



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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The Honorable Phil Hare
Member, U.S. House of Representatives
261 North Broad Street, Suite 5
Galesburg, IL 61401

Dear Congressman Hare:

I am responding to your letter of May 5, 2008, on behalf of your constituent,

In 2001, Congress provided that the Secretary of the Navy must make a payment of back pay to any person who was not available to accept a promotion because the person was interned as a prisoner of war while serving as a member of the Navy or the Marine Corps during World War II (WW II) [section 667(c) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (P.L. 106-398) (the 2001 Act)]. This payment represented the difference between the amount the prisoner of war would have received if he had been able to accept the promotion and the amount of basic pay actually received during the period the military member was unable to accept the promotion.

In 2008, Congress amended the law to provide for an increase in the back pay amount to reflect increases in the cost of living since the date the basic pay was awarded [section 675 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) (2008 Act)].

As the widow of a WW II prisoner of war, recently received the increased back pay amount authorized under the 2008 Act. asked if this payment is taxable.

Military pay members of the United States Armed Forces receive is generally includable in gross income [section 1.61-2(a) of the Income Tax Regulations].

However, certain “qualified military benefits” are excluded from gross income [section 134 of the Internal Revenue Code (the Code)]. The term “qualified military benefit” means any allowance or in-kind benefit (other than personal use of a vehicle) that

- Any member or former member of the uniformed services of the United States or dependent of such member receives by reason of such member’s status or service as a member of the uniformed services; and
- Was excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice in effect on such date (other than a provision of this title).

Because the benefits payable under section 675 of the 2008 Act were not established until 2008, they cannot fit into the definition of “qualified military benefit” provided in section 134 of the Code. Accordingly the payment is not excludable from income under section 134.

Compensation received for active service as a member below the grade of commissioned officer in the Armed Forces of the United States while serving in a combat zone is excluded from gross income under section 112(a) of the Code. A similar exclusion exists for commissioned officers in the Armed Forces, but the exclusion is limited to a certain amount of compensation per month [section 112(b) of the Code].

Because Congress added section 112 to the Code in 1954, it does not apply to combat zone compensation earned for service during WW II. Rather, the governing Code provision is section 22(b)(13) of the 1939 Code, which provided a similar exclusion for combat zone compensation. While we were not asked about the federal income tax consequences of back pay awarded under the 2001 Act, it would likely meet the requirements for exclusion as pay earned in a combat zone. Unfortunately, the cost of living adjustment under the 2008 Act does not fit within the definition of nontaxable combat zone compensation. Although the payments under the 2008 Act are related to service in a combat zone, they are really payments to reflect increases in the cost of living since the period the military member was imprisoned and therefore unable to accept a promotion for which he had been selected. As such, the payments are not for service in a combat zone and these payments are taxable.

I hope this information is helpful in responding to . If you have further questions, please contact at () .

Sincerely,

Nancy J. Marks
Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)