

Opinion No. 53-5660

February 4, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. E. K. Newmann Assistant District Attorney Fifth Judicial District Carlsbad, New Mexico

{*48} We are in receipt of your letter of January 28th asking that we render an opinion concerning whether or not the "soldiers' tax exemption", § 76-111 N.M.S.A., 1941 Comp., is applicable to the honorably discharged veterans of the Korean conflict, where those veterans meet all the other requirements of the soldiers' tax exemption law. We thank you for your excellent opinion on this matter and we are adopting, in our opinion, much of the language used in your opinion.

There is a technical question of whether or not the official hostilities have ended between the United States and Germany, which hostilities began and were declared by the Congress on December 9, 1941. In Opinion of the Attorney General No. 4799, written by Mr. C. C. McCulloh, and dated October 2, 1945, it is stated, in a quotation from an opinion of the Attorney General of the United States to the President of the United States, as follows:

{*49} "Speaking generally, I believe that statutes of the type just mentioned should be considered as effective until a formal state of peace has been restored, unless some earlier termination date is made effective by appropriate governmental action. In *Hamilton v. Kentucky Distilleries Co.*, supra, Mr. Justice Brandies, speaking for the court, said: 'In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace.' Again, in *Commercial Cable Co. v. Burleson*, 255 Fed. 99 104, Judge Learned Hand rejected the contention that certain wartime powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added: 'Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war.'" See also *Kahn v. Anderson*, 255 U.S. 1, 10; *Ware v. Hylton*, 3 Dall. 199, 236; 22 Op. A.G. 190 (1898). It is perhaps unnecessary to add that the Congress can at any time, in response to changed conditions, repeal or amend any wartime statute or group of statutes."

There has been no treaty of peace between the United States and Germany; therefore it would seem that under and by virtue of Opinion No. 4799 we are still engaged in a **declared** war with Germany. Thus, the persons honorably discharged from the armed services, otherwise qualified, would be eligible to receive their tax exemption under and by virtue of the fact that this declared war has not officially ceased.

However, and in addition, the Constitution of the State of New Mexico, Art. 8, § 5, reads as follows:

"The legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars (\$ 200) and the property, including the community of joint property of husband and wife, of every honorably discharged member of the armed forces of the United States

who served in the armed forces of the United States at **any time during which the United States was regularly and officially engaged in any war**, in the sum of two thousand dollars (\$ 2,000). Provided, that in every

case where exemption is claimed on the ground of the claimants having served with the armed forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property upon which exemption is claimed, shall be upon the claimant." (Underlining supplied).

You will note that this section and the enabling legislation set out in 76-111 N.M.S.A. 1941 Compilation refers to "any time in which the United States is **regularly** and **officially** engaged in any war." This language does not say that the war must be declared. To be officially engaged in war does not necessarily mean that the United States must be in a formally declared war. In spite of the fact that there is an undeclared war, the United States is regularly and officially engaged in war in Korea. United States' troops, supplies, arms and equipment were sent to Korea by the President of the United States and such action has received the official sanction of the Congress through appropriations and other legislation designed to implement the prosecution of the Korean {*50} conflict. Troops of the United States have suffered casualties and the industry and economy of the United States has been placed on a wartime footing as a result of the engagement in Korea.

The language in the Constitution and in the enabling legislation § 76-111 N.M.S.A., 1941 Comp., apparently avoids, purposely, the words "while the United States is engaged in a **declared** war" or other comparable language. We feel that the words "regularly" and "officially" mean that it is necessary that the conflict is a war as distinguished from an insurrection, rebellion, or border raid. Any time a nation engages itself and pits its economy, troops and resources to the end of winning an armed conflict then that conflict has been given official sanction and is in effect an "official" and "regular" war.

Thus it is the opinion of this office that a veteran of the Korean conflict is a "soldier" within the meaning of the Constitution and statutes regarding tax exemption and is entitled to such exemption if otherwise qualified.

By Fred M. Standley

Assist. Attorney General