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DECISION

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

FILE: B-190531

DATE: April 3, 1978

MATTER OF: Mr. Saburo Nishikawa - Waiver of
overpayment of compensation

- DIGEST:**
1. Where an employee's wife receives a check payable to employee and cashes it, she is acting as his agent for the benefit of the family. Therefore, for purpose of determining existence of fault, she would be a "person having an interest in obtaining a waiver of the claim" as used in 5 U. S. C. 5584(b)(1).
 2. Where record indicates employee's wife, who cashed check payable to employee on bare assumption that it represented back salary for two pay periods, had working knowledge of his salary entitlement, since amount of check was far in excess of that possible entitlement, she must be considered as being partially at fault, thus, precluding waiver.
 3. Where employee contends that amount of indebtedness should be the net amount of money received, not the gross amount (the difference being the amount withheld by employing agency for Federal income tax purposes), under provisions of Internal Revenue Code, the gross amount of reported wage constitutes earned income in the years received. While he employee may not actually receive all monies normally earned, employer withholding for Federal income tax purposes does not diminish the amount of the indebtedness.

This action is in response to a letter dated August 24, 1977, with enclosures, from Mr. Saburo Nishikawa, concerning his indebtedness to the United States in the amount of \$5,297.85, representing erroneous lump-sum leave payments made incident to a cancelled reduction-in-force action. Mr. Nishikawa is appealing a determination by our Claims Division, dated January 12, 1977, denying a waiver in his case based on a finding of partial fault.

In response, Mr. Nishikawa, in effect, denies that he was at fault in the matter, contending that the payments in question were mailed

E-190531

from Vietnam to his wife in the same manner as allotment checks were sent; further, that since there were two pay periods for which he was not paid while in Vietnam, his wife assumed that these payments were for that purpose and cashed the checks. He contends further that he was unaware of these payments and did not become aware of them until sometime later when he received payroll change slips in the mail from his former office in Vietnam.

In addition to the foregoing, Mr. Nishikawa contends that even if waiver is not granted, since he did not receive all of the money (\$1,059.58 was withheld for Federal taxes), his maximum indebtedness should only be \$4,238.27.

The record in the case shows that Mr. Nishikawa, a civilian employee of the United States Army (GS-12, step 7), serving in the Republic of Vietnam, was separated from his position at that location effective August 21, 1972, as a result of a reduction-in-force action. That action, however, was subsequently cancelled when he received a reassignment to the position of Inventory Management Specialist, Headquarters, USARPAC, Honolulu, Hawaii, to become effective September 18, 1972. After his return to his home in Hawaii, Mr. Nishikawa was erroneously paid for accrued leave by DOV No. 300200, dated November 22, 1972, in the net amount of \$3,777.12 (gross amount \$4,721.40) and by DOV No. 300318, dated February 1, 1973, in the net amount of \$461.15 (gross amount \$576.45), by his former office in Vietnam based on the reduction-in-force action.

It is fundamental that persons receiving money erroneously paid by a Government agency or official acquire no right to the money and are bound in equity and good conscience to make restitution. In other words, if a benefit is bestowed through mistake, no matter how careless or inexcusable the act of the bestower may have been, the recipient of the benefit must make restitution, the theory being that restitution results in no loss to the recipient. See B-124770, September 16, 1955, and cases cited therein.

The law which vests authority in the Comptroller General to waive indebtedness arising out of erroneous payments of pay to employees of the Federal Government is contained in 5 U. S. C. 5584. However, limitations on the right to exercise that waiver

B-190531

authority are contained in subsection (b) thereof, which provides in pertinent part:

"(b) The Comptroller General * * * may not exercise his authority under this section to waive any claim--

"(1) if, in his opinion, there exists, in connection with the claim, an indication of * * * fault * * * on the part of the employee or any other person having an interest in obtaining a waiver of the claim * * *." (Underscoring supplied.)

The lump-sum payments were sent to the employee's home address since he was not present in Vietnam to receive them. The fact that the employee's wife received the money, does not alter the case. Clearly, she was acting as his agent. Since these were not payments to her in her own right, the very most that could be said regarding her interest in these funds is that they could be treated as being for the benefit of the family. Therefore, for the purpose of determining the existence of fault under the before-quoted subsection, Mrs. Nishikawa would qualify as a person having an interest in obtaining a waiver of the claim.

While Mr. Nishikawa has attempted by his statement to show the innocence of her actions in not informing him that these payments were received, we do not believe that the statements made establish the absence of fault. Implicit in his statement is that he informed her of his LWOP status and the period thereof and that she had working knowledge of his approximate biweekly pay entitlement. In this connection, it is to be noted that the net amount of the November 1972 check for lump-sum leave payment was \$3,777.72. That amount was far in excess of the amount his gross pay would be for the two pay periods, including his entitlement to a 25 percent foreign pay differential and a separate maintenance allowance while he was in Vietnam.

Therefore, it is our view that since the employee's wife should have known and informed him, coupled with his enjoyment of the family benefit derived, the basis upon which Mr. Nishikawa seeks waiver is insufficient to overcome the concept of fault as used in

B-190531

5 U.S.C. 5584(b)(1) and the action previously taken denying waiver in the case is sustained.

As to the matter of Mr. Nishikawa's contention that the amount which he would be required to refund should be reduced to the net amount received, it is clear that the total amount of the lump-sum leave payment erroneously made was \$5,297. For purposes of the Internal Revenue Code, such amounts constituted income in the years they were received. See 26 U.S.C. 61 (1970). Under formulas contained in other provisions of the Internal Revenue Code, certain portions of wages must be withheld by the employer for application against the Federal taxes required to be paid by the employee on earned income. While an employee may not receive all monies normally earned, such withholding for Federal income tax purposes does not alter the amount of an indebtedness. Since the matter of an individual's income tax liability is under the jurisdiction of the Internal Revenue Service, the employee should discuss the matter with the IRS office which services the area in which he resides.

With regard to the employee's leave-without-pay status, the record in the case shows that he was scheduled to leave Vietnam on August 21, 1972, and travel to Honolulu, Hawaii. For purposes of that travel he was authorized 10 days annual leave at that latter location prior to reporting to his new duty assignment in Hawaii. On August 10, 1972, apparently for personal reasons, he requested and received permission to delay his departure from Vietnam on August 21, 1972, to September 18, 1972, and was provided a reporting date at his new assignment of September 25, 1972.

The file indicates that Mr. Nishikawa requested annual leave for the period August 22 through September 17, 1972. However, in spite of the fact that he had more than ample annual leave accrued he was placed in a leave-without-pay status for that time.

Under the circumstances and since the record shows that Mr. Nishikawa's accrued unused annual leave account effective August 21, 1972, was more than adequate for that purpose, we would have no objection to Mr. Nishikawa being placed in an annual leave status for the period August 22 through September 17, 1972, and be permitted to reduce his indebtedness by an amount equal to the value of the leave actually taken at his then rate of

B-190531

pay, with the leave taken to be charged against his otherwise proper leave balance.

R. F. Kiffin
Deputy Comptroller General
of the United States

A.J. Riedinger

CP

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

TO : Director, Claims Division

April 3, 1978

FROM : Deputy
Comptroller General *Parke M. M.*

SUBJECT: Indebtedness of Mr. Saburo Nishikawa to the
United States--B-190531-O.M.

Returned herewith is Claim File No. Z-2609C67, forwarded for our consideration on October 21, 1977, concerning Mr. Nishikawa's indebtedness to the United States in the amount of \$5,297.85, together with a copy of our decision dated today sustaining your division's action dated January 12, 1977, denying waiver in the case.

Attachments - 2