



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Colonel Robert M. Krone, USAF (ret.)—Federal Income Tax Withholding from Military Retired Pay for Former Spouse Protection Act Purposes.

File: B-271052

Date: August 6, 1996

DIGEST

In calculating the amount of monthly disposable retired pay which is subject to apportionment under the Uniformed Services Former Spouses' Protection Act, the deductions of regular and additional federal income tax withholdings from gross retired pay may not be fixed at a combined percentage rate exceeding the retiree's projected effective tax rate, that is, the ratio of the retiree's anticipated total income tax to his anticipated total gross income from all sources. 63 Comp. Gen. 322 (1984). Accordingly, the Defense Finance and Accounting Center was correct in limiting a member's request for additional withholding deductions to an amount computed using his projected effective tax rate.

DECISION

This is in response to a request for an advance decision regarding the calculation of the amount of income tax withholding from the military retired pay of Colonel Robert M. Krone, USAF (Ret.), as that amount affects the apportionment of the retired pay between Colonel Krone and his former spouse.¹

BACKGROUND

Colonel Krone and his former spouse were divorced in Nevada in 1976, incident to which the court awarded the former spouse a fixed monthly amount of Colonel Krone's retired pay as property. Subsequently, she submitted an application to the Defense Finance and Accounting Service (DFAS) to have a portion of Colonel Krone's retired pay paid directly to her under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. Her request was honored effective December 1994. Effective July 1995, her payments were modified from a

¹The request was submitted by the Director, Former Spouse Division, Garnishment Operations Directorate, Defense Finance and Accounting Service, Cleveland Center.

fixed amount to a percentage of disposable retired pay pursuant to a Nevada Court order dated March 16, 1995. Because Colonel Krone was already having an additional amount withheld from his retired pay for federal income tax purposes, DFAS requested that he provide documentation to justify the additional withholding if he wanted the additional withholding to be deducted from his gross retired pay to calculate his disposable retired pay to which the percentage allocable to his former spouse would be applied pursuant to Former Spouses' Protection Act.

Colonel Krone responded with a request that a total of \$1,040 be withheld from his retired pay for calculation of both his net pay and the portion allocable to his former spouse. In support of his request, Colonel Krone submitted a copy of his tax return from 1994 and information from his accountant indicating that the marginal tax rate on his military retired pay was 28 percent and that \$1,040 in withholding was required to cover his estimated tax liability calculated at that rate.

DFAS based its calculation of Colonel Krone's withholding for Former Spouses' Protection Act purposes on our decision B-213895, April 25, 1984, 63 Comp. Gen. 322. It calculated his projected effective tax rate to be 12.2382 percent and used that rate to determine that regular withholding (at 01 married) of \$446.65 plus additional withholding of \$8.48 could be deducted from Colonel Krone's retired pay to determine his former spouse's portion of it. The balance of the withholding he requested would be used only to calculate his net pay.²

Colonel Krone disagrees with the above calculations. He objects to the fact that the amount of additional withholding allowed for Former Spouses' Protection Act purposes is based on the effective tax rate applicable to his and his current wife's combined income rather than his highest marginal tax rate.

ANALYSIS

The Uniformed Services Former Spouse Protection Act, 10 U.S.C. § 1408,³ gives state courts the authority to treat a member's disposable retired pay either as the property of the member or as the property of the member and his spouse, in accordance with the law of the state concerned. 10 U.S.C. § 1408(c). Under prescribed limitations, the law provides that the department concerned shall make payments directly to the spouse or former spouse of a portion of the member's disposable retired pay under state court order as child support, alimony, or a

²Colonel Krone also requested withholding of \$250 for payment of his state income tax. Of that amount DFAS determined that \$107 may be used in the calculation of his former spouse's share. The \$143 balance may be used to calculate his net pay.

³Pub. L. No. 97-252, Title X, § 1002(a), 96 Stat. 730 (1982).

division of property. 10 U.S.C. § 1408(d). The term "disposable retired pay" as defined in 10 U.S.C. § 1408(a)(4), is the member's total monthly retired pay from which certain deductions have been made. For the purposes of this decision, those deductions include the authorized and required amount of withholding for federal, state, or local income tax (formerly at 10 U.S.C. § 1408(a)(4)(C) (1988 ed.)), and additional withholding requested by the member if the member presents evidence of a tax obligation to support such withholding (formerly at 10 U.S.C. § 1408(a)(4)(D)(1988 ed.)).⁴

In our decision 63 Comp. Gen. 322, supra, we discussed the issue of the amount of additional tax withholding that a member may have applied in computing his disposable retired pay for Former Spouses' Protection Act purposes. We said that the tax obligation referred to above may properly be expressed in terms of the difference between the anticipated ultimate rate of taxation and the ordinary rate of tax withholdings prescribed. We computed the claimant's estimated tax for the year from his estimated family income and the Internal Revenue Service (IRS) tax table. Then we compared this anticipated total tax to the anticipated total income, which yielded a projected effective tax rate for all his income. We used this rate to calculate his tax obligation. We said that, in the absence of more specific guidance in the law or regulations, the use of a single effective tax rate for all his anticipated income was the best method available for calculating the member's estimated tax obligation to be used to determine disposable retired pay. 63 Comp. Gen. at 328.

While Colonel Krone objects to the use of a projected effective tax rate, in effect an average rate for all income, we still believe that is the fairest method for calculating tax obligations. At the time the matter was submitted to us, Colonel Krone's former spouse was receiving \$1,578.44 per month. He argued that under the method of calculation used by DFAS he was receiving only \$850.56. It should be noted that DFAS sends \$1,290 to the appropriate federal and state agencies on Colonel Krone's behalf. Therefore, in effect, he was receiving \$2,140.56 per month.

As we pointed out in 63 Comp. Gen. 322, supra, the authority to issue authoritative revenue rulings on federal income tax withholding rests in the IRS. Our decision concerns Colonel Krone's tax withholdings only to the extent that the amounts withheld affect the calculation of his disposable retired pay as that term is defined

⁴For divorces, dissolutions, annulments, and legal separations that become effective after the end of a 90-day period beginning on November 5, 1990, the definition in 10 U.S.C. § 1408(a) of "disposable retired pay" has been changed to eliminate deductions for income tax withholding and additional tax withholding in the computation of disposable retired pay. See Pub. L. No. 101-510, § 555(b)(3), 104 Stat. 1569 (1990). Since Colonel Krone's divorce became effective in 1976, the previous provisions authorizing such deductions remain applicable.

in 10 U.S.C. § 1408. DFAS advises that it has applied the method we approved in 63 Comp. Gen. 322, supra, to determine the maximum withholding amount which can be subtracted from Colonel Krone's retired pay to obtain his disposable retired pay. That determination appears correct, and we have no basis to disturb it.

/s/Seymour Efras
for Robert P. Murphy
General Counsel