



Comptroller General  
of the United States  
Washington, D.C. 20548

153226

## Decision

**Matter of:** Leroy A. Joseph and Pamela C. Anderson - Per Diem - Retroactive Increase

**File:** B-257489

**Date:** January 13, 1995

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### DIGEST

Travel orders providing a special reduced per diem rate for two employees assigned to long-term temporary duty were proper when issued, and the fact that a subsequent change in federal tax law enacted after the assignments began and of which the employees and agency officials were unaware, effectively reduced the value of the per diem did not render the rate set in the orders erroneous. While the agency states that had it been aware of the effect of the tax change, it would have increased the per diem rate prospectively, setting such a rate was within the agency's discretion, considering various factors, and the fact that it did not prospectively amend the orders to increase the per diem rate does not constitute administrative error since there was no administrative policy or regulation in effect at the time requiring agency officials to do so. Paul Manaker, B-134853, Feb. 26, 1958. Accordingly, the employees's travel orders may not be amended retroactively to increase the per diem rates.

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### DECISION

The Internal Revenue Service (IRS) requests a decision on whether temporary duty (TDY) assignment travel orders for IRS employees Leroy A. Joseph and Pamela C. Anderson may be amended retroactively to compensate for changes in federal tax law that became effective during their long-term temporary duty that effectively reduced the value of their special per diem rate.<sup>1</sup> The answer is no.

### BACKGROUND

Mr. Joseph and Ms. Anderson were given 2-year temporary duty assignments as tax administration advisors by the IRS Tax Administration Advisory Service to assist in the Virgin Islands' Bureau of Internal Revenue. The assignments began August 26, 1991, and ended July 30, 1993. Prior to the beginning of the assignments, the agency set a special per diem rate for the employees at 65 percent of the maximum rate applicable in the

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<sup>1</sup>The IRS Southeast Regional Fiscal Officer submitted the request for decision.

Virgin Islands. The agency states that it considered that this rate would provide adequate compensation to the employees for the high costs of living associated with the assignment. The agency further states that at the time the special rate was set and the employees agreed to the assignments, travel reimbursements were not considered taxable income, and the employees were so advised during their interviews for the assignments. The agency also states that this fact was taken into consideration when the special per diem rate was set, and had such reimbursements been considered taxable income at that time, the per diem would have been set at the maximum rate rather than the 65 percent rate.

Subsequently, a 1992 amendment to the tax code that became effective January 1, 1993, limited tax deductions available for business travel to reimbursements for travel that does not exceed 1 year.<sup>2</sup> Consequently, because the employees in this case already had been in travel status for more than 1 year, the travel reimbursements they received from January 1, 1993, until the end of their assignments on July 31, 1993, were subject to tax as income. The agency states, however, that an interim report on the impact of the tax change was not prepared for the agency officials involved in this case until June 18, 1993, and neither they nor the two employees were aware of the impact on the employees until after the assignments were completed in July.

The agency is aware of the general rule against retroactively amending travel orders to increase or decrease allowances. It asserts, however, that if the agency officials had been aware of the tax change, they would have set the per diem at 100 percent of the maximum rate to compensate for it. On this basis, the agency would now like to retroactively amend the employees' travel orders to authorize the higher rate, but they seek our approval before doing so.

#### OPINION

The general rule is that travel orders may not be revoked or modified retroactively so as to increase or decrease the rights that accrue to an employee who has performed official travel. See Eugene P. Tuttle, B-223599, Jan. 5, 1987, and decisions cited therein. See also 24 Comp. Gen. 439 (1944); and 23 Comp. Gen. 713 (1944), cited by the agency. As these decisions state, however, we have recognized a limited exception to this rule when an error is apparent on the face of the original orders or the facts and circumstances clearly demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence in preparing the orders.

In this case, at the time the orders were issued, they reflected the intent of the agency to set a reduced per diem rate based on the existing facts. In this regard, the regulations applicable to prescribing per diem provide that if it can be determined in advance of the

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<sup>2</sup>Energy Policy Act of 1992, Pub. L. 102-486, Sec. 1938, 106 Stat. 2776, 3033 (Oct. 24, 1992).

travel that there are factors that will cause an individual traveler's expenses to be less than the maximum rate, the agency should authorize a "reduced rate that is commensurate with the known expense levels." Federal Travel Regulation (FTR), 41 C.F.R. § 301-7. One such factor is when the assignment involves an extended period at a TDY location where the traveler is able to secure lodging and/or meals at lower rates (e.g., weekly or monthly rentals). FTR § 301-7.12(b). We assume that this factor also was taken into consideration in setting the reduced per diem rate for the extended period in question here. Thus, under this authority and the facts then existing, the agency appears to have acted properly in setting the reduced per diem rate in advance of the extended assignments in the Virgin Islands. Later, when the value of the per diem changed with the enactment of the new tax law, it would have been within the agency's authority to consider amending the travel orders to provide some increase, prospectively, to the authorized rate established when the orders were issued. However, this was not done, and the previously authorized rate remained in effect through the remainder of the assignments.

While as the agency states, it may have increased the per diem rate had it been aware of the change in the tax law, as noted above, however, factors other than the tax consequences also were appropriate for consideration in setting a per diem rate for extended TDY assignments. In any event, setting the per diem rate, taking various factors into consideration, was a matter generally within the agency's discretion, and the fact that it did not prospectively amend the employees' travel orders to account for the tax change does not constitute administrative error since there was no administrative policy or regulation in effect at the time requiring agency officials to do so. See Paul Manaker, B-134853, Feb. 26, 1958, involving a similar situation. Accordingly, the general rule referred to above applies and the employees' travel orders may not be amended retroactively to increase the per diem rates.

/s/ Seymour Efros  
for Robert P. Murphy  
General Counsel