

DECISION

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

28873

FILE: B-211389**DATE:** July 23, 1984**MATTER OF:** Southside Investment Co.

DIGEST: Internal Revenue Service seized building in California owned by Southside Investment Co. in order to enforce lien for delinquent taxes against Southside's tenant. Southside sued for damages. Ninth Circuit has recognized cause of action in such circumstances under Tucker Act. Monetary settlement in favor of Southside is properly payable from permanent appropriation established by 31 U.S.C. § 1304, rather than from funds under control of IRS.

The Internal Revenue Service (IRS), Department of the Treasury, and the Tax Division, Department of Justice, have sought clarification as to the proper source of funds for payment of a monetary settlement in the case of Southside Investment Co., et al. v. United States, No. CV 80-00624-TJH (C.D. Cal.).^{1/} For the reasons that follow, the settlement is properly payable from the permanent indefinite appropriation established by 31 U.S.C. § 1304 (1982).

Facts

The IRS seized a building in California owned by Southside Investment Co. in order to enforce a lien for delinquent taxes against Leon's Family Restaurant. Leon's Family Restaurant operated in the building owned by Southside under a lease agreement.

Southside, as owner and lessor, brought suit against the United States for damages incurred as a result of the seizure. The damages sought consisted of lost rent plus damage resulting from the rotting and decayed food which had not been removed apparently because the IRS had refused access to

^{1/} The settlement in the Southside case has already been paid (GAO Claim No. Z-2850408). The case is used here as a reference case in order to resolve the issue for the future.

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the premises. The jurisdictional basis for the suit was the Tucker Act, 28 U.S.C. § 1346(a)(2) (1982). The parties agreed to a monetary settlement, on the basis of which the suit was dismissed.

Because tax judgments generally are paid directly by the IRS, a question arose in this case as to whether the settlement should be paid by IRS or, upon certification by the General Accounting Office, from the permanent judgment appropriation.

Payment of tax judgments: a summary

Prior to 1956, most judgments against the United States could be paid only upon enactment of specific congressional appropriations. In that year, Congress changed the way in which the United States paid its judgments by enacting a permanent indefinite appropriation, subsequently amended to include compromise settlements and now found at 31 U.S.C. § 1304. The judgment appropriation, however, is available only for those judgments the payment of which is "not otherwise provided for." In other words, if some appropriation or fund under the control of the agency involved in the litigation is legally available to satisfy a particular judgment, then the judgment appropriation may not be used. E.g., 62 Comp. Gen. 12 (1982); B-210706, July 5, 1984.

The method of appropriating for tax refunds has also changed several times over the decades. Prior to fiscal year 1921, appropriations for refunding internal revenue taxes were made on an annual, indefinite basis. These appropriations were not available for judgments, however, and tax refund judgments required specific appropriations. 2 Comp. Gen. 501, 502 (1923).

As the result of legislation enacted in 1919 (40 Stat. 1145), tax refund appropriations starting with fiscal year 1921 became regular (definite) annual appropriations, based on budget requests submitted by the Treasury Department. These appropriations were available for judgments. 27 Comp. Dec. 442 (1920); 2 Comp. Gen. 501 (1923).

The tax refund appropriation was converted to a permanent indefinite appropriation in 1948,^{2/} but this change did not affect the payment of judgments. In addition, the Commissioner of IRS is specifically authorized to pay judgments "for any overpayment in respect of any internal-revenue tax," 28 U.S.C. § 2411 (1982). Thus, judgments representing overpayments or amounts improperly collected by IRS are paid by IRS and charged to the IRS' "Refunding Internal Revenue Collections" account. Judgments in this category may result from suits for refund under 26 U.S.C. § 7422 or suits for wrongful levy under 26 U.S.C. § 7426. The judgments are paid directly by IRS without the need for settlement action by GAO. A-97256, November 3, 1938.

This treatment of tax judgments makes sense from the accounting perspective as well. Amounts collected by the IRS by way of judgments are credited as internal revenue collections. 26 U.S.C. § 7406. Paying tax judgments from the IRS refund account is therefore logical and gives a more accurate picture of the net effect of the Government's tax collecting activities. Compare 55 Comp. Gen. 625 (1976).

One additional type of "tax judgment" is paid by the IRS--judgments against individual officers or employees for actions taken in the performance of their duties in matters relating to tax administration. These are payable from general operating appropriations. 26 U.S.C. § 7423; 56 Comp. Gen. 615 (1977).

It can be seen from the foregoing that tax judgments are generally "otherwise provided for," and their payment does not involve use of the permanent judgment appropriation.

The Southside case

As IRS has noted, the claim in Southside is essentially one for wrongful levy. However, the suit was not brought under 26 U.S.C. § 7426, because while that section authorizes relief in the form of the return of seized property or the refund of the proceeds from the sale of seized property, it does not authorize the award of money damages. Young v. United States, 75-2 U.S.T.C. para. 9574 (S.D.N.Y. 1975). Also, a suit under the Federal Tort Claims Act would appear

^{2/} Supplemental Treasury and Post Office Departments Appropriation Act, 1949 (June 19, 1948), § 101, 62 Stat. 561. The provision is discussed in B-137762.33, August 5, 1977.

equally unavailing. 28 U.S.C. § 2680(c); Young v. United States, supra.

As to whether an action will lie under the Tucker Act, 28 U.S.C. § 1346(a)(2), in circumstances similar to Southside, the courts have thus far not been uniform. The court in Young v. United States, supra, rejected such an approach. However, the Ninth Circuit has recognized a Tucker Act cause of action on similar facts, applying an "inverse condemnation" theory. Smith v. United States, 458 F.2d 1231 (9th Cir. 1972). The court said:

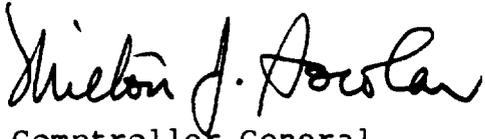
"The government, of course, enjoyed the right to seize Lichty's property to enforce its tax lien. However, it did not have the right to seize the property of the Smiths and to use the same as a storage facility without running afoul of the Fifth Amendment. The Smiths were entitled to compensation." 458 F.2d at 1233.

See also American Oil Co. v. United States, 383 F. Supp. 1281 (N.D. Okla. 1974). The settlement in Southside was predicated upon the adverse precedent of the Smith case in the controlling circuit.

Although the liability of the United States in Southside was a direct result of the revenue-collecting activities of the IRS, Southside is quite different from those cases in which judgments have been held payable by IRS. Southside does not involve the return of anything received by the IRS, either the refund of an overpayment (26 U.S.C. § 7422) or the return of seized property or the proceeds of its sale (26 U.S.C. § 7426). Nor was it a suit against an individual revenue officer or agent (26 U.S.C. § 7423). It was simply a suit for damages under the Tucker Act, albeit damages incurred in the course of enforcing the Internal Revenue Code. Accordingly, we see no basis to charge the settlement in Southside either to IRS operating appropriations or to the "Refunding Internal Revenue Collections" account.

If, for example, an IRS agent while en route to seizing a building were involved in a motor vehicle accident and negligently injured a private citizen, the citizen would have a claim cognizable under the Federal Tort Claims Act. An adverse judgment in such a case would be payable from the permanent judgment appropriation, even though the IRS agent was in the course of performing revenue-collecting duties at the time of the accident. We view the Southside case as conceptually similar, and distinguishable from those "tax judgments" that are payable directly by the IRS.

In view of the foregoing, we conclude that the monetary settlement in Southside is properly payable under 31 U.S.C. § 1304 rather than from funds under the control of the IRS.

for 
Comptroller General
of the United States