

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

NOTICE OF HEARING AND PROPOSED RULES

The New Mexico Taxation and Revenue Department proposes to adopt the following regulation:

Native American Veterans' Income Tax Settlement Fund

3.3.2.11 NMAC Section 7-2H-3 NMSA 1978

(Claims for Settlement Payments from the Native American Veterans' Income Tax Settlement Fund)

This proposal was placed on file in the Office of the Secretary on September 1, 2009. Pursuant to Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final of the proposal, if filed, will be filed as required by law on or about November 13, 2009.

A public hearing will be held on the proposal on Thursday, October 22, 2009, at 9:30 a.m. in the 1st floor auditorium of the Harold Runnels Bldg., 1190 St. Francis Drive, Santa Fe, New Mexico. Auxiliary aids and accessible copies of the proposals are available upon request; contact (505) 827-0928. Comments on the proposals are invited. Comments may be made in person at the hearing or in writing. Written comments on the proposals should be submitted to the Taxation and Revenue Department, Director of Tax Policy, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before October 22, 2009.

3.3.2.11 CLAIMS FOR SETTLEMENT PAYMENTS FROM THE NATIVE AMERICAN VETERANS' INCOME TAX SETTLEMENT FUND

A. A claim for a settlement payment from the Native American veterans' income tax settlement fund may be made for any period of active duty in the armed forces of the United States during which the claimant or, where the claimant is a successor, the deceased veteran:

- (1) was a member of a federally recognized Indian nation, tribe, or pueblo;
- (2) was a resident within the boundaries of the Indian member's or the member's spouse's reservation or pueblo grant, or within the boundaries of lands held in trust by the United States for the benefit of the member or spouse or the member's or spouse's nation, tribe or pueblo; and
- (3) had New Mexico personal income tax withheld from his or her active duty military pay, and the amount withheld:
 - (a) has not already been refunded to the claimant or the claimant's representative; and
 - (b) cannot be claimed as a refund by filing a New Mexico personal income tax return because the period for filing a refund has run under the applicable statute of limitations.

B. A claim for a settlement payment must provide the following substantiation of the claimant's or, where the claimant is a successor, the deceased veteran's, eligibility for the claim and the amount of the claim.

- (1) **Active duty in the armed forces of the United States.** The claimant must provide a copy of certificate of release or discharge from active duty (DD Form 214) or other proof of service provided by the department of defense and approved by the department of veterans' service. If a claimant does not have a copy of his or her DD Form 214 or other proof of service, the claimant can request that the department of veterans' services request the claimant's DD Form 214 or other proof of service from the department of defense.
- (2) **Status as a Native American.** The claimant must provide a statement signed by the claimant that the claimant or, where the claimant is a successor, the deceased veteran was a member of a federally recognized Indian nation, tribe, or pueblo during the period(s) of his or her active duty in the armed forces of the United States.
- (3) **Domicile on tribal land during period(s) of active duty.** The claimant must substantiate domicile on tribal land (as described in Paragraph (2) of Subsection A above) during the period(s) any New Mexico personal income tax was withheld from active duty military pay. If the address shown on the DD Form 214 or other proof of service is on the claimant's tribal land, the claimant's or deceased veteran's DD Form 214 is sufficient substantiation. If the address shown on the claimant's or deceased veteran's DD Form 214 or other proof of service is not on tribal land, or the claimant cannot establish that the address is on tribal land, the claimant must provide a statement signed by the claimant that the claimant or deceased veteran was domiciled on tribal land during the period(s) any New Mexico personal income tax was withheld from active duty military pay; the statement must provide the claimant's or deceased veteran's address on the tribal land for each period and an official designated by the nation, tribe, or pueblo must attest that each address is on tribal land.

(a) For the purposes of this regulation, "domicile" means a place where an individual has a true fixed home and is a permanent establishment to which the individual intends to return after an absence. Every individual has a domicile somewhere, and each individual has only one domicile at a time. Once established, domicile does not change until the individual moves to a new location with the bona fide intention of making that location his or her permanent home. No change in domicile results when an individual leaves the tribal land if the individual's intent is to stay away only for a limited time, no matter how long.

(b) Examples:

(i) G is a Native American who lives and works on his tribe's pueblo in New Mexico. G joins the marines and is stationed outside New Mexico. G's domicile remains unchanged during his military service unless G moves to a new location with the intent to make that location his permanent home after leaving the military.

(ii) C is a Native American who lives on her tribe's pueblo in New Mexico. She leaves New Mexico to pursue a two-year master's degree program in Spain. She intends to return to her pueblo when she completes her studies. She remains domiciled on her pueblo while in Spain.

(4) **Amount of New Mexico personal income tax withheld from active duty military pay.** The claimant can substantiate this amount by providing copies of Form(s) W-2 covering active duty military pay for the year(s) during which New Mexico personal income tax was withheld. If a claimant does not have copies of the applicable Form(s) W-2 for one or more of these years, the claimant can request that the taxation and revenue department obtain the claimant's or deceased veteran's Form(s) W-2 (or other withholding information in a form approved by taxation and revenue department) from the department of defense.

(5) **Amount of withholding has not already been refunded.** The claimant must provide a signed statement attesting that the claimant or deceased veteran did not receive a refund of the New Mexico personal income tax withheld for the year(s) for which the claimant is filing a claim for a settlement payment.

C. A claim for a settlement payment must be made by the eligible Native American veteran, or, in the case of a deceased veteran, by the veteran's surviving spouse, other successor or personal representative (an executor, administrator, or anyone in charge of the deceased veteran's property). If the claim is being made for a deceased veteran, the claim must be accompanied by a death certificate or other proof of death and by:

(1) if the claimant is a successor who is not the surviving spouse of the deceased veteran, a signed and dated notarized statement attesting that:

(a) the value of the entire probate estate of the decedent, wherever located, less liens and encumbrances, does not exceed thirty thousand dollars (\$30,000);

(b) at least 30 days have elapsed since the death of the decedent; and

(c) the successor is entitled to the settlement payment, or

(2) if the claimant is a personal representative, executor, or other representative authorized to administer the estate under applicable state law or the tribal law of the deceased veteran, a signed and dated notarized statement attesting that:

(a) he or she has been duly appointed as the personal representative, executor, or other representative of the estate of the decedent; and

(b) a copy of that appointment is attached;

(3) if the estate exceeds thirty thousand dollars (\$30,000), only the surviving spouse, a personal representative, an executor, or other representative of the estate as designated by applicable law or tradition may make a claim.

D. No claim for a settlement payment can be made for an amount of withholding that can be claimed as a refund by filing a New Mexico personal income tax return. A New Mexico personal income tax return can be filed by a Native American veteran to claim a refund by the later of:

(1) December 31 of the year three years after the veteran separated from military service, or

(2) December 31 of the year three years after the year in which New Mexico personal income tax was withheld from the active duty pay of the veteran.

E. All claims for settlement payments must be made with the department of veterans' services on the form prescribed by the taxation and revenue department. No claim for a settlement payment may be made after December 31, 2012.

F. Settlement payments will include interest on substantiated amounts of eligible withholding, computed on a daily basis from the date of withholding to the date a settlement warrant is issued at the rate specified for individuals pursuant to Section 6621 of the Internal Revenue Code of 1986. The date of withholding will be determined as follows:

(1) for withholding that occurred over an entire calendar year, one-twelfth of the amount withheld during the year will be considered to have been paid on the last day of each calendar month of the year; or

(2) for withholding that occurred over a period of less than an entire calendar year, the amount withheld during the period will be divided by the number of months (including partial months) in the period, and the resulting amount will be considered to have been paid on the last day of each calendar month during the period.

G. Eligible settlement payments will be made by the taxation and revenue department from the Native American veterans' income tax settlement fund. Settlement payments will be made on a "first come, first served" basis until the fund is exhausted or until no further claims are received.

H. Department of veterans' services must determine whether the claim meets the requirements of Paragraphs (1), (2) and (3) of Subsection B above and must act on a claim for settlement payment within 210 days of receipt of the claim. Claims not acted upon within 210 days are deemed denied.

I. A claimant whose claim is denied by department of veterans' services for failure to meet the requirements of Paragraphs (1), (2) and (3) of Subsection B above may dispute the denial by filing with the secretary of the department of veterans' services a written protest of the denial.

(1) The protest must contain the name and address of the claimant and must state with specificity the grounds for the protest. All evidence in support of the protest must also be submitted with the written protest. The secretary or designated hearing officer shall not consider any evidence that has not been submitted to the department of veterans' services at least 10 days prior to the hearing.

(2) The written protest must be filed within 30 days of the date of mailing to the claimant by the department of veterans' services of the denial of the claim.

(3) Upon timely receipt of a protest, the department of veterans' services shall promptly set a date for hearing and on that date hear the protest. The hearing shall be scheduled no later than 90 days after the filing of the written protest. Notice of the hearing shall be mailed to the protestant no less than 15 days prior to the date of the hearing. The secretary of the department of veterans' services may designate a hearing officer to conduct the hearing. The claimants may appear at a hearing for themselves, may have the assistance of an advocate, or may be represented by an attorney. Hearings shall not be open to the public except upon request of the claimant and may be postponed or continued at the discretion of the secretary or hearing officer.

(4) The technical rules of evidence and the rules of civil procedure shall not apply in the hearings, but hearings shall be conducted so that claims are amply and fairly presented. It is the burden of the claimant to prove that the denial of the claim was improper.

(5) A complete record of the proceedings will be made. A written decision shall be issued within 30 days of the hearing.

J. If the department of veterans' services approves the claim, the claim will be sent to taxation and revenue department to determine whether the claim meets the requirements of Paragraphs (4) and (5) of Subsection B above. The taxation and revenue department must act on a claim within 210 days of the date that the claim is received by the taxation and revenue department from the department of veterans' services. Claims not acted upon within 210 days are deemed denied.

K. A claimant whose claim is denied in whole or in part by the taxation and revenue department for failure to meet the requirements of Paragraphs (4) and (5) of Subsection B above may dispute the denial by filing with the secretary of the taxation and revenue department a written protest of the denial.

(1) The protest must contain the name and address of the claimant and must state with specificity the grounds for the protest. All evidence in support of the protest must also be submitted with the written protest. The secretary or designated hearing officer shall not consider any evidence that has not been submitted to the taxation and revenue department at least 10 days prior to the hearing.

(2) The written protest must be filed within 30 days of the date of mailing to the claimant by the taxation and revenue department of the denial of the claim.

(3) Upon timely receipt of a protest, the taxation and revenue department shall promptly set a date for hearing and on that date hear the protest. The hearing shall be scheduled no later than 90 days after the filing of the written protest. Notice of the hearing shall be mailed to the protestant no less than 15 days prior to the date of the hearing. The secretary of the taxation and revenue department may designate a hearing officer to conduct the hearing. The claimants may appear at a hearing for themselves, may have the assistance of an advocate, or may be represented by an attorney. Hearings shall not be open to the public except upon request of the claimant and may be postponed or continued at the discretion of the secretary or hearing officer.

(4) The technical rules of evidence and the rules of civil procedure shall not apply in the hearings, but hearings shall be conducted so that claims are amply and fairly presented. It is the burden of the claimant to prove that the claimant or deceased veteran is entitled to a settlement payment.

(5) A complete record of the proceedings will be made. A written decision shall be issued within thirty (30) days of the hearing.
[3.3.2.11 NMAC - N, XXX]