 New Mexico personal income tax return with the Department reflecting tax due in the amount of \$42.

2. The Taxpayer timely protested the self-assessment of tax

¹ New Mexico bases its definition of "net income" subject to tax upon "base income" which is defined as federal adjusted gross income with some deductions which are not pertinent to this matter. Section 7-2-2 (B) and (N) NMSA 1978.

when he accompanied his 1994 New Mexico personal income tax return with a letter protesting the inclusion of the Taxpayer's military retirement pay received during the tax year in the calculation of the Taxpayer's 1994 New Mexico income tax liability.

3. The Taxpayer's military retirement pay is deferred compensation for services rendered in the past, which is realized for purposes of imposition of New Mexico personal income tax when the retirement pay is received by the Taxpayer.

4. The military retirement pay received by the Taxpayer during 1994 while he was a resident of New Mexico was properly included in income subject to tax by the Department for the tax year 1994.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.

DONE, this 17th day of February, 1996.