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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

*[Request for Reconsideration of Waiver Denial]*

**FILE:** B-199108

**DATE:** March 10, 1981

**MATTER OF:** Lieutenant Commander James D. Connors, USNR

**DIGEST:** 1. A service member who was overpaid due to excessive payments of withholding tax on his behalf to the Internal Revenue Service may not have the debt waived since he was aware of the overpayment on his behalf when he filed his Federal income tax return and received the financial benefit at that time; therefore, collection would not be against equity and good conscience. Further, financial hardship, alone, resulting from collection is not a sufficient reason to retain the payments.

2. A service member erroneously paid a housing allowance during a period while he was assigned Government quarters may have the debt waived where delivery of his Leave and Earnings Statements was unduly delayed, the statements contained numerous errors affecting their reliability, and he could not reasonably determine that he was being overpaid.

Lieutenant Commander James D. Connors, USNR, requests reconsideration of our Claims Division's November 7, 1979 denial of his application for waiver of his debt to the United States in the total amount of \$970.74. The debt arose from erroneous payments of pay and allowances attributable to undercollection of Federal Income Tax Withholding paid on his behalf and erroneous credits for housing allowance while he was assigned to Government quarters. Waiver is granted for \$418.86 in erroneous credits for housing allowance because the error was not apparent; however, waiver is denied for the remainder of the debt consisting of overpayments attributable to undercollection of income tax withholding which was credited to Commander Connors' tax account at the Internal Revenue Service.

After Commander Connors began active duty on May 17, 1976, he filed an Employee's Withholding Allowance Certificate (Form W-4) requesting Federal Income Tax Withholding at a rate

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based on being married with two dependents (M-2). Apparently, this document was never received by the Navy Finance Center in Cleveland, Ohio, and his centralized pay account was established with his tax liability reported to the Internal Revenue Service indicating tax withholding at a rate based on being single and no dependents (S-0).

An audit we requested from the Navy Family Allowance Activity indicates that Commander Connors was overpaid in the amount of \$551.87 during 1976 attributable to under-collection of income tax withholding. This overpayment occurred when local disbursing officers who paid him computed his pay based on the lower withholding rate of M-2, whereas the centralized pay system computed his pay based on the higher withholding rate of S-0. The Navy transmitted an amount consistent with the higher S-0 rate to the Internal Revenue Service and that amount was reflected on the Wage and Tax Statement (W-2) issued to him for the tax year 1976 which he then received credit for when he computed his income tax although only the lower amount had actually been withheld from him.

During January, February and March 1977, Commander Connors was overpaid an additional amount of \$418.86 because the computation of his normal pay for these months included an erroneous credit of \$4.70 a day for housing allowance which he was not entitled to because he was assigned to Government quarters. Therefore, the total amount of his overpayments was actually \$970.73.

Commander Connors, in his original request for waiver, indicated that the tax withholding error occurred through no fault of his when information regarding his tax withholding was processed by the Navy. As to the erroneous housing allowance, he stated that he had not requested a housing allowance, and repayment would cause him hardship. Waiver was denied by our Claims Division on the ground that because he received a tax refund from the Internal Revenue Service for an amount not withheld from his pay but paid on his behalf, collection would not be against equity and good conscience. It was also determined that he was partially at fault in not recognizing the erroneous credit of housing allowances on his Leave and Earnings Statements.

In his appeal, Commander Connors indicates that his Leave and Earnings Statements for May through October 1976

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were not prepared until October 24, 1976. In addition, he indicates that since he was stationed in Guam at that time, he believes that he probably did not receive these statements before late November or early December 1976 and that he was unable to verify them for accuracy in a timely manner.

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if, in the opinion of the Comptroller General--

"\* \* \* there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member \* \* \*."

We interpret the word, "fault", as used in 10 U.S.C. 2774, as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in light of all of the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See B-184514, September 10, 1975, and B-193450, February 26, 1979.

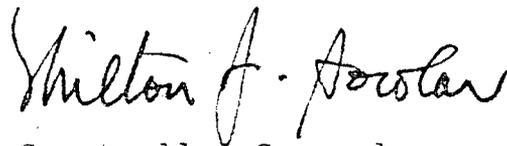
In the present situation, Commander Connors was paid during 1976 by manual computations which were essentially correct. The amounts deducted for income tax withholding were in accordance with Commander Connors' expressed instructions on his Form W-4; i.e., deductions were made at the M-2 rate. The erroneous payments occurred only after the Navy transmitted to the Internal Revenue Service an amount based on the higher S-0 rate which was credited to Commander Connors' tax account at the Internal Revenue Service. The withholding problem was discovered in January 1977 well before he could have filed and received a refund for tax year 1976. Thus, at the time he filed his tax return he should have been aware of the overpayment made to the Internal Revenue Service on his behalf for which he then received credit or refund. Financial hardship resulting from collection is not a sufficient reason

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for a debtor to retain payments which did not belong to him. B-183460, May 28, 1975; B-192380, November 8, 1978. In these circumstances collection of the excess tax credits given Commander Connors would not be against equity and good conscience. Therefore, waiver of the undercollection in the amount of \$551.87 is denied.

With respect to the overpayment of \$418.86 resulting from the erroneous crediting of housing allowance, we have consistently held that service members have a responsibility to verify the entries on their Leave and Earnings Statements. Commander Connors' contention regarding the Leave and Earnings Statements covering May through October 1976 appears to be correct. The record shows that these and subsequent statements would have had limited usefulness for determining the correctness of pay because of the numerous errors they contained. For example, the statements for May through October 1976 show basic pay at the rate for an 0-3 under 2 years service whereas he was entitled to and was paid the pay of an 0-3 over 8 years service. Therefore, he could not have reasonably relied upon them even if he had received them on time. Accordingly, waiver is granted for these erroneous credits in the amount of \$418.86.

If any of the amount waived has been repaid, it may be refunded to Commander Connors if he files a claim for it with the Navy within 2 years of this waiver.



Acting Comptroller General  
of the United States