Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

April 19, 2006

GSBCA 16820-RELO

In the Matter of JASON K. PETERSON

Jason K. Peterson, Benbrook, TX, Claimant.

Rick Miller, Civilian Travel and Overseas Allowances Policy Manager, Force Sustainment Division, Office of the Chief of Staff, Department of the Air Force, Washington, DC, appearing for Department of the Air Force.

DANIELS, Board Judge (Chairman).

A transferred employee's contributions to the Thrift Savings Plan are not considered part of his gross compensation when calculating the relocation income tax (RIT) allowance to which the employee is entitled.

Background

The Air Force transferred Jason K. Peterson from Florida to Texas in September 2003. It paid him relocation benefits in conjunction with this move. Along with these benefits, the agency also paid a RIT allowance. In determining the amount of this allowance, the Air Force applied the formula prescribed by the Federal Travel Regulation (FTR). *See* 41 CFR 302-17.8(f) (2003). This formula requires the insertion of a combined marginal tax rate (CMTR) – a single rate determined by combining the applicable marginal tax rates for federal, state, and local income taxes – for the employee for the year in question. *Id.* 302-17.5(j).

The FTR provides that in calculating an employee's CMTR, an agency shall use a figure based on the earned income of the employee (and the employee's spouse, if there is

one and the employee and spouse file tax returns jointly). 41 CFR 302-17.8(d). The term "earned income" is defined, for purposes of the RIT allowance, to include "only the gross compensation (salary, wages, or other compensation . . .) that is reported as income on IRS [Internal Revenue Service] Form W-2 for the employee (employee and spouse, if filing jointly), and if applicable, the net earnings (or loss) for self-employment income shown on Schedule SE of the IRS Form 1040." *Id.* 301-17.5(h).

The Air Force used as Mr. Peterson's CMTR a figure based on an earned income which included his salary less the portion of the salary he contributed to the Thrift Savings Plan. Mr. Peterson contends that the agency should not have deducted the Thrift Savings Plan contribution in determining his earned income. If the agency had adopted the employee's position, it would have used a higher figure for earned income. This would have resulted in the agency's using a higher CMTR, which would have led to the employee's having received a larger RIT allowance.

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) (2000). This additional sum is called a RIT allowance. 41 CFR 302-17.1.

The procedures for calculating the RIT allowance are established in regulations issued by the Administrator of General Services (the head of the General Services Administration (GSA)), in consultation with the Secretary of the Treasury (who supervises the IRS). 5 U.S.C. § 5738(b); *see* 41 CFR pt. 302-17. The procedures "are based on certain assumptions jointly developed by GSA and IRS, and tax tables developed by IRS." 41 CFR 302-17.8(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.* 302-17.8(b)(2). *See generally Robert D. Baracker*, GSBCA 16781-RELO (Mar. 15, 2006); *W. Don Wynegar*, GSBCA 15602-RELO, 01-2 BCA ¶ 31,563; *Robert J. Dusek*, GSBCA 14325-RELO, 98-1 BCA ¶ 29,440 (1997).

As noted above, the prescribed procedures require the calculation of a CMTR which is based on an employee's earned income, and that earned income includes "gross

compensation" (including salaries) "that is reported as income on IRS form W-2." The regulation is imprecise in this regard, for the IRS form W-2 does not include a space for "gross compensation." The form contains instead three boxes in which wages (including salaries) are to be recorded. Box 1 is entitled "Wages, tips, other compensation"; box 3 is entitled "Social security wages"; and box 5 is entitled "Medicare wages and tips."

The Thrift Savings Plan is a retirement savings and investment plan for federal employees. Contributions to the Plan are tax-deferred – taxes are not due on those contributions until the funds are withdrawn from an employee's account. The contributions are excluded from the taxable income reported on IRS form W-2 box 1 in the year in which the contributions are made, but are included on the form's boxes 3 and 5 in that year. *See* Thrift Savings Plan website *at* http://www.tsp.gov/features/chapter01.html, /chapter03.html (last visited Apr. 18, 2005); IRS form W-2 (2003); IRS Instructions for Forms W-2 & W-3 at 7-8.

The Air Force's determination to calculate Mr. Peterson's CMTR on the basis of his earned income as reported in IRS form W-2 box 1 is consistent with two decisions previously issued by the Board. In *Sam M. Kulumani*, GSBCA 16141-RELO, 04-1 BCA ¶ 32,577, we explained:

> The purpose of the RIT allowance is to offset, to a large degree, the extra taxes that employees are required to pay because they must declare certain relocation benefits as taxable income. . . . The gross income on which the RIT allowance is calculated is the amount subject to income taxes in the tax year for which the benefit is paid, which is the amount reflected in block one of Form W-2, and reported to the IRS. . . . [The claimant] did not pay or owe income taxes on the additional amount [contributed to the Thrift Savings Plan] reflected in blocks three and five of the Form W-2 and he is not entitled to have these amounts included in the RIT allowance calculation.

In *Eddie G. Hoklotubbe*, GSBCA 16452-RELO, 04-2 BCA ¶ 32,763, we held, "Because [the claimant] did not pay income tax based upon the amount shown in Box 5 [which includes contributions to the Thrift Savings Plan], [the agency] correctly decided to use the amount shown in Box 1 of his IRS Forms W-2 when it calculated his allowances."

Mr. Peterson acknowledges the existence of these two decisions, but maintains that the cases were resolved incorrectly. He makes the following arguments in support of this position: The Federal Travel Regulation does not use the term "taxable income." Even if it did, Thrift Savings Plan contributions are taxable; they differ from other portions of salary only in that they are taxed in future years, not the one in which they are received. Elective deferrals therefore do not reduce gross compensation; they merely change the taxable

treatment of the income. Further, not including the contributions in "gross compensation" for the purpose of calculating the RIT allowance penalizes retirement savings. The regulation is not intended to impose such a penalty. Additionally, amounts which are similarly tax-deferred, such as some individual retirement account contributions, are included in box 1 of IRS form W-2, and contributions to the Thrift Savings Plan should not receive less advantageous treatment for RIT calculations just because they go to an employer-sponsored retirement plan.

We have noted in the past that the inflexibility of the procedures for calculation of RIT allowances has resulted in complaints by affected federal employees. In each of our cases in which the complaints have been voiced, however, the employee was disadvantaged because income which he actually received and was taxed upon was not included in the "gross compensation" on which his CMTR was based, and his RIT allowance was smaller as a result. *Wynegar*. Here, by virtue of the agency's determination not to include Thrift Savings Plan contributions in "gross compensation," the CMTR used in calculating the employee's RIT allowance was in line with the actual CMTR for the year in question.

Congress directed that the regulations governing calculation of the RIT allowance are to provide that the allowance cover "*substantially* all of the Federal, State, and local income taxes incurred by an employee and such employee's spouse (if filing jointly)" as a result of receipt of relocation benefits. 5 U.S.C. § 5724b(a) (emphasis added). The regulations therefore need only establish a scheme which results in the employee receiving an allowance which covers a large degree or the main part of the increased tax liability. *Wynegar*; *William A. Lewis*, GSBCA 14367-RELO, 98-1 BCA ¶ 29,532. The interpretation given to the regulation by the Air Force in this case, as by other agencies in other cases in the past, comports with this mandate. Indeed, it is focused on the effect of relocation benefits on taxable income in the year in which the benefits are paid, which promotes the goal of the regulation. Mr. Peterson's interpretation does not do this.

The parties have shown us that GSA, which wrote the regulation, concurs in the Air Force's interpretation. This causes us to give that interpretation further deference. *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Cathedral Candle Co. v. United States International Trade Commission*, 400 F.3d 1352, 1366-67 (Fed. Cir. 2005); *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1282-83 (Fed. Cir. 2005). Also worthy of deference is the fact that the interpretation is of long standing. Although the regulation could have been written more definitively, to make clear which box on IRS form W-2 should be considered when determining earned income and consequently the CMTR necessary to calculate a RIT allowance, we have accepted and continue to accept the interpretation given by the Air Force.

Decision

The claim is denied.

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STEPHEN M. DANIELS
Board Judge