

Date: January 19, 1994

O.G.C. Precedent 1-94

From: General Counsel (02)

Subj: Improved-Pension Income -- Application of \$2,000 Exclusion  
of Tribal Per Capita Payments Under 25 U.S.C. § 1407

To: Director, Compensation and Pension Service (213B)

QUESTION PRESENTED:

Whether, in computing annual income for improved pension purposes, the \$2,000 exclusion provided by 25 U.S.C. § 1407 for certain Native American tribal per-capita payments applies to the sum of all payments received during an annual reporting period or applies to each individual payment received during the reporting period.

COMMENTS:

1. In the two subject cases, the veterans have reported receiving several per capita distributions from tribal trust funds during the course of an annual reporting period. In both cases, the amount of each payment was less than \$2,000, but the aggregate of such payments exceeded \$2,000 for the reporting period. The veterans assert that the \$2,000 exclusion should apply to each per capita distribution, resulting in exclusion of the entire amount of the per capita distributions for pension-income purposes.

2. Pursuant to 38 U.S.C. § 1521, the amount of improved pension payable to an eligible veteran must be reduced by the amount of the veteran's annual income. Section 1503(a) of title 38, United States Code, governing income computation for improved-pension purposes, provides that "all payments of any kind or from any source" shall be included in annual income, with the exception of certain specified categories. The legislative history of section 1503(a) indicates Congress' intent "that a pensioner's total annual nonpension income shall be included in determining the amount of pension payable, unless a specific exclusion from

such income is authorized by law." S. Rep. No. 95-1329, 95th Cong., 2d Sess. 22 (1978). Therefore, any payment received by a veteran must be counted as income unless expressly excluded by statute.

3. One such statutory exclusion is found in 38 U.S.C. § 1503(a)(6), which excludes from income "profit realized from the disposition of real or personal property other than in the course of a business." See also 38 C.F.R. § 3.272(e). As noted in O.G.C. Prec. 71-90, this office indicated in a series of unpublished opinions that payments to Native Americans from tribal trust funds which are in the nature of compensation for relinquishment of property interests may be considered a conversion of assets and excluded from income under section 1503(a)(6). In O.G.C. Prec. 81-90, we indicated that the section 1503(a)(6) exclusion applies to funds derived from disposition of nonrenewable resources, e.g., removal of minerals from the land, but not to income from renewable resources, e.g., rental of land for grazing or planting. In O.G.C. Prec. 12-89, we concluded that funds distributed by the Federal government under the Alaskan Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971), as amended, (codified at 43 U.S.C. §§ 1601-1629e) representing payment for the relinquishment of land claims by the recipients, are excluded from pension income under 38 U.S.C. § 1503(a)(6) because those payments constitute profit from the disposition of property. We also stated in that opinion that the underlying basis for a distribution under the Indian Tribal Judgment Funds Use or Distribution Act, Pub. L. No. 93-134, 87 Stat. 466 (1973), as amended, [hereinafter the Judgment Funds Distribution Act] must be examined to determine whether it represents a conversion of assets from one form to another.

4. The claims files in the subject cases do not indicate the nature of the funds distributed to the veterans as per capita payments. Therefore, on the facts before us, we are unable to conclude whether the payments may be considered profit from the disposition of property so as to warrant application of the section 1503(a)(6) exclusion.

5. The other exclusions that may be applicable to the per capita distributions in the subject cases are the exclusions under the Judgment Funds Distribution Act, (codified, as amended, at 25 U.S.C. §§ 1401-1408) and the so-called Per Capita Distributions Act, Pub. L. No. 98-64, 97 Stat. 365 (1983) (codified at 25 U.S.C. §§ 117a-117c). The former statute provides for the use and distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission and the United States Court of Federal Claims in favor of Indian tribes. The latter statute provides for the per capita distribution of "[f]unds which are held in trust by the Secretary of the Interior . . .

for an Indian tribe." 25 U.S.C. § 117a. Section 7 of the Judgment Funds Distribution Act, as amended by Pub. L. No. 97-458, § 4, 96 Stat. 2512, 2513 (1983), (codified at 25 U.S.C. § 1407) provides that none of the funds distributed per capita pursuant to a plan approved under the Judgment Funds Distribution Act, as amended, shall be "considered as income or resources . . . under the Social Security Act or, except for per capita shares in excess of \$2,000, any Federal or federally assisted program." Additionally, section 2(a) of the Per Capita Distributions Act (codified at 25 U.S.C. § 117b(a)) provides that distributions under that statute "shall be subject to the provisions of section 7 of [the Judgment Funds Distribution Act], as amended." Accordingly, per capita payments made under either statute are excluded from income computation for VA improved-pension purposes "except for per capita shares in excess of \$2,000." See O.G.C. Prec. 71-90.

6. In O.G.C. Prec. 12-89, we responded to a question as to whether the \$2,000 exclusion in 25 U.S.C. § 1407 applies on an annual basis or on one occasion only. We concluded that section 1407 provides an annual exclusion of \$2,000 from income and net worth for VA pension purposes. We noted that the statute and its legislative history were ambiguous as to the period for which the exclusion applies, but we identified two factors supporting an annual, rather than a one-time, exclusion. First, the House and Senate committee reports concerning Pub. L. No. 97-458, which amended section 7 of the Judgment Funds Distribution Act to add

the \$2,000 exclusion applicable to Federal and federally-assisted programs, both spoke of the \$2,000 exclusion applying with respect to determinations of "eligibility," thus suggesting that the exclusion applies to the period with respect to which eligibility is determined. Because VA pension eligibility is determined based on twelve-month periods, the \$2,000 exclusion would, under this interpretation, apply with respect to each twelve-month period. Second, we noted that the language of a similar, later-enacted \$2,000 exclusion in 43 U.S.C. § 1626(c) provided guidance in the interpretation of 25 U.S.C. § 1407, pursuant to the principle that "interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." 2B N. Singer, Sutherland Statutory Construction § 53.03 (5th ed. 1992). Section 1626(c) provides that, in determining the eligibility of a household of an Alaskan Native, an individual Alaskan Native, or the descendent of an Alaskan Native to receive Federal need-based benefits, cash received from a Native Corporation shall not be considered as an asset or resource "to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum." We noted that 25 U.S.C. § 1407 and 43 U.S.C. § 1626(c) both apply to protect need-based benefits of Native Americans from diminution as a result of certain payments intended for their benefit and that it would be anomalous, in the absence of any congressionally-expressed intention to the contrary, to apply a different rule to treatment of the \$2,000 exclusions under those similar statutory provisions.

7. The claimants in the subject cases now assert that our conclusion that the section 1407 exclusion applies annually is unnecessarily restrictive and that the \$2,000 exclusion should be interpreted to apply to each individual distribution received by them. The claimants further assert that other Federal agencies, specifically including the Social Security Administration (SSA), have concluded that the exclusion applies to each payment, rather than annually.

8. We note initially that the SSA's treatment of payments under the Per Capita Distributions Act and the Judgment Funds Distribution Act is not relevant to our determination because that agency's treatment of such payments is governed by a different statutory standard. Section 1407 expressly provides that such payments will be excluded in their entirety from income and resource computation for SSA purposes, whereas only \$2,000 received from such payments will be excluded for purposes of determining eligibility for benefits administered by other Federal agencies, including VA. Therefore, the SSA has no reason to consider the scope of the \$2,000 exclusion in 25 U.S.C. § 1407, and the SSA's treatment of per capita distributions from tribal trust funds cannot be considered as an interpretation of the \$2,000 exclusion.

9. In a 1988 report to Congress, the United States General Accounting Office (GAO) reviewed information received from the Department of Agriculture, the Department of Housing and Urban Development, and the Bureau of Indian Affairs and concluded that Federal agencies administering need-based benefits had reached conflicting conclusions as to whether 25 U.S.C. § 1407 excludes \$2,000 per payment or per year. GAO, Welfare Eligibility: Programs Treat Indian Tribal Trust Fund Payments Inconsistently, GAO/HRD-88-38, 23 (1988). We are not aware of any definitive analysis of the \$2,000 exclusion by any of these agencies, either before or after the GAO report. In view of the agencies' conflicting interpretations of the \$2,000 exclusion and the lack of articulated reasons for those interpretations, we find no persuasive guidance in the treatment of 25 U.S.C. § 1407 by other Federal agencies.

10. As we noted in O.G.C. Prec. No. 12-89, the text of 25 U.S.C. § 1407 is ambiguous as to the application of the \$2,000 exclusion. However, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the

law." United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988) (citations omitted). Here, other provisions of the Judgment Funds Distribution Act provide guidance in the interpretation of the \$2,000 exclusion at 25 U.S.C. § 1407 (section 7 of the Judgment Funds Distribution Act, as amended).

11. Congress, in August 1993, amended section 8 of the Judgment Funds Distribution Act (codified at 25 U.S.C. § 1408) to provide that "up to \$2,000 per year of income received by individual Indians" that is derived from such individuals' interests in trust or restricted property "shall not be considered income" in determining eligibility for assistance under the Social Security Act or any other Federal or federally-assisted program. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13736, 107 Stat. 312, 663 (emphasis added). This exclusion in Pub. L. No. 103-66 pertains to individual income from trust property, rather than per capita payments. However, it is similar in its purpose to the exclusion in 25 U.S.C. § 1407 in providing a partial exclusion from income of money derived from trust funds or trust property. The establishment of an annual \$2,000 exclusion in section 1408, which is similar in its purpose to 25 U.S.C. § 1407, is part of the same act, and immediately follows section 1407 in the United States Code strongly suggests that the \$2,000 exclusion in section 1407 is also intended to apply on an annual, rather than a per-payment, basis. Absent any expression of a contrary congressional intent, it would be anomalous to conclude that the \$2,000 exclusions in those two related and successive provisions were intended to be computed in different manners.

12. The legislative history of the 1993 amendment to the Judgment Funds Distribution Act provides further support for interpreting the exclusion in 25 U.S.C. § 1407 consistently with that added to 25 U.S.C. § 1408 by section 13736 of Pub. L. No. 103-66. In a joint explanatory statement on the 1993 amendment, the congressional conference committee contrasted the then-existing difference in treatment between income received by Native Americans from tribally-owned trust lands and income received from individually-owned trust or

restricted Native American lands. H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 875-76 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1564-65. The conference committee's discussion of the exclusion under 25 U.S.C. § 1407 for per capita payments suggests that Congress was cognizant of the section-1407 exclusion applicable to per capita payments and intended to create a similar exclusion for income from individually-owned trust property. Surely, if Congress had intended that the two related exclusions were to be applied in different manners, it would have so specified. This leads us to conclude that the exclusions in sections 1407 and 1408 should be applied in a similar fashion, i.e., as annual exclusions.

13. Furthermore, we continue to believe that the \$2,000-per-year exclusion under 43 U.S.C. § 1626(c), discussed in paragraph 6, above, is relevant to the interpretation of the \$2,000 exclusion under 25 U.S.C. § 1407, inasmuch as both statutes have as their purpose the limitation of the extent to which certain payments to Native Americans affect the amount of need-based Federal benefits to which those individuals are entitled. See, e.g., Great Northern Railway Co. v. United States, 315 U.S. 262, 277 (1942) ("subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject"). Therefore, the enactment of 43 U.S.C. § 1626(c) also suggests that the \$2,000 exclusion in 25 U.S.C. § 1407 is intended to be an annual exclusion.

14. The fact that the other statutory exclusions from income applicable to Native Americans for purposes of Federal benefits apply on an annual basis strongly suggests that the similar exclusion in 25 U.S.C. § 1407 should also apply on an annual, rather than a per-payment, basis. A contrary conclusion would be at odds with the statutory scheme established by Congress in 25 U.S.C. § 1408 and 43 U.S.C. § 1626(c) for computing such exclusions for Native Americans on an annual basis. Interpreting the section-1407 exclusion as an annual exclusion is consistent with the language of the statute creating the exclusion. Further, a contrary conclusion would result in potentially inconsistent treatment of similarly situated claimants. For example, if the

exclusion were construed as a per-payment exclusion, a Native American who received three separate per capita distributions of \$2,000 each in a single year would have no countable income from such payments, but another Native American who received a single payment of \$6,000 would have \$4,000 of countable income from that payment. Even though these persons would have received the same amount of money from per capita trust-fund payments during the relevant one-year period for determining pension eligibility, they would be treated differently for purposes of that need-based benefit based solely on the manner in which those payments were distributed. In the absence of any indication of an intent to treat such persons differently, we would not "attribute to Congress the intention to promulgate a rule which would open the door to such obvious incongruities." United States v. Dow, 357 U.S. 17, 25 (1958).

HELD:

For purposes of computing annual income under the improved-pension statutes, 25 U.S.C. § 1407 authorizes the exclusion from a claimant's income of no more than \$2,000 of the aggregate amount received during the relevant twelve-month period as per capita distributions from a Native-American tribal trust fund.

Mary Lou Keener