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MEMBER OF NATIONAL GUARD WHO IS ALSO MEMBER OF ARMY OR AIR NATIONAL GUARD OF THE U. S.—IS ALSO MEMBER OF ARMED FORCES OF THE UNITED STATES. 1—MILITARY PAY NOT SUBJECT TO MUNICIPAL INCOME TAX. SECTION 718.01, R.C.

SYLLABUS:

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.

Columbus, Ohio, October 9, 1959

Hon. Loren G. Windom, The Adjutant General
Adjutant General's Department, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion upon the following matter is requested. Numerous municipalities in the State of Ohio have local income tax

laws. Quite uniformly these local income tax laws exempt members of the armed forces from the payment of such taxes upon their military salaries. Several municipalities have asked whether members of the Ohio National Guard, who are also members of the Army or Air National Guard of the United States and who are employed full time in the business of the Guard, should be exempted under their local income tax laws.

“The facts bearing upon the matter are as follows :

“1. There appears to be no question with respect to drill pay because Guardsmen are on ‘active duty’ for drill periods by federal regulations and such income would be exempt.

“2. The Guard has a number of officers and enlisted men who are employed full time by this Department. Some of such categories are :

“a. Officers and men on Air Force standby alert status.

“b. Technicians who operate and maintain our National Guard air bases and our aircraft.

“c. Technicians who operate and maintain our National Guard army installations and equipment.

“3. All equipment of the Guard is Federal property.

“4. This personnel is paid in a variety of ways as follows :

“a. 100% by the Federal Government.

“b. 100% by the State.

“c. 75% Federal and 25% State.

“The method of payment may change from time to time although there is no change in job assignment. This is caused by shifts in financing at the Federal level and by Federal-State agreements relative to maintenance of the Guard.

“5. The National Guard (Army and Air) is a component of the Armed Forces of the United States. (32 U.S.C.A., Sec. 101 (5) (7)).

“6. It is noted that 10 U.S.C.A., Sec. 3062 states ‘(c) The Army consists of—(1) The Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve; * * *’; that 10 U.S.C.A., Sec. 8062 states ‘(d) The Air Force consists of (1) the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States and the Air Force Reserve; * * *’; that 32 U.S.C.A., Sec. 101 states ‘(2) Armed Forces means the Army * * * Air Force * * *’.

“Your opinion is specifically desired upon the following question :

“Is a member of the National Guard, who is also a member of the Army or Air National Guard of the United States and who is a full time duty employee of the National Guard, a member of the Armed Forces of the United States within the meaning of the municipal income tax laws?”

Regarding taxation of military pay of members of the armed forces of the United States by municipal corporations, Section 718.01, Revised Code, reads in part:

“* * *

“No municipal corporation shall tax the military pay or allowances of members of the armed forces of the United States,
* * *.”

The first question to consider in this matter is whether a member of the National Guard who is also a member of the Army or Air National Guard, is a member of the armed forces of the United States. The second question to consider is whether, if the answer to the first question is yes, the fact that the member is on full-time duty should affect the application of the tax.

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, Title 10, U. S. Code Annotated, Section 101, provides in part:

“* * *

“(2) ‘Armed forces’ means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

“* * *

“(5) ‘Army National Guard of the United States, means the reserve component of the Army all of whose members are members of the Army National Guard.

“* * *

“(7) ‘Air National Guard of the United States’ means the reserve component of the Air Force all of whose members are members of the Air National Guard.

“* * *

It also appears that members of the Army National Guard and members of the Air National Guard are members of the Army and Air Force, respectively.

Title 10, U. S. Code Annotated, Section 3062, reads in part :

“* * *

“(C) The Army consists of—

“(1) the Regular Army, *the Army National Guard of the United States*, the Army National Guard while in the service of the United States, and the Army Reserve; and

“* * * (Emphasis added)

Title 10, U. S. Code Annotated, Section 8062, reads in part :

“* * *

“(D) The Air Force consists of—

“(1) the Regular Air Force, *the Air National Guard of the United States*, the Air National Guard while in the service of the United States, and the Air Force Reserve;

“* * * (Emphasis added)

In view of the foregoing, I am of the opinion that a member of the Army or Air National Guard of the United States, as such, *is* a member of the armed forces of the United States, and his pay in such capacity is therefore not subject to a municipal corporation income tax.

Considering the second question, a member of the Ohio National Guard in serving as a member of the Army or Air National Guard of the United States is a member of the armed forces of the United States in such service. Thus, it follows that *no* pay in such capacity is subject to municipal income tax regardless of whether the work involved is part-time or full-time.

Accordingly, it is my opinion and you are advised 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.

Respectfully,

MARK MCELROY

Attorney General