

**REDACTED DECISION -- 08-063 RPD -- BY GEORGE V. PIPER, ALJ --
SUBMITTED for DECISION on JUNE 2, 2008 -- ISSUED on JUNE 9, 2008**

SYNOPSIS

PERSONAL INCOME TAX -- FEDERAL LAW ENFORCEMENT OFFICER'S RETIREMENT BENEFITS NOT FULLY EXCLUDED WHEN QUALIFIED FOR SOCIAL SECURITY BENEFITS -- Retired deputy United States Marshall who performed duties similar to those performed by West Virginia state fire fighters and police officers, but who could collect social security benefits, may not fully exclude her retirement benefits from the West Virginia personal income tax, pursuant to the ruling in *Dodson v. Palmer*, and pursuant to W. Va. Code § 11-21-12(c)(6), as amended, because said ruling is applicable only to those federal law enforcement officers who were unable to collect social security benefits.

FINAL DECISION

On March 4, 2008, the Petitioner filed a claim for refund for the tax year 2007. The Personal Income Tax Unit of the Internal Auditing "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent"), by letter dated March 10, 2008, totally denied the refund claim as not being supported by statutory law.

Thereafter, by mail, postmarked April 23, 2008, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund. *See* W. Va. Code §§ 11-10A-8(2) [2002] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10-A-10 [2002].

FINDINGS OF FACT

1. Petitioner was employed by a federal government agency in clerical positions from April 29, 1969 through June 17, 1977, and was placed in the Civil Service Retirement System (CSRS).

2. After a break in service, Petitioner was rehired by the Department of Justice, Federal Bureau of Prisons (FBOP) as a correctional officer from September 16, 1984 through January 12, 1985.

3. Beginning on January 13, 1985, until Petitioner's retirement on December 30, 2006, Petitioner was employed by the United States Department of Justice, United States Marshall Service ("USMS").

4. On March 27, 2003, Petitioner, then employed by the United States Department of Justice, USMS, filed an appeal with the Merit Systems Protection Board ("MSPB"), challenging a determination from the Office of Personnel Management ("OPM"), that the Petitioner had been in the appropriate retirement plan. This action was filed under the Federal Erroneous Retirement Coverage Correction Act (FERCCA), Pub. L. No. 106-265, Title II, 114 Stat. 762, 770-786 (2000).

5. On August 7, 2003 (date the decision became final), a Federal Administrative Law Judge ruled in favor of the United States Department of Justice and against the Petitioner, and found as follows:

(a) When Petitioner was rehired into federal service in 1984 by the Department of Justice, Federal Bureau of Prisons, she was placed into the CSRS-offset retirement plan coverage and that that coverage remained when Petitioner transferred to the USMS in 1985.

(b) On July 20, 1987, Petitioner elected to switch retirement systems and enrolled into the federal employees retirement system (FERS).

(c) Although Petitioner argued that she should not be considered as having elected to enroll in the FERS system because she did not place her initials in the appropriate box, as required, the fact remains that she was the person who made the checkmark in the box electing FERS coverage and therefore did, from the evidence, elect FERS coverage.

(d) If Petitioner was misinformed concerning her election options in this matter, such inadequate or incorrect advice is not sufficient to reverse OPM's decision. See *Richmond v. Office of Personnel Management*, 110 S. Ct. 2465, 2476 (1990).

DISCUSSION

Because Petitioner qualifies as a federal law enforcement officer as having performed duties as both a correctional officer for the FBOP and later as a Deputy U. S. Marshall, the only issue which remains to be determined is whether, based upon the facts in this case, Petitioner qualifies for the tax exemption in W.Va. Code § 11-21-12 (c) (5), as amended, pursuant to the holding in *Dodson v. Palmer*, Civil Action No. 00-C-AP (Monongalia County, W. Va. (2000)).

The statutory law of the State of West Virginia explicitly excludes, fully, from state income tax, those pensions and annuities paid to retired “West Virginia police officers,” West Virginia firemen, West Virginia state police and West Virginia deputy sheriffs. West Virginia Code § 11-21-12(c) (6), as amended.

For purposes of establishing special retirement eligibility, the Federal Office of Personnel Management has defined a federal “law enforcement officer” to mean “an employee whose job duties are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. 5 C.F.R. § 831.902; *see also* 5 C.F.R. §§ 831.901 & 831.903. The federal government has also distinguished such “law enforcement officers” from

other civil service employees, including military personnel, in that the federal “law enforcement officers” retirement is calculated using an altogether different formula from the one used to calculate other federal civil service employees’ retirement benefits.

According to the ruling of the Circuit Court of Monongalia County, West Virginia, in *Dodson v. Palmer* (2000), a person who proves that he or she worked as a federal “law enforcement officer” and did not qualify to receive social security benefits while working in that job may exclude all of his or her federal retirement income from that job, for purposes of the West Virginia personal income tax (akin to the total exclusion for West Virginia police and firefighters’ retirement income).

Since the 2000 ruling in *Dodson v. Palmer* this tribunal has consistently applied the language contained therein in a literal fashion and without further expansion, because exemptions and deductions from tax must be strictly construed against the person claiming the exemption or deduction. *See* Syl. Pt. 1 *RGIS v. Palmer*, 209 W. Va. 152, 544 S.E. 2d 79 (2001); *See also* Syl. Pt. 4, *Shawnee Bank, Inc. v. Paige*, 200 W.Va. 20, 488 S.E. 2d 20 (1997).

Because Petitioner did not prove that, as a federal law enforcement officer, she did not qualify to receive social security benefits, this tribunal has no recourse but to find that Petitioner may not fully exclude her federal retirement benefits from the measure of the West Virginia personal income tax.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the petitioner-taxpayer, to show that the

petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and W Va. Code St R. § 121-1-63.1 (April 20, 2003).

2. The Petitioner has not carried the burden of proof with respect to the issue of whether Petitioner is entitled to the same treatment as the taxpayer in the *Dodson* ruling discussed above, because Petitioner, although a federal law enforcement officer, has elected to and does qualify to receive social security benefits.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of West Virginia personal income tax, for the tax year 2007, in the amount of \$2,932.00 should be and is hereby **DENIED**.