

OPINION NO. 79-020

Syllabus:

Ohio National Guard Technicians are not exempt from municipal income taxation under R.C. 718.01 unless they are on active duty, as defined in 10 U.S.C. §101(22) and 37 U.S.C. §101(18), or are performing under the special circumstances outlined in 37 U.S.C. §§204 and 206.

To: James C. Clem, Adjutant General, Worthington, Ohio
By: William J. Brown, Attorney General, May 24, 1979

I have before me your request for an opinion regarding R.C. 718.01. That section states in pertinent part:

No municipal corporation shall tax the military pay or allowances of members of the armed forces of the United States

Specifically, you have asked the following question:

May an Ohio municipal corporation tax the pay and allowances of technicians serving in the Ohio National Guard?

Your question thus raises two issues. The first is whether these technicians are "members of armed forces of the United States." The second is whether the pay they receive is "military pay."

Only two cases can be found which address the issue of municipal taxation of a National Guard Technician's pay. Springfield v. Saunders, 21 Ohio Op. 2d 442 (Clark County Ct. App. 1962), concluded that the employment status of an Air National Guard Technician was essentially civilian in character, and that it would, therefore, be discriminatory and unjust to exempt the income earned by him solely because he was a member of the National Guard.

In City of Bellefontaine v. Krouse, 58 Ohio Misc. 1 (1978), the "military pay" issue was conceded by the city, and the court addressed the sole issue of whether the defendant, an Administrative Supply Technician of the Ohio National Guard, was a "member of the armed forces of the United States." Based on the facts of that particular case, the court found that he was.

Both Saunders and Krouse turn on their particular facts and offer no specific answer to your generalized question. Prior to those decisions, one of my predecessors spoke to the issue in 1959 Op. Att'y Gen. No. 859, p. 574. He concluded that:

. . .[A] member of the National Guard who is also a member of the Army or Air National Guard of the United States is a member of the armed forces of the United States within the purview of Section 718.01, Revised Code, and his military pay in such capacity is not subject to municipal income tax whether earned in part-time or in full-time work. (Emphasis added.)

That opinion was based on the premise that the National Guard member in question was also a member of the "National Guard of the United States." In light of that opinion, it is appropriate to consider whether there is a distinction between being a member of the "National Guard" and being a member of the "National Guard of the United States," and, if so, whether the distinction affects a member's receiving "military pay and allowances [as a member] of the armed forces of the United States."

There is no question that the Army and Air Force of the United States are parts of the "armed forces of the United States." In this regard, 10 U.S.C. §101 provides, in part:

(4) "Armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Furthermore, 10 U.S.C. §3078 states:

The Army National Guard while in the service of the United States is a component of the Army. (Emphasis added.)

10 U.S.C. §8078 makes a similar provision with respect to the Air National Guard.

The key phrase, therefore, is "while in the service of the United States." In that regard, 10 U.S.C. §§3079 and 8079 speak to the Army and Air National Guard respectively, and those sections state that "active duty" is the decisive factor in determining whether or not a member of the National Guard is in the "National Guard of the United States." Reference to the "Historical and Revision Notes" indicates that those sections were revised in 1956 [70A Stat. 171, 496] as follows:

When not on active duty in the service of the United States members of the [Army or Air] National Guard of the United States shall be administered, armed, uniformed, equipped and trained in their status as members of the [Army or Air] National Guard. (Underlined words omitted as "surplusage.")

Thus, "in the service of the United States" and "active duty" appear to be synonymous. Furthermore, 10 U.S.C. §§3495 and 8495 state that:

Members of the [Army or Air] National Guard of the United States are not in active Federal service except when ordered thereto under law.

Decisions in other states indicate that, unless members of the National Guard are on active duty in the federal service, they are not part of the armed forces of the United States. Rather, they are employees of the state, and are merely members of the reserve component of the federal forces subject to call up to the active service under law. Storer Broadcasting Company v. United States, 251 F. 2d 268 (5th Cir. 1958); Williams et al. v. United States, 189 F. 2d 607 (10th Cir. 1951); Bianco v. Austin, 204 App. Div. 34, 197 N.Y.S. 328 (1922); Sadowski v. State, 274 N.Y.S. 2d 368, 51 Misc. 2d 832 (Ct. Cl. 1966); State v. Johnson, 186 Wis. 1, 202 N.W. 191 (1925).

While 10 U.S.C. speaks to the organization of the National Guard, 37 U.S.C. speaks to pay and allowances of members. The Enacting Clause of 37 U.S.C. [76 Stat. 451] provides, in part:

That the laws relating to pay and allowances of the uniformed services of the United States are revised, codified, and enacted as title 37 of the United States Code, entitled "Pay and Allowances of the Uniformed Services". . . .

37 U.S.C. §204 states:

(a) . . . [T]he following persons are entitled to the basic pay of the pay grade to which assigned or distributed . . .

- (1) a member of a uniformed service who is on active duty; and
 (2) . . . a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training, training duty with pay, or other full-time duty, provided by law, including participation in exercises or the performance of duty under section 3033, 3496, 3541, 8033, 8496, or 8541 of title 10, or section 503, 504, 505, or 506 of title 32.

. . . .

- (c) A member of the National Guard who is called into Federal Service for a period of 30 days or less is entitled to basic pay (Emphasis added.)

Thus, it is clear that only members on active duty under federal law are entitled to military pay under this section. 37 U.S.C. §206 provides for additional specific circumstances wherein a member of the National Guard may be entitled to military pay and allowances. That section provides compensation, at a rate of 1/30 of the basic pay, for each regular period of instruction, duty, drill, or training.

In light of the foregoing, it is clear that, unless members are on active duty under federal law, or are performing under the special circumstances outlined in 37 U.S.C. §§204 and 206, they are part of the reserve component of the armed forces of the United States, but are not receiving "military pay and allowances" as members of the "armed forces of the United States."

Thus, it is my opinion, and you are advised, that:

Ohio National Guard Technicians are not exempt from municipal income taxation under R.C. 718.01 unless they are on active duty, as defined in 10 U.S.C. §101(22) and 37 U.S.C. §101(18), or are performing under the special circumstances outlined in 37 U.S.C. §§204 and 206.