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DECISION



5. Serling
Proc II

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

FILE: B-189121

DATE: November 30, 1977

MATTER OF: Kim Xum

DIGEST:

Where Government leases property in foreign country and lessor fails or refuses to collect rental checks tendered to him payable in foreign currency as provided by lease agreement, and foreign currency is now valueless, lessor is not entitled to be paid in dollars since risk of currency devaluation was on lessor. No officer or employee of Government may modify lease to favor another party unless some compensating benefit is received by Government.

Kim Xum appeals from the denial of his claim for payments alleged to be due under a lease executed between him and the United States Secretary of State. The claim was denied by our Claims Division Settlement Certificate dated September 30, 1976.

Pursuant to lease No. S-647-FBO-72/72, dated August 23, 1971, the claimant leased to the United States Secretary of State certain property for use as an Embassy residence in Phnom Penh, Khmer Republic, for a term of 2 years at the stipulated rental of 25,000 riels per month, payable quarterly in advance after the initial year of occupancy. The lease agreement permitted renewal of the lease for up to four further 1-year terms under the same terms and conditions as the original lease at the option of the Secretary of State, and also provided that the Secretary of State could terminate the lease at any time after giving 30 days notice to the lessor. Notice of termination was given on April 12, 1975, effective May 12, 1975. The claimant has claimed \$6,750, the rent for the period January 1, 1974 through March 31, 1975, in U.S. currency at the 1971 conversion rate.

The record indicates that payment vouchers and checks covering the period in question were processed by the U.S. Disbursing Officer of the American Embassy at Phnom Penh on a quarterly basis as required by the lease agreement. However, the claimant failed or refused to collect the checks. "The refusal by the creditor of a proper tender of the money due him

is operative to prevent the debtor from being guilty of a breach of duty, although it is not a discharge of his duty." 5A A. Corbin, Contracts § 1233 (1964). Therefore, the tender of payments did not relieve the U.S. Government of its obligation to pay rent.

However, the fact that Mr. Xum, through his own actions, did not receive payment of the 375,000 riels does not entitle him to payment of the corresponding amount in U.S. currency at 1971 conversion rates. The lease agreement provided for payment of monthly rent in riels, not U.S. dollars. The riel was considerably devalued between 1971 and 1974, and now has been abolished as the currency of the Khmer Republic, so that the conversion value of the 25,000 riel monthly rent dropped from \$450 to \$0. The risk of currency devaluation is an element which a contractor is presumed to take into account and no recovery may be had where the foreign currency in question is worthless. Cf. 70 C.J.S. Payment § 20 (1951); Dougherty v. National City Bank of New York, 157 Misc. 849, 235 N.Y.S. 491 (Sup. Ct. 1935).

While the claimant may now find himself in somewhat unfortunate circumstances with respect to his entitlement under the lease, this Office is without authority to consider a request for modification, reformation, rescission or cancellation of an agreement on equitable grounds. Moreover, no officer or employee of the United States is empowered to modify an existing Government contract or lease, to favor another party, except in receipt of some compensating benefit by the Government. 40 Comp. Gen. 309, 311 (1960); Lessor's FIART, L. D. B. and ISMEIM, B-185960, August 19, 1976, 76-2 CPD 175.

Consequently, we are unable to direct that payment be made in U.S. dollars in lieu of the now valueless riels required by the lease agreement, and the Settlement Certificate denying the claim is affirmed.


Deputy Comptroller General
of the United States