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January 12, 1983

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ARIZONA ATTORNEY GENERAL

The Honorable Bill DeLong
Arizona State Senator
State Capitol, Senate Wing
Phoenix, Arizona 85007

Re: I83-004 (R82-161)

Dear Senator DeLong:

In your letter of September 27, 1982, you asked for our opinion whether A.R.S. § 43-1022.9 applies to both compensation for active military personnel and to retirement benefits¹ for retired military personnel.

A.R.S. § 43-1022.9 provides as follows:

In computing Arizona adjusted gross income, the following amounts shall be subtracted from Arizona gross income:

9. The salary, wages, bonuses, allowances and other compensation received by an individual for his services as a member of the armed forces of the United States, including any auxiliary branch thereof and public health officers, not to exceed one thousand in the aggregate.

1. By retirement benefits, it is assumed that you are referring to military retirement pay and not a pension, annuity, or similar payment for personal injury or sickness. The latter type of payment is exempt at the federal level and therefore, is not included in Arizona gross income. (See I.R.C. Sec. 104(a)(4) and A.R.S. § 43-1001.2).

The statute does not specifically include or exclude military retirement pay. Rather, the statute raises the question of whether or not military retirement pay is compensation received by an individual for his services as member of the armed forces.

The Arizona Department of Revenue has consistently interpreted A.R.S. § 43-1022.9, enacted in 1978, and its predecessor statutes^{2/} as applying to compensation received by an individual on active duty only. This long-continued administrative construction of A.R.S. § 43-1022.9 is reflected in the instructions provided to the taxpayer by the Arizona Department of Revenue. An instruction that the one thousand dollar subtraction applies only to compensation received by an individual on active duty was published at least from 1977 to 1982. The 1982 instruction stated as follows:

Line 12 (page 2, Part ii)
First \$1,000 of Active Military Pay
Arizona will allow you to exclude the first \$1,000 of your military pay (this includes the National Guard and Reserves as well). Enter here your military pay (from your W-2) or \$1,000, whichever is smaller (NOTE: This does not include military retirement.)

In addition, the CCH Arizona State Tax Reporter states that "United States servicemen on active duty are allowed an additional \$1,000 exemption against service pay for each taxable year of active duty" citing a letter from the Director of Income Tax Division as the source of this data. 1 CCH Ariz. Tax Rep., ¶10-495.20. The Director's letter was published in full at 2 CCH Ariz. Tax Rep. ¶200-127 in 1964.

We note that this administrative interpretation of the Department of Revenue does not correspond to federal case law characterizing the nature of military retirement pay.^{3/} Even

2. The provisions of A.R.S. § 43-1022.9 first appeared in Arizona's Income Tax Act of 1954. It was reenacted as A.R.S. § 43-112.b.22 in 1956 and its language remained the same through successive amendments to other portions of A.R.S. § 43-112 in 1962, 1971, 1973 and 1975.

3. The federal case law characterization has not evolved in the context of tax cases, but in cases involving disputes concerning the receipt of military retirement pay. In addition, the nature of military retirement pay has been discussed in bankruptcy and divorce proceedings.

though a member of the armed forces is retired from active duty and is receiving retirement pay, he is still subject to call to active duty as long as his physical condition will permit. For this reason, the federal courts have consistently characterized military retirement pay as a continuation of active pay on a reduced basis despite the fact that the retired member is not on active duty. It is not considered deferred compensation for past services. Costello v. United States, 587 F.2d 424 (9th Cir. 1978) cert. denied 99 S.Ct. 2858, 442 U.S. 929 (1979); Lemly v. United States, 75 F.Supp. 248 at 249 (1948); Hostinsky v. United States, 292 F.2d 508, 154 Ct. Cl. 443 (1961). The word "pay" as used in statutes relating to retirement pay connotes "wages." Matter of Harter, 10 B.R. 272 (N.D. Ind. 1981).

Courts today regard military retirement pay as a mode of employee compensation. It is generally not considered a pension, grant or gratuity, but is something the serviceman or woman earns and has earned. Payne v. Payne, 82 Wash.2d 573, 512 P.2d 736 (St. Ct. Wa. 1973); Berkey v. United States, 361 F.2d 983, 176 Ct. Cl. 1 (1966); In re Marriage of Ellis, 538 P.2d 1347 (Ct.App. Colo. 1975) affirmed 191 Colo. 317, 552 P.2d 506 (1976); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969).

Although pay for injuries resulting in disability while in the armed forces is a "pension", "retirement pay" is payment for a status held by the retired serviceman or woman and is an emolument of the office so held. In the Matter of the Marriage of Butler, 543 S.W.2d 147, (Ct. App. Tex. 1976), citing Lemly v. United States, supra.

However, A.R.S. § 43-1022.9 cannot be construed only on the basis of the federal case law characterization. A long-continued administrative construction by the state agency is entitled to considerable weight in construing a statute. When there is doubt as to the meaning of the law, an administrative construction under these circumstances will be acquiesced in and not disturbed by a court. Copper Queen Consol. Min. Co. v. Territorial Board of Equalization, 9 Ariz. 383, 84 P.511, affirmed, 27 S.Ct. 695, 206 U.S. 474, 51 L.Ed. 1143 (1907); also see Van Veen v. County of Graham, 13 Ariz. 167, 108 P.252 (1910); City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1965); Jenney v. Arizona Express Inc., 89 Ariz. 343, 362 P.2d 664 (1964). This is especially appropriate where the Legislature reenacts the statute without change.

Austin v. Barrett, 41 Ariz. 138, 16 P.2d 12 (1932); Copper Queen Consol. Min. Co. v. Territorial Board of Equalization, supra. There is a presumption that the Legislature knew of the uniform construction of officers required to act under the statute and adopted it in reenacting a statute. Jenney v. Arizona Express, Inc., supra; The Carriage Trade Management Corp v. Arizona State Tax Commission, 27 Ariz. App. 584, 557 P.2d 183 (1976); Jackson v. Northland Const. Co., 111 Ariz. 387, 531 P.2d 144 (1975); Arizona Foundation for Neurology and Psychiatry v. Sienerth, 13 Ariz. App. 472, 477 P.2d 758 (1970); Industrial Commission v. Harbor Insurance Company, 104 Ariz. 73, 449 P.2d 1 (1968). Only an administrative construction which is manifestly erroneous will be disturbed under the circumstances described above. Austin v. Barrett, supra; Industrial Commission v. Harbor Insurance Company, supra.

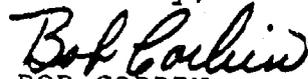
The Department of Revenue's construction of the statute to mean that only compensation received by an individual on active duty for his services as a member of the armed forces is not obviously erroneous. A tax statute granting an exemption must be construed strictly and every interpretation of a taxation statute shall be against exemption from taxation. Ebasco Services, Inc. v. Arizona State Tax Commission, 105 Ariz. 94, 459 P.2d 719 (1969). Since military retirement pay is not set forth expressly in A.R.S. § 43-1022.9, a strict interpretation would exclude such pay from the one thousand dollar exemption.

Moreover, the Department has construed the language of A.R.S. § 43-1022.g. to give the words and phrases a reasonable, common and natural meaning. Salary, wages, bonuses, allowances and other compensation received by an individual for his services as a member of the armed forces would not commonly be thought to include retirement pay to a retired member. In the absence of clearly defined legislative intent, words and phrases are to be construed and understood according to the common, ordinary and natural use of language. Kuts-Cheraux et al. v. Wilson, 71 Ariz. 461, 229 P.2d 713, opinion supplemented 72 Ariz. 37, 230 P.2d 512 (1951); Parise v. Industrial Commission, 16 Ariz. App. 177, 492 P.2d 426 (1971); Phoenix Title & Trust Company v. Burns, 96 Ariz. 332, 395 P.2d 532 (1964). Generally, language in a statute is to be given the meaning in which it would be understood by the ordinarily intelligent man, unless it is clearly used in some special or technical sense. Southern Pac. Co. v. Maricopa County, 50 Ariz. 247, 107 P.2d 212 (1940); State ex rel Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768 (1942).

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Thus, in light of the long-standing administrative construction, which construction is not manifestly erroneous, and given the fact that the Legislature has reenacted the same language several times without change, we think the administrative interpretation is controlling, notwithstanding the characterization of military retirement pay in federal case law. Therefore, until the legislature or Department of Revenue determines otherwise, A.R.S. § 43-1022.9 applies to compensation received by an individual on active military duty only and does not apply to military retirement pay.

Sincerely,



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Attorney General

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