**Board of Contract Appeals**
General Services Administration
Washington, D.C. 20405

August 2, 2001

GSBCA 15602-RELO

In the Matter of W. DON WYNEGAR

W. Don Wynegar, Lafayette, CO, Claimant.

Steve Tatum, Relocation Services Specialist, Mountain Administrative Support Center, Department of Commerce, Boulder, CO, appearing for Department of Commerce.

**DANIELS**, Board Judge (Chairman).

A claim by W. Don Wynegar, an employee of the Department of Commerce's National Oceanic and Atmospheric Administration, calls into question the procedures for calculating the relocation income tax (RIT) allowance paid by the Government to transferred employees.

## Background

Mr. Wynegar was transferred in October 2000 from Washington, D.C., to Boulder, Colorado. The agency paid him more than $40,000 in relocation benefits. This amount included a RIT allowance.

The agency's payment constituted taxable income to Mr. Wynegar, and it brought his household's taxable income for 2000 to a figure greater than the amount at which a federal taxpayer begins to lose the full value of his itemized deductions. See 26 U.S.C. § 68 (1994). As a consequence of the reduction in the value of his itemized deductions, Mr. Wynegar says, he had to pay an additional $433 in federal tax.

The employee complained to his agency that the RIT allowance had been insufficient to compensate him for the taxes required to be paid on his relocation benefits. The allowance, he maintained, had been determined in an unfair way. A Department of Commerce relocation services specialist wrote on his behalf to the General Services Administration (GSA) regarding the matter: "Please look into this situation and see if the RIT calculation can be changed to permit reimbursement of this incremental increase in taxes paid due to this IRS [Internal Revenue Service] rule." (The "IRS rule" referenced is apparently the regulation which implements the statute that mandates reductions in itemized deductions for higher-income taxpayers.) GSA responded: "Until such time as the law is revised, we have no authority to revise the FTR as suggested. We have determined that the current method of reimbursement of the RIT allowance [is] fair and equitable to Government employees."

## Discussion

Relocation benefits paid by the Government to employees whom it transfers from one permanent duty station to another are generally considered taxable income to the recipients. To cover the increased tax liability resulting from receipt of the benefits, Congress has authorized agencies to pay an additional sum to transferred employees. 5 U.S.C. § 5724b(a) (Supp. V 1999). This additional sum is called a RIT allowance. 41 CFR 302-11.1 (2000).

The procedures for calculating the RIT allowance are established in regulations issued by the Administrator of General Services (the head of GSA), in consultation with the Secretary of the Treasury (who supervises the IRS). 5 U.S.C. § 5738(b); see 41 CFR pt. 302-11. The procedures "are based on certain assumptions jointly developed by GSA and IRS, and tax tables developed by IRS." 41 CFR 302-11.8(b)(1). According to the regulations, "This approach avoids a potentially controversial and administratively burdensome procedure requiring the employee to furnish extensive documentation, such as certified copies of actual tax returns and reconstructed returns, in support of a claim for a RIT allowance payment." Id. The regulations further state, "The prescribed procedures, which yield an estimate of an employee's additional tax liability due to moving expense reimbursements, are to be used uniformly. They are not to be adjusted to accommodate an employee's unique circumstance which may differ from the assumed circumstances." Id. 302-11.8(b). See generally Peggy A. Byers, GSBCA 15307-RELO, 01-1 BCA ¶ 31,336; Catherine S. Cunningham, GSBCA 15035-RELO, 00-1 BCA ¶ 30,807; William A. Lewis, GSBCA 14367-RELO, 98-1 BCA ¶ 29,532; Robert J. Dusek, GSBCA 14325-RELO, 98-1 BCA ¶ 29,440 (1997).

The inflexibility of the procedures for calculation of RIT allowances has resulted in complaints by many affected federal employees. A common complaint is that the procedures do not permit the inclusion of unearned income when calculating the basis from which the RIT allowance is derived. As a result, for employees who have taxable income which boosts them into higher tax brackets than the ones they are presumed to be in for purposes of determining their RIT allowance, the allowance does not cover all of the increased tax liability imposed by the receipt of relocation benefits. See Dusek; 41 CFR 302-11.8(d). Thus, an employee who has investment income -- usually from interest and/or dividends -- is disadvantaged relative to an employee who has only earned income. Jeffrey P. Nielsen, GSBCA 15069-RELO, 00-1 BCA ¶ 30,746; Sol Gilman, GSBCA 14938-RELO, 99-2 BCA ¶ 30,506. Because of the way in which "earned income" is defined in the regulation, income which could arguably be deemed "earned" (since it is based on past earnings), such as a spouse's disability pension or Social Security benefits, is not counted for purposes of calculating the RIT allowance, either. Thus, an employee whose family has this kind of income is disadvantaged as well. Elizabeth Atkeson, GSBCA 15093-RELO, 00-1 BCA ¶ 30,656 (1999); Linda R. Drees, GSBCA 14436-RELO, 99-1 BCA ¶ 30,198 (1998); Lewis. Similarly, an employee whose spouse's income, though resulting from his personal efforts, comes from distributions of a subchapter S corporation is harmed by the prescribed formula. Cunningham. Another group of transferred employees whose RIT allowances do not cover the tax liability imposed on them by receipt of relocation benefits is persons whose deductions, exemptions, and credits are different from the deductions, exemptions, and credits assumed in construction of the formula. Michael R. Planitz, GSBCA 15073-RELO, 00-1 BCA ¶ 30,751; Patricia Russell, GSBCA 14758-RELO, 99-1 BCA ¶ 30,291 (as resident of Texas, employee paid no state income taxes).

Mr. Wynegar brings to our compilation yet another example of an employee who, due to the inflexibility of the prescribed procedures for calculating the RIT allowance, does not receive an allowance sufficient to cover the increased tax liability he incurred by receiving relocation benefits. Like the others, he can receive no relief from us. The statute does not mandate an allowance which covers increased tax liability on a dollar-for-dollar basis. Instead, it requires only that "substantially all" of the increased liability be covered, and it leaves to the regulation writers the determination of how the allowance will be calculated. 5 U.S.C. § 5724b(a). As we explained in Lewis, "substantial" means "that specified to a large degree or in the main," and unless an employee can demonstrate that he does not receive through the RIT allowance a large degree or the main part of the increased taxes he had to pay on account of having received relocation benefits, we cannot find that the regulation treats him in a different way from what the statute permits. Mr. Wynegar has not made such a demonstration. Thus, his claim must be denied.

This is not to say that GSA's position, that that agency has no authority to revise the regulation until the statute is modified, is correct. In 5 U.S.C. §§ 5724b and 5738, Congress has given GSA the right and the power to revise the regulation at any time, as long as the revision leaves a rule which is consistent with the statute's substantive requirements. GSA's current regulation mandates the application of a particular procedure for calculating the RIT allowance in the interest of administrative efficiency. As our cases show, the procedure treats diversely employees who have identical tax liability but receive different kinds of income and have different deductions, exemptions, and credits from the ones on which the prescribed formula is based. Although this regulation may be permissible, it is certainly not the only permissible choice. GSA may wish to consider whether to amend the regulation, taking into consideration the situations noted in this opinion.

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STEPHEN M. DANIELS
Board Judge