

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:ITA:B04:YLee
PRES-120275-22

UILC: 139F.00-00

date: September 13, 2023

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subject: Reconsideration of Advice on Restoration of Back Pay to Exonerated Military Service Members

This memorandum provides non-specific legal advice regarding the application of section § 139F of the Internal Revenue Code (Code) and is a reconsideration of advice previously provided to you. This document should not be used or cited as precedent.

ISSUE

Whether forfeited military pay that subsequently is restored to a service member pursuant to § 875 of the Uniform Code of Military Justice (UCMJ) when a court-martial sentence has been set aside or disapproved may be excluded from gross income of that service member under § 139F of the Code.¹

CONCLUSION

We have reconsidered our advice in PMTA 2020-05 following the receipt of additional information. Based on the information, we conclude that forfeited military pay that is restored to a service member whose court-martial sentence is set aside or disapproved may not be excluded from gross income of that service member under § 139F of the Code. The IRS Wrongful Incarceration FAQ Q9/A9, www.irs.gov/individuals/wrongful-incarceration-faq, will be revised to reflect this position.

¹ Unless otherwise indicated, statutory references are to the Uniform Code of Military Justice, Title 10 U.S.C. Ch. 47 (UCMJ) or to the Internal Revenue Code of 1986, Title 26 U.S.C. (Code).

LAW AND ANALYSIS

Members of the military services are entitled to pay as a matter of statute and not as compensation for services performed. See 37 U.S.C. § 204 (service members on active duty “are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service”). Pay and allowances therefore continue to accrue to a service member in military confinement unless such service member’s pay and allowances are forfeited by a court-martial sentence. As service members are entitled to pay by statute, if a court-martial sentence is set aside or disapproved, § 875 of the UCMJ requires that forfeited pay and allowances be restored to the service member.²

Section 139F of the Code allows “any wrongfully incarcerated individual” to exclude from gross income “any civil damages, restitution, or other monetary award . . . relating to the incarceration of such individual . . . for which such individual was convicted.” A payment to a service member under § 875 when a court-martial sentence is set aside or disapproved, however, is not a civil damage, restitution, or other monetary award that relates to the incarceration of a service member, but merely the restoration of pay and allowances to which the service member is entitled by statute. For this reason, forfeited pay and allowances that are restored to a military service member pursuant to § 875 cannot be excluded from the gross income of that service member under § 139F.

Please call (202) 317-4718 if you have any further questions.

² See *Dock v. United States*, 46 F.3d 1083, 1087 (Fed. Cir. 1995) (Section 875 “is a statute that deals with entitlement to pay”).