

STATE OF ALABAMA,  
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. INC. 92-283

ROBERT, JR. AND SARAH COMSTOCK  
1640 Hubert Pierce Road  
Semmes, AL 36575,

§

§

Taxpayers.

§

FINAL ORDER

The Revenue Department assessed income tax against Robert, Jr. and Sarah Comstock for the year 1989. The Comstocks appealed to the Administrative Law Division and a hearing was conducted on November 13, 1992 in Mobile, Alabama. Robert Comstock, Jr. (Taxpayer) appeared at the hearing. Assistant counsel Duncan Crow represented the Department. The facts are undisputed.

The Taxpayer is a retired military officer and was employed by the Mobile County School Board in 1989 as a junior ROTC instructor.

The issue in dispute is whether the Taxpayer's pay from the School Board included tax exempt military allowances from the U. S. Government.

The Taxpayer's pay was computed as follows: The Taxpayer would have received active duty pay of \$3,327.60 a month. As a retired officer, the Taxpayer actually received \$1,964.00 a month.

The School Board pay was the difference of \$1,363.60, plus the basic allowances for quarters, subsistence, and variable housing that the Taxpayer would have received had he been on active duty,

\$577.80, \$119.61 and \$4.86, respectively, for a total monthly pay of \$2,065.87. The Army reimbursed the School Board for one-half of the Taxpayer's monthly pay.

The Taxpayer claims that his pay from the School Board included the basic allowances from the military, which are exempt from Alabama income tax pursuant to Treasury Reg. §1.61-2(b). The Department contends that the entire School Board pay was taxable and that the allowances were used only as part of a formula by which the Taxpayer's pay was computed. I agree with the Department.

The Taxpayer did not receive tax-free military allowances from the U. S. Government during 1989. The entire amount received by the Taxpayer was paid by the Mobile County School Board. The military allowances were used only as part of a formula by which the School Board pay was calculated.

Sweeney v. U.S., 74-2 USTC, is directly on point. In Sweeney, the U. S. District Court ruled that the amount received by a retired military officer serving as a junior ROTC instructor is taxable in full, as follows:

Neither the United States Supreme Court, the United States Court of Appeals, Fifth Circuit, nor any other Court of Appeals has interpreted this statute as far as this court has determined, and the only case known to this court interpreting 10 U.S.C. 2031 is an apparently unreported decision, Scott v. United States, Civ. No. 72-1324 (D.S.C. Nov. 27, 1973). Scott held, in a well-reasoned opinion, that 10 U.S.C. 2031(d)(1) did not provide for retired personnel teaching JROTC to receive "allowances" that would be excluded from gross income but

rather the statute set out a formula by which their compensation as a JROTC instructor is to be computed. This court agrees with the reasoning and the holding reached in Scott.

First it should be noted that the plaintiff is paid as an instructor by the Atlanta Board of Education, not by the Department of the Army. The plaintiff is entitled to his retired pay from the Army under any circumstances. The controversy centers around the "additional amount" he is entitled to receive from the school board. Retired personnel serving as instructors are entitled to receive in addition to normal retired pay "an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty . . . ." Only a strained reading of this statute can produce the result that such retired personnel are entitled to "allowances."

It is clear to this court that the statute merely sets out a formula by which it can be determined the maximum amount the school can pay the JROTC instructors. The statute does not set a fixed amount but only establishes a maximum limit above which the schools cannot go. The retired personnel are entitled to "an additional amount of not more than . . .", therefore, conceivably the school can pay such instructors any amount mutually agreed upon under that maximum amount. This means these instructors could be paid less than the difference between retired pay and active duty pay and allowances.

The statute makes no provision for determining what amount would be attributed to "allowances" and what amount would be attributed to pay if this "additional amount" paid by the schools was, in fact, less than the difference between retired pay and active duty pay and allowances. Plaintiff's interpretation seems to suggest that any amount he receives would always be considered "allowances" for tax purposes up to the full amount of allowance he would have been entitled if he were on active duty. This is clearly unrealistic, and while it is apparently not the case in the action sub judice, it points out the unworkability of plaintiff's reading of the statute. Section 2031(d)(1) provides for the retired personnel to receive an "additional amount of not more than the difference between their retired pay and active duty pay and allowances"; it does not provide for them to receive active duty pay and allowances less their retired pay. This distinction is important. The statute gives a formula to ascertain the maximum amount to which such

retired personnel are entitled; it does not provide that they receive "allowances." If Congress had intended these retired members of the Armed Services to receive allowances, it would have surely provided for it in a direct way with an established method for computing the amount of the allowance in every situation.

\* \* \*

This court holds that retired military personnel employed by schools under 10 U.S.C. §2031 (Supp. 1974) are not entitled to exclude from their gross income any part of the monies received from local school boards while serving as JROTC instructors as "allowances" for quarters, rations, and clothing.

The above clearly establishes that the Taxpayer did not receive tax-exempt military allowances from the U.S. Government as part of his junior ROTC pay. Accordingly, the assessment in issue is affirmed and judgment is entered against the Taxpayer for \$281.71, with additional interest from August 10, 1992.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on December 1, 1992.

---

BILL THOMPSON  
Chief Administrative Law Judge