



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

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B-212117

July 19, 1983

The Honorable Christopher H. ^{D.}Smith
Member, United States House
of Representatives
402 East State Street
Trenton, New Jersey 08608

Dear Mr. Smith:

This letter is in response to yours dated June 8, 1983, on behalf of a constituent who is a member of the Army Reserve, and who has requested our official opinion concerning the legality of withholding social security taxes from the pay of military reservists if they have already paid the full amount of those taxes for the year on wages received from nonmilitary sources.

Official decisions in specific cases involving the withholding of Federal taxes from income, and the payment of claims for Federal tax refunds, are primarily matters reserved for determination by the Department of the Treasury, Internal Revenue Service, and are not within our jurisdiction. See, e.g., Matter of Martin, 58 Comp. Gen. 528 (1979); 52 Comp. Gen. 420, 424 (1973); and 26 U.S.C. 7801, 7802. However, at your request we reviewed the applicable laws and regulations and we conclude that the withholding of social security taxes from active duty military basic pay in the circumstances described is consistent with the governing provisions of law.

The Federal Insurance Contributions Act, as amended and as currently codified in sections 3101 through 3126 of title 26 of the United States Code, requires the withholding of social security taxes from the wages of employees who are covered by Federal hospital insurance; or by Federal old-age, survivors, and disability insurance; or both. Section 3101 establishes the applicable tax rates on wages for each type of insurance coverage. These rates are applied to the employee's wages and the appropriate amount is to be withheld by the employer.

A "contribution and benefit base" is established yearly under section 230 of the Social Security Act (42 U.S.C. 430). The base amount for 1983 is \$35,700. Under 26 U.S.C. 3121(a)(1) an employee is not subject to social security tax withholdings on wages paid "by an employer during the calendar

year" in excess of that year's base amount. (Emphasis on the singular added.) Thus, if an individual has 2 or more separate employers in the course of a year, each employer must withhold social security taxes from wages paid to the individual up to the maximum base amount, without regard to the wages paid and taxes withheld by the other employers. However, 26 U.S.C. 6413(c) provides that if, "by reason of an employee receiving wages from more than one employer during a calendar year," this results in the withholding of social security taxes in an aggregate sum exceeding the contributions payable on the base amount for that year, then the individual is eligible to have the excess withholdings credited against any Federal income taxes owed, and to claim a monetary refund of any balance remaining. Regulations of the Internal Revenue Service contained in title 26 of the Code of Federal Regulations are consistent with these governing provisions of statute. See 26 C.F.R. 31.3121(a)(1)-1 and 31.6413(c)-1.

Social security coverage was extended on a contributory basis to members of the uniformed services on January 1, 1957, through the amendment of both the Social Security Act and the Federal Insurance Contributions Act by Public Law 881, 84th Congress, approved August 1, 1956, ch. 837, 70 Stat. 857. The Federal Insurance Contributions Act now defines military service, including service as a reservist, as "employment" for purposes of the act. See 26 U.S.C. 3121(m) and (n). In addition, active duty basic pay is defined as constituting "wages," exclusive of inactive duty Reserve weekend drill pay and other emoluments payable under the military pay and allowance system. See 26 U.S.C. 3121(i)(2). No provision exempts the military and naval services, as "employers", from withholding social security taxes from the active duty basic pay of service members on account of a member's outside private employment. Thus, every service member's active duty basic pay is subject to social security tax withholdings notwithstanding any private employment a member may have in the year in which the active duty is performed. This includes members of the Army Ready Reserve who are required under 10 U.S.C. 270 to perform a minimum of 2 weeks' active duty each year in addition to periodic inactive duty training drills throughout the year. In the event the service member's aggregate social security tax withholdings exceed the contributions payable on the social security "base amount" in any given year because of other employment, the member's recourse is to claim an income tax credit or a refund in the same manner as any other taxpayer in that situation.

B-212117

Thus, it appears that social security taxes are being withheld from the active duty basic pay of your constituent in the manner prescribed by law, as discussed above.

We trust this will serve the purpose of your inquiry.

Sincerely yours,

for *Harry R. Kim Cleve*
Comptroller General
of the United States