

**REDACTED DECISION -- 07-314 RPD -- BY GEORGE V. PIPER, ALJ --  
SUBMITTED for DECISION on AUGUST 2, 2007 -- ISSUED on AUGUST 8, 2007**

### **SYNOPSIS**

**PERSONAL INCOME TAX -- OUT-OF-STATE MUNICIPAL LAW ENFORCEMENT OFFICER'S RETIREMENT BENEFITS NOT FULLY EXCLUDED** -- Retired out-of-state municipal police officer who performed duties similar to those performed by West Virginia state fire fighters and police officers, and who, like a limited class of federal retirees, could not collect social security benefits, may not fully exclude his 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 applies only to federal law enforcement officers and, by logical extension, to law enforcement retirees from the Metropolitan Police Department of Washington, D.C., whose retirement system is administered by the United States Department of the Treasury.

### **FINAL DECISION**

On February 15, 2007, the Petitioners timely filed a claim for refund of West Virginia personal income tax for the tax years 2003, 2004, and 2005. 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 February 20, 2007, totally denied the refund claim as not being supported by statutory law.

Thereafter, by mail postmarked April 17, 2007, the Petitioners 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].

Prior to the hearing, Petitioner requested that the hearing in person be waived and that a decision be rendered based upon the documentary evidence filed. Because no material factual disputes existed, this tribunal granted that request.

## **FINDINGS OF FACT**

1. Petitioner served as a police officer with an out-of-state municipal police department, from 1980 through 2003. As a police officer, his duties included basic patrolling, investigations, supervisions, crowd control and various administrative duties.

2. The Petitioner is not a retired “West Virginia police officer,” retired West Virginia state police officer, retired West Virginia fire fighter or retired West Virginia deputy sheriff, although his duties are essentially identical to duties performed by West Virginia state police officers and federal police officers.

3. The Petitioner is not a retired federal law enforcement officer.

4. The out-of-state municipal police department retirement system does not mirror in every way the retirement system of federal law enforcement officers. Specifically, the retirement system for the out of state municipality is not administered by the United States Department of the Treasury.

5. Under the retirement system for the out-of-state municipal police department, the Petitioner did not pay into the social security system and may not, therefore, collect social security benefits.

6. Petitioners currently reside in a county in West Virginia.

## **DISCUSSION**

The sole issue is whether, the Petitioner, who was an out-of-state municipal law enforcement officer who could not collect social security benefits, is allowed to totally

exclude his retirement pension for West Virginia personal income tax purposes, pursuant to the holding in *Dodson v. Palmer*, Civil Action No. 00-C-AP (Monongalia County, WV 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*, 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).

However, in this case, Petitioner's counsel argues that failure to give Petitioner the benefit of West Virginia Code § 11-21-12(c)(6) violates the principle of "intergovernmental tax immunity," because his duties were the same as West Virginia police officers, thereby contradicting the alleged all-encompassing requirement that one sovereign not discriminate against a citizen for dealing with another sovereign, as allegedly contained in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989). \*

Petitioner's line of reasoning was recently rejected in the case of *Pfadenhauer v. Helton*, Civil Action No. 06-AA-3 (Morgan County, WV, July 11, 2007), wherein that court disallowed this same total exclusion for a retired Baltimore City, Maryland police officer, by concluding that, as a general rule, intergovernmental tax immunity applies to the relationship between the federal government and the state government, and not to the relationships among the states.

More importantly, that West Virginia circuit court concluded that federalism and the dangers avoided by intergovernmental tax immunity are not implicated by the application of West Virginia Code §11-21-12 (c)(6) to out-of-state municipal pensions.

Accordingly, because *Davis and Dodson* are based upon protections given to the federal government and its employers under federal law, pursuant to 4 USC § 111,

intergovernmental immunity does not apply to West Virginia's decision to tax residents who receive pensions from other states or from municipalities in other states.

If Petitioner had been a retired federal law enforcement officer, his pension would be fully excluded from West Virginia personal income tax, under *Dodson v. Palmer*; however, since he is not, his pension is not fully excludable.

---

\* In *Davis* the United States Supreme Court struck down a Michigan law that discriminated against federal employees by exempting retirement benefits paid to state employees from state income tax, but including benefits paid to other employees, including federal employees.

The Petitioners also argue that West Virginia Code § 11-21-12 (c)(6), on its face: allegedly violates Article X, Section 1 of the West Virginia Constitution, which requires equal and uniform taxation for similarly situated taxpayers; allegedly violates the Equal Protection Clause of the Fourteenth Amendment, as the classification allegedly has no rational basis and allegedly does not further a legitimate state interest; and allegedly violates other constitutional principles, such as the Commerce Clause and the Privileges and Immunities Clause, as this statute allegedly discriminates against interstate commerce and allegedly impedes the Petitioners' choice on where to reside. This limited-jurisdiction, executive-branch tribunal does not have the jurisdiction, under art. V, §1 of the State *Constitution*, to hold any statute to be unconstitutional on its face.

## 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 does not qualify as a federal law enforcement officer, in that he neither worked as a federal law enforcement officer, nor is his retirement program administered by the United States Department of the Treasury, as in the case involving the Metropolitan Police Department of Washington, D.C.

3. The principle of intergovernmental immunity is not applicable to relationships between West Virginia and the other states or municipalities in other states.

## 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 years 2003, 2004 and 2005, in the total amount of \$\_\_\_\_\_, should be and is hereby **DENIED**.