B-236055.3

December 15, 1994

Mr. Gerald Murphy
Fiscal Assistant Secretary
Department of the Treasury

Dear Mr. Murphy:

This is in reply to your letter of June 28, 1989, as supplemented by the letter of March 29, 1994, from , Chief, Accounting Branch asking our Office to relieve , former Director, Austin Service Center, Internal Revenue Service for a loss of $25,400. For the reasons stated below, we grant relief.

Your submission and supplemental information indicate that on November 21, 1986, the Austin Service Center became aware that a taxpayer check dated October 15, 1983, in the amount of $25,400 had been lost. After attempting to trace the check, it was discovered that the check had been properly drafted to the order of the "Internal Revenue Service," paid by the payor bank, but not recorded in the IRS account at the depository, First Tennessee Bank. Upon further inspection, service center officials determined that the check was not credited to the IRS account due to a "piggy-back" error, i.e., the check was stuck to the back of another check. An examination of the canceled check revealed that the front of the check did not contain IRS markings that would indicate that the front had been reviewed, although IRS had encoded the back of the canceled check with account information. In addition, neither the amount nor the name appearing on the front of the check matched the amount or name recorded in the IRS account under the code from the back of the check.

After the taxpayer gave IRS officials a copy of his canceled check showing that the funds had been drawn out of his bank account, the Austin Service Center credited the taxpayer with the full $25,400 and debited the account of the service center director in an equal amount. Though the service center could determine that it never recorded the taxpayer payment, it could not determine whether it was the payor bank or depositary bank that kept the funds. When the service center requested that First Tennessee search for "extra item" credits that might be in its accounts from 1983, the depositary bank informed the agency that the pertinent records had been destroyed and no further information was available.[1] As a result of the lack of a paper trail, IRS counsel determined that it was not likely to obtain sufficient evidence to substantiate legal action to recover the missing tax payment and decided that it would not be feasible to pursue collection from either of the two financial institutions.

Under 31 U.S.C. § 3527(a), this Office is authorized to relieve accountable officers of liability for a physical loss of government funds if we concur in the determination by the head of the agency that (1) the loss or deficiency occurred while the officer was carrying out his or her official duties, or that it occurred by reason of an act or omission of a subordinate of the officer, and (2) the loss or deficiency occurred without fault or negligence on the part of the officer. B-235147.2, Aug. 14, 1991.

The deficiency in this case is a physical loss. A physical loss of funds is, by itself, sufficient to raise a rebuttable inference or presumption of negligence. B-240574, Apr. 5, 1991. Government officials charged with the custody of public moneys are expected to exercise the highest degree of care in the performance of their duties and, when funds are lost, the presumption naturally arises that the responsible official was derelict in some way. The burden lies with the official to rebut this presumption with evidence to the contrary. B-235368, Apr. 19, 1991.

The record here indicates that the service center employees did not review the front of the "piggy-back" check and record the information necessary for the depositary bank to deposit it properly. Thus, the $25,400 tax payment was not included on the deposit form that was sent to the depositary bank. In anticipation of errors of this sort, IRS policy in effect at the time required depositary banks, upon discovery of a deposit greater than the amount verified on the service center deposit form, to inform the service center of the discrepancy. First Tennessee asserts that the $25,400 check must have remained stuck to the back of another check because it has no record of receiving that amount with the other IRS deposits.

IRS officials believe that, at some point within the bank clearing process, the "piggy-back" checks became separated and the $25,400 check was presented to the payor bank; otherwise, it would not have been cashed. Even though there were routing codes on the back of the check, the payment was not sent to the IRS account. The service center has concluded that the check was either kept in the payor bank's "extra item" account or sent to the depositary bank and placed in its "extra item" account. But since both banks destroyed their 1983 deposit records prior to the service center's request for deposit information, the service center has been unable to make a recovery from either bank because it cannot establish which bank received the funds.

[1]By the time officials at First Tennessee responded in October 1987 to the service center request for records, the depositary had already destroyed its documentation of IRS deposits for 1983, 1984 and 1985. IRS closed its account with First Tennessee Bank on September 30, 1987.

Although it took the service center more than three years from the time that the check was deposited to request information from the banks, that was not an unreasonable amount of time since the check was for an estimated tax payment and the account could not be processed as delinquent until after the end of the filing period. In addition, a determination that the check was missing could not be made until after the taxpayer was given an opportunity to prove that he paid his taxes. IRS's inability to resolve this matter seems to have resulted from First Tennessee's premature destruction of records. Treasury guidelines required depositaries to retain deposit documentation for a period of 6 years and 6 months after the deposit date. Treasury Financial Manual, Vol. 5, Part 1, Chap. 2000.

Accordingly, we agree with the administrative determination that the loss of funds did not occur as a result of fault or negligence on the part of Ms. or her subordinates, but as the result of the failure of at least one of the financial institutions involved to properly document and direct the tax payment. Thus, we grant relief to the former Director of the Austin Service Center.

Sincerely yours,

Gary L. Kepplinger
Associate General Counsel

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DIGEST

IRS service center director is relieved of liability under 31 U.S.C. § 3527(a) for a loss of $25,400. The taxpayer check was lost due to a "piggy-back" error and both the depositary and payor banks failed to provide the service center with deposit information necessary to locate the missing amount.