DIGEST - L - GGM

DECISION

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

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FILE: B-164766 DATE: JUN 1 1979

MATTER OF: Payment of refund ordered by Court of Claims in National Presto Industries, Inc. and World Aerospace Corp. v. United States

DIGEST:

Order of Court of Claims directing refund payment to be made to contractor upon substitution of bond under Renegotiation Act may be certified for payment under 28 U.S.C. § 2517 and 31 U.S.C. § 724a, but only after the appellate process is completed with respect to that order. Refund may not be paid from the appropriation established by 31 U.S.C. § 725q-1 for "Refund of Moneys Erroneously Received and Covered" since original payment was properly deposited into the Treasury as miscellaneous receipts.

This decision is in response to a request from the Department of Justice concerning the payment of a refund to a contractor, pursuant to an order of the Court of Claims in National Presto Industries, Inc. and World Aerospace Corp. v. United States, Ct. Cl. No. 301-76. The Department asks first whether the Comptroller General can lawfully certify an interlocutory order for payment pursuant to 31 U.S.C. § 724a and 28 U.S.C. § 2517. We are also asked whether such certification and payment can occur before the Solicitor General determines whether to seek certiorari, or if certiorari is sought, before the Supreme Court either denies certiorari or decides the issue. In addition, the Department asks whether the refund ordered by the Court may be lawfully paid from the account for "Refund of Moneys Erroneously Received and Covered" (31 U.S.C. § 725q-1), or from any other available appropriation. For the reasons that follow, we believe that the order may only be paid under 31 U.S.C. § 724a and 28 U.S.C. § 2517, but only after the appellate process is completed with respect to that order. The fund established by 31 U.S.C. § 725q-1 is not available for the payment of the order, nor do we know of any other appropriation from which the refund may be drawn.

In May, 1976, the Renegotiation Board determined that National Presto Industries, Inc., and World Aerospace Corp. had realized $25.4 million in excess profits on certain Department of the Army

negotiated contracts. 1/ Under the Renegotiation Act of 1951 (50 U.S.C. App. § 1218 (1976), a person who wishes to seek a redetermination by the Court of Claims of a Renegotiation Board determination of excess profits has a choice of paying the amount awarded less appropriate tax credits, or filing a bond for the same amount. See also Court of Claims Rules, Rule 26. The contractors elected to make payment, and on July 2, 1976, paid the Department of Army under protest $11,076,995.15. The payment was deposited into the Treasury as miscellaneous receipts, apparently pursuant to 50 U.S.C. App. § 1215(b)(7).

On February 16, 1979, the Court of Claims granted the contractors' motion for leave to substitute a bond, and ordered the United States to refund the amount previously paid. The Department of the Army stated that it no longer had an available appropriation from which to pay the refund since, as mentioned above, the amount collected had been deposited in the Treasury as miscellaneous receipts. As a result, the Department of Justice requested a decision from our Office regarding an available source of appropriations for the refund.

We take no position on the merits of permitting the substitution of a bond at this late date since that is the very issue before the Court. If it is decided by the Department not to appeal the Court of Claims ruling, we will certify the amount due to the contractor without question, as a ministerial duty. The role of the General Accounting Office (GAO) in the payment of Court of Claims judgments is prescribed by 28 U.S.C. § 2517(a) as follows:

> "Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court." (Emphasis added.)

Judgments of the Court of Claims are payable from the permanent indefinite appropriation established by 31 U.S.C. 724a. Section 724a, as amended by Pub. L. No. 95-26 (May 4, 1977), 91 Stat. 61, 96, provides in pertinent part as follows:

1/ The Renegotiation Board went out of existence on March 31, 1979, but the validity of many of its orders, including the instant one, made before that date are still in litigation.

> "There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28 . . . , together with such interest and costs as may be specified in such judgments or otherwise authorized by law * * *." (Emphasis added.)

The order in question is not a "judgment" as that term is commonly understood. Nevertheless, it is an order of the Court directing the payment of money by the United States. As such, we believe it may be certified for payment under 31 U.S.C. § 724a if the other requirements of that section are met--specifically, if the order is "final" and if payment is "not otherwise provided for."

Both of the above statutes--our authority to certify judgments for payment and the appropriation therefor--are limited by their terms to final judgments. It has been our traditional position that a judgment is not final for payment purposes until the appellate process is complete with respect to all elements of the litigation. We have no authority to make "intermediate" payments. B-172574, May 19, 1971.

We recognize that the basic issue of the contractor's excess profits has been in litigation for three years and may well continue considerably longer. The issue of the refund, however, is readily severable from the merits of the underlying litigation. Although the Court's order directing the refund may be "interlocutory" with respect to the underlying litigation, it may nevertheless, when the appellate process is complete with respect to it, be deemed "final" as to the issue of the refund. However, the refund order may still be appealed to the Supreme Court and therefore cannot be considered "final" at this stage of the litigation. Therefore, payment may not be lawfully made prior to such time as the Solicitor General has determined whether to petition for certiorari from the Court of Claims' order. If certiorari is sought, payment cannot be made prior to the time that the Supreme Court finally disposes of the issue, either by denying certiorari or, if granted, until it issues its decision. Thus, the order will become final for payment purposes when one of three things occurs--the Department of Justice determines not to seek further review, the Supreme Court denies a petition for certiorari, or if the petition is granted, the Supreme Court issues its decision.

The next question to consider is whether there is any other appropriation available for payment of the refund. We agree that there is no provision in the Department of the Army's current appropriation acts to make such a payment. It has been suggested that a possible source might be the account for "Refund of Moneys Erroneously Received and Covered", established by 31 U.S.C. § 725q (1976). Appropriations for this account are provided on a permanent indefinite basis under 31 U.S.C. § 725q-1.

The general rule for the use of the account for "Refund of Moneys Erroneously Received and Covered" was stated in 17 Comp. Gen. 859, 860 (1938) as follows:

> "* * * It is only when collections erroneously covered into the Treasury as miscellaneous receipts are involved and the refund is not properly chargeable to any other appropriation that there is for consideration charging the appropriation 'Refund of moneys erroneously received and covered.'"

See also 55 Comp. Gen. 625 (1976); 55 Comp. Gen. 243 (1975).

The Court of Claims, in its May 11, 1979 order in this case, stated that it appears that the Army erroneously paid the money received into the Treasury under 50 U.S.C. App. § 1215(b)(7). Section 1215(b)(7) provides that "All money recovered by way of repayment or suit under this subsection [50 U.S.C. App. § 1215 governing proceedings before the Renegotiation Board] shall be covered into the Treasury as miscellaneous receipts." The Court interpreted this provision as being not applicable to a payment made in lieu of posting a bond, and therefore questioned the propriety of the Army's action in covering the payment into the Treasury as miscellaneous receipts.

Without expressing an opinion on the applicability of § 1215(b)(7), we believe that the Army was nevertheless required to deposit the payment as miscellaneous receipts by virtue of 31 U.S.C. § 484 (1976). Section 484 provides that the gross amount of all monies received from whatever source for the use of the United States (with certain exceptions not relevant here) shall be deposited into the Treasury as miscellaneous receipts. In the absence of express statutory authority to the contrary, the requirements of 31 U.S.C. § 484 must be followed. Therefore, since there is no statutory authority for any other disposition of the funds, we believe the Army properly deposited the payment into the Treasury as miscellaneous receipts.

Since the Army's action in depositing the payment into the Treasury was required by law, it may not be said that the funds were "erroneously received and covered" so as to make available for refund the appropriation established by 31 U.S.C. § 725q-1.

We have also reviewed the provisions of 50 U.S.C. App. § 1231(f). This section provides that refunds of "all amounts finally adjudged or determined to have been erroneously collected by the United States pursuant to a determination of excess profits" shall be paid "from such appropriations as may be available therefor" upon certification to the Treasury Department by the Administrator of the General Services Administration (GSA). Payments within the scope of this section could not be certified under 31 U.S.C. § 724a. B-129072, October 22, 1974. GSA has a permanent appropriation account, 47X0515, "Refunds under Renegotiation Act, General Services Administration," for the payment of refunds under section 1231(f). However, the Acting Administrator of GSA has concluded, and we agree, that section 1231(f) is not available for payment in this case since there has been no final adjudication on the merits of the Board's excess profits determination and therefore it cannot be said that the funds were "erroneously collected by the United States."

As indicated earlier, we are aware of no other appropriation that would be available for the payment of the Court's order. We conclude that the Court's refund order may only be certified for payment from the permanent appropriation established by 31 U.S.C. § 724a, once the conditions of finality as discussed above have been satisfied.

R.F. Keller

Deputy Comptroller General
of the United States