

1975 O. A. G.

OFFICIAL OPINION NO. 30

November 21, 1975

Honorable Michael E. Gery
State Senator
530 Robinson
West Lafayette, Indiana 47906

Dear Senator Gery:

This is in response to your request for an opinion as to the following question:

“Is a person receiving retired United States military pay entitled to the two thousand dollar (\$2,000) military pay exemption provided for in IC 1971, 6-3-3-4?”

ANALYSIS

Section 108 of the Adjusted Gross Income Tax Act of 1963, Indiana Code of 1971, section 6-3-1-8, provides the following:

“The term gross income shall mean gross income as defined by section 61(a) of the Internal Revenue Code [U.S.C. tit. 26, Sec. 61(a)].”

Section 61 of the Internal Revenue Code provides, in part, the following:

“Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.”

Under this definition, all income is “gross income” unless it is subject to a specific statutory exclusion. A specific statutory exclusion relating to military retirement pay is included in the Adjusted Gross Income Tax Act at Code section 6-3-3-4, which provides, in part, the following:

“[T]he provisions of this Act and the taxes imposed shall not apply to nor be levied upon the first two thousand dollars (\$2,000) of compensation received per annum for military or naval service by members

OPINION 30

of the active or reserve components of the armed forces of the United States . . . while on active or inactive duty.”

Since the exclusion provided by this section applies to income received by military personnel in “active or reserve components,” the answer to your question turns on whether retired military personnel are “members of active or reserve components of the armed forces” within the meaning of Code section 6-3-3-4.

The organization of the armed forces of the United States and status of their personnel are prescribed by federal law. Statutes relating specifically to the nature of retired personnel and their attendant rights provide that a retired officer or enlisted person remains a part of his branch of the armed services and, under certain conditions, even may be recalled to active duty. 10 U.S.C. Sections 274, 675, 676 (Regular Reserve Personnel). See also *United States v. Tyler* (1882), 105 U.S. 244, 26 L.Ed. 985. 10 U.S.C. Section 3075 expressly includes retired officers and enlisted members of the regular army within the definitions of “regular army”. A similar provision with respect to retired air force personnel is found at 10 U.S.C. Section 8075.

Since the Indiana General Assembly, in light of the federal statutory classification of armed forces personnel, has not indicated a clear intention to distinguish between those regular or reserve personnel who are retired and those who are not retired, Code section 6-3-3-4 must be construed as including retirement pay within the \$2,000 exclusion.

CONCLUSION

It is, therefore, my Official Opinion that the \$2,000 exclusion from gross income allowed by Indiana Code of 1971, section 6-3-3-4 applies to military retirement pay.