

## VOLUME NO. 36

## Opinion No. 64

**TAXATION — Income Tax — Special Military Exemption. Section 84-4907.2 Revised Codes of Montana 1947.**

**HELD: Section 84-4907.2 R.C.M. 1947 exempts from state income tax the salary received by members of the Montana Air National Guard who are called into active duty with the United States Air Force pursuant to §672 of Title 10, U.S.C.A.**

April 1, 1976

E.L. Gemberling, Lt. Colonel, MT ANG  
Assistant Adjutant General  
Department of Military Affairs  
1101 North Last Chance Gulch  
Helena, Montana 59601

Dear Colonel Gemberling:

You have requested my opinion on the following question:

Does section 84-4907.2 R.C.M. 1947 enacted by the forty-fourth legislative assembly, exempt from state income tax the salary received by members of the Montana Air National Guard who are called into active duty with the United States Air Force pursuant to §672 of Title 10, U.S.C.A.?

The underlying facts are:

1. Certain members of the Montana Air National Guard are ordered to active duty each month in the 120th Fighter Interceptor Group Air Defense Alert Detachment. (a component of the Air National Guard) This detachment augments and is under the control and supervision of the regular Air Force, 24th NORAD Region. (North American Aerospace Defense Command)
2. Approximately thirty men are enrolled in this alert program with tours of duty ranging from one to twenty days each month.

Section 84-4907.2 R.C.M. 1947 provides:

**Special Military Exemption.** The salary received from the armed forces by residents of Montana, who are **servicing on active duty** in the **regular armed forces**, and who entered into active duty from Montana is exempt from state income tax. (Emphasis supplied)

In construing a statute, whenever possible, the intention of the legislature must be determined from the plain meaning of the words used. *State ex rel. Hoffman v. District Court*, 154 Mont. 201, 461 P.2d 847 (1969). From a literal reading of section 84-4907.2 it can be ascertained that the salary of a National Guard Airman is exempt from state income tax if he is a Montana resident and the salary was received while serving on active duty in the regular armed forces.

The threshold question is to determine whether the members of the alert program are on active duty.

In **Vashon v. United States**, 369 F.Supp 1202 (N.D. Ga. 1973) the court at page 1205 stated:

“Active duty” ...is a descriptive term used by the Air Force to define the existence of a state of being carrying with it certain rights and responsibilities. Since it is the Air Force ... which invests “active duty” with whatever practical consequences that term embodies, whether the status of “active duty” has been obtained in fact depends on whether the definitional preconditions established by the Air Force have been met. Accordingly, in deciding whether plaintiff was on active duty, the court must look to plaintiff’s orders and the applicable regulations.

ADCM55-61 (6-2) (a) provides that members of the alert program ... will be ordered to tours of **active duty** in support of the Federal Mission (ADC Alert Program) under the provisions of U.S. Code, Title 10, section 672(d). The airmen’s orders, in conformity with this regulation, state that they are being ordered to federal active duty pursuant to §672(d).

In view of the requirements set forth in **Vashon, supra**, it is manifest that the airmen are on active duty since both their orders and the appropriate military regulation specify that they are on active duty.

The second question to be considered is whether the airmen are in the regular armed forces when they serve in the alert program.

ADCM 55-61 (1-4) (a) states that the airmen in the alert program:

...participate as integral and permanent parts of the overall air defense system for the North American continent. In such a role, the ANGADADs [ANG Air Defense Alert Detachments] will be operationally considered and employed as **regular Air Force active air defense units** within their geographic area,... (Emphasis supplied)

ADCM 55-61 (1-5) (a) provides:

1-5. Command and Control:

- a. Operational Controls of ANGADADs will be vested in the appropriate NORAD/CONAD controlling agency.

Additionally, the airmen are activated into the alert program under the authority of Title 10, U.S.C.A., (pertaining to the regular armed forces) rather than under Title 32 U.S.C.A., (pertaining to the National Guard).

From the preceding it must be concluded that the airmen are under the supervision and control of, and are serving in the regular armed forces during tours of duty in the alert program.

Active duty in the alert program is distinguishable from active duty for annual training (summer camp). Annual training does not qualify for the section 84-4907.2 tax exemption, because the guardsmen are not activated into the regular armed forces under Title 10, U.S.C.A. In a training situation the guardsmen are called to active duty pursuant to Title 32, U.S.C.A. and remain under the supervision and control of the Montana Air National Guard.

House Bill 363, a companion bill to section 84-4907.2, was killed by the legislature. This bill, if passed, would have granted guardsmen an exemption for the first one thousand dollars in salary received for service in the Montana National Guard. This legislative action makes it clear that the legislature did not intend to grant guardsmen a tax exemption unless their compensation is received for duty in the regular armed forces.

From a review of the legislative history of section 84-4907.2, it appears that its initial purpose was to give a tax exemption to Montana residents entering the armed forces from Montana and serving their time outside the state. However, as the original bill (H.B. 152) passed through the legislature, it was amended, and the provision requiring service outside the state was deleted.

A plain and literal reading of the statute, in its present form, establishes that an airman qualifies for the tax exemption if he is a resident of Montana and serves on active duty in the regular armed forces. Service outside the state is not required.

**THEREFORE, IT IS MY OPINION:**

Section 84-4907.2 R.C.M. 1947, exempts from state income tax the salary received by members of the Montana Air National Guard who are called into active duty with the United States Air Force pursuant to §672 of Title 10, U.S.C.A.

Very truly yours,  
ROBERT L. WOODAHL  
Attorney General