

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE:

B-183290

DATE:

AUG 21 1975

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MATTER OF:

DIGEST:

Retroactive Application of Statutory Reduction of
Department of Defense Reserve for Israeli Notes
under Foreign Military Sales Act.

In absence of clear Congressional intent to contrary, and in view of strict rules of statutory construction concerning retroactive application of laws, requirement of section 45 of the Foreign Assistance Act of 1974, that DOD's reserve for payment of claims under guaranties of Israeli Notes be reduced from 25% of principal amount to 10%, applies only to funds obligated to reserve after June 30, 1974. Reserve funds in excess of 10% obligated before July 1, 1974, which were recently debilitated by DOD are required to be retransferred to DOD's guaranty reserve.

This decision to the Secretary of Defense is made in response to the request of the law firm of Debevoise, Plimpton, Lyons, & Gates for our opinion concerning the proper interpretation of section 24(c) of the Foreign Military Sales Act of 1968, 22 U.S.C. § 2764(c), as amended by section 45 of the Foreign Assistance Act of 1974. The firm, as special counsel to the purchasers of the Government of Israel's 9 3/4% Notes due June 30, 1974, specifically requests a ruling from this Office that the amendment did not require debilitation of funds committed to the reserve prior to the July 1, 1974, effective date of the amendment and that the funds for the period before July 1, 1974, which were recently debilitated by the Department of Defense (DOD) shall be retransferred to the reserve.

The Israeli Notes were guaranteed in an aggregate principal amount not exceeding \$300 million on June 3, 1974, by the United States, acting through the Defense Security Assistance Agency of the Department of Defense, pursuant to section 24(a) of the Foreign Military Sales Act of 1968, Pub. L. No. 90-629, 82 Stat. 1320, 1324, 22 U.S.C. § 2764(a), as amended. Section 24(c) of that Act, 22 U.S.C. § 2764(c), effective on July 1, 1968, provided for obligation of funds equal to 25 percent of the contractual liability related to any guarantee issued under section 24 to a single reserve for the payment of claims under such guaranties. In accordance with the 25 percent requirement, \$75 million was placed in the guaranty reserve.

Section 45(a)(4) of the Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, 1814, December 30, 1974, amends section 24(c) of Pub. L. No. 90-629 so as to reduce the reserve percentage requirement from 25 percent to 10 percent. Section 45(b) of Pub. L. No. 93-559, 88 Stat. 1815, provides that the 10 percent reserve requirement is retroactive at least to July 1, 1974:

"(b). The amendment made by paragraph (4) of subsection (a) shall take effect on July 1, 1974. Obligations initially charged against appropriations made available for purposes authorized by section 31(e) of the Foreign Military Sales Act after June 30, 1974, and prior to the enactment of this section in an amount equal to 25 percent of the principal amount of the contractual liability related to guaranties issued pursuant to section 24(a) of that Act shall be adjusted to reflect such amendment with proper credit to the appropriations made available in the fiscal year 1975 to carry out that Act."

The Department of Defense has interpreted section 45(b) as requiring deobligation of funds put into the reserve both before and after July 1, 1974. The letter of request indicates that DOD bases its interpretation of the effect of the amendment on a statement in the Conference Report that:

"Funds in excess of 10 percent of the principal amount of the contractual liability of all outstanding guaranties shall be transferred to the general fund of the Treasury."
H.R. Rep. No. 93-1610, p. 48 (December 17, 1974).

Statutes are generally construed so as to provide prospective application, especially where substantive rights would be affected, Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913); South East Chicago Commission v. HUD, 488 F. 2d 1119, 1122-1123 (7th Cir. 1973). However, where the intention of the Congress to make a statute retroactive is stated in express terms, such intent must be followed. DeRodulfa v. U.S., 461 F. 2d 1240, 1247 (D.C. Cir. 1972). Express language to make the reduction of the reserve specified in section 45(a)(4) retroactive to July 1, 1974, is provided by section 45(b) of Pub. L. No. 93-559. However, DOD's position that the provisions of section 45(a)(4) are retroactive prior to July 1, 1974, appears to contravene the above-stated rule of construction since the language of section 45(b) does not expressly so provide. An examination of the legislative history also fails to reveal any intention to apply the reduction to funds in the reserve prior to July 1, 1974.

S. 3394, 93d Congress, the derivative source of Pub. L. No. 93-559, provided in section 35(a)(5) as reported by the Senate Foreign Relations Committee:

"(5) Section 24(c) is amended to read as follows:

'(c) Funds made available to carry out this Act shall be obligated in an amount equal to 25 per centum of the principal amount of contractual liability related to any guaranty issued prior to July 1, 1974, under this section. Funds made available to carry out this Act shall be obligated in an amount equal to 10 per centum of the principal amount of contractual liability related to any guaranty issued after June 30, 1974, under this section. All the funds so obligated shall constitute a single reserve for the payment of claims under such guaranties, and only such of the funds in the reserve as may be in excess from time to time of the total principal amount of contractual liability related to all outstanding guaranties under this section shall be decobligated and transferred to the general fund of the Treasury. Any guaranties issued hereunder shall be backed by the full faith and credit of the United States.'"

The accompanying report of the Senate Committee on Foreign Relations, however, delineated the purpose of the amendment in a somewhat abbreviated form as follows:

"Paragraph 5 amends section 24(c) of the FMSA by reducing the requirement for obligation of funds in connection with foreign military sales guaranties from 25 per cent of the principal amount of contractual liability to 10 per cent of that principal amount, effective July 1, 1974. Funds obligated under section 24(c) are set aside as a reserve against claims due to defaults by foreign countries on private loans guaranteed by the United States. The absence of any defaults since the enactment of the FMSA in 1968 has demonstrated that a 25 per cent reserve requirement is unnecessarily high. In addition, it provides for retention in the reserve account of all funds not in excess of the principal amount of all outstanding guaranties." S. Rep. No. 93-1299, 93d Cong., 2d Sess. 65 (1974).

Although the Committee's report omitted an express reference to retaining the 25 percent reserve requirement prior to July 1, 1974,

it is reasonable to assume that the reference to the reduction to 10 percent as "effective July 1, 1974" was intended to mean that the 25 percent rate would continue to apply to guarantees made prior to that date. This assumption is borne out by the express terms of the section as reported by the Committee.

The final version of S. 3394, as reported out of Conference and passed by both Houses of the Congress, changed the Bill by providing for the reduced reserve requirement in one subsection and for making that change retroactive in another subsection. We found no indication, however, that any substantive change was intended thereby. Furthermore, the Conference's analysis of those provisions indicates that existing law is being retained, except for reducing the reserve requirement from 25 percent to 10 percent, effective July 1, 1974:

"The committee of conference agreed to retain existing law with an amendment to reduce the reserve guaranty requirement from 25 percent to 10 percent, effective July 1, 1974. Funds in excess of 10 percent of the principal amount of the contractual liability of all outstanding guaranties shall be transferred to the general fund of the Treasury."
H.R. Rep. No. 93-1610, 93d Cong., 2d Sess. 48 (1974).

DOD apparently relied upon the second sentence of the Conference Report quoted above as the basis for its action in applying the 10 percent rate to pre-July 1974 funds. However, such reliance seems misplaced in the absence of any other evidence of intent to make the reduction apply before July 1, 1974. Instead, a more reasonable interpretation of that sentence is that it merely showed the Conference Committee's rejection of the Senate bill's provision that all funds not in excess of the principal amounts of liability were to remain in reserve. The conference thus decided that only 10 percent of the principal amounts had to be kept in the reserve, but it gave no indication that this was to apply before July 1, 1974.

We have cited above the rule of construction against retroactivity unless clearly intended by Congress. There is a corollary rule against retroactive action by Government agencies which is relevant. In *TWA v. CAB*, 169 F. 2d 893 (D.C. Cir. 1948), the court stated the rule as follows (*Id.* at 894):

"In the first place, we are met with the almost conclusive presumption against power to take retroactive action unless Congress plainly specifies such power."

B-183290

See also Greene v. U.S., 376 U.S. 143, 150 (1964) in which the Supreme Court ruled against retroactive application of an administrative regulation.

Furthermore, we cannot ignore the argument made by counsel for the purchasers that all the purchasers had entered into purchase contracts at a time when the reserve percentage requirement was 25 percent, and that the purchasers had the expectation that the reserve would not be depleted except by payments to claimants. Consequently, the purchasers of the Israel Notes who contracted before July 1, 1974, would appear to have antecedent rights, bringing those purchasers within the protected area outlined by the cases cited, supra.

Therefore, in the absence of clear Congressional intent to the contrary and in view of the strict rule of statutory construction concerning retroactive application of laws, we conclude that the requirement of section 49(a)(4) of Pub. L. No. 93-559, the Foreign Assistance Act of 1974, that reserve funds established by the Department of Defense for the payment of claims under guaranties of Israeli Notes be reduced from 25 percent of the principal amount to 10 percent applies only to funds obligated to the reserve after June 30, 1974. Since the Department of Defense had no clear authority from Congress to apply the reduction to funds obligated for the reserve prior to July 1, 1974, any such funds deobligated by DOD pursuant to the amendment are required to be returned to the guaranty reserve from the general fund of the Treasury, pursuant to 31 U.S.C. § 706.

R. F. KILMER

Acting Comptroller General
of the United States