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

FILE: B-207262 **DATE:** May 10, 1983

MATTER OF: Jose A. Claus, T. J. Hannigan, and others

DIGEST:

1. The construction of provisions of treaty and statute, as expressed in implementing regulations issued by those charged with their execution, must ordinarily be sustained in the absence of any showing of plain error, particularly when the regulations have been long followed and consistently applied with legislative assent. Hence, it may not be concluded that the method used to compute a tax allowance for Panama Canal employees, as consistently prescribed between 1958 and 1980 by regulations issued by the Secretary of the Army, unlawfully contravened the governing provisions of treaty and statute, even though another method might properly have been used.

2. A 15-percent tropical differential, and a tax allowance based on international differences in income tax rates, were authorized under treaty and statute for certain Panama Canal employees until 1979, when a new treaty and statute took effect which instead authorized them to have a 25-percent "retention differential." The President did not act unlawfully in continuing to authorize the tropical differential and tax allowance by regulation after 1979, since by law he was vested with broad discretionary authority to administer the "retention differential" and could therefore order its payment in the form of a tropical differential and tax allowance.

3. The payment of a tropical differential and a tax allowance in 1979 and 1980 to certain Panama Canal employees who were United States citizens did not contravene provisions of treaty and statute requiring that "rates of basic pay" of Panama Canal

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employees be applied without regard to nationality, since the tropical differential and the tax allowance did not constitute a part of "rates of basic pay" but were rather ancillary elements of compensation payable in addition to basic salary or wages.

4. In 1980 the Secretary of the Army rescinded a regulation which had authorized a tax allowance for certain Panama Canal employees since 1958. The Secretary's action was based upon delegated authority from the President to administer the tax allowance as part of a "retention differential" for the employees under a treaty and statute which became effective in 1979. Although a provision of the treaty directed that the employees' terms of employment "will in general be no less favorable" than those previously existing, the statute giving effect to that treaty provision did not specifically preserve entitlement to the tax allowance. Hence, the Secretary had discretionary authority to rescind the allowance and did not violate the treaty or statute in doing so.

The Administrator of the Panama Canal Commission requests our decision on the question of whether payment may be made on claims for backpay submitted by Mr. Jose A. Claus, Mr. T. J. Hannigan, and certain other Commission employees. The matter involves a tax allowance and a tropical differential that affected the employees' monetary benefits. Their claims fall into three categories:

1. Non-U.S. citizen employees claim they were underpaid between 1958 and October 1, 1979, contending that the tax allowance was then improperly computed. (Mr. Claus and others)

2. Non-U.S. citizen employees also claim they were underpaid between

October 1, 1979, and October 5, 1980, contending that the tax allowance should have been completely eliminated on October 1, 1979. (Mr. Claus and others)

3. U.S. citizen employees claim they were underpaid after October 5, 1980, contending that the tax allowance was improperly discontinued on that date. (Mr. Hannigan)

We conclude that none of these claims may be paid.

Background

1. 1955 Treaty and 1958 Law

Attached to the 1955 Treaty of Mutual Understandings and Cooperation with the Republic of Panama was a Memorandum of Understandings Reached on "various administrative and policy matters which were the subject of discussion in the course of the treaty negotiations." Among other things, that Memorandum stated:

> "On the part of the United States of America:
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> "1. Legislation will be sought which will authorize each agency of the United States Government in the Canal Zone to conform its existing wage practices in the Zone to the following principles:
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> "(a) The basic wage for any given grade level will be the same for any employee eligible for appointment to the position without regard to whether he is a citizen of the United States or of the Republic of Panama.
>
> "(b) In the case of an employee who is a citizen of the United States, there may be added to the base pay an increment

> representing an overseas differential plus an allowance for those elements, such as taxes, which operate to reduce the disposable income of such an employee as compared with an employee who is a resident of the area."

These principles were adopted in Public Law 85-550, approved July 25, 1958, 72 Stat. 405, and the provisions of that law were subsequently reenacted and codified by Public Law 87-845, approved October 18, 1962, 76A Stat. 16, in subchapter III of chapter 7, title 2 of the Canal Zone Code (2 C.Z.C. 141-156). United States citizen employees were specifically authorized payment of the tax allowance and the overseas (or "tropical") differential referred to in the international agreement, under 2 C.Z.C. 146 which provided:

> "In addition to established basic compensation, there shall be paid to each employee who is a citizen of the United States such amounts as the head of the department concerned determines to be payable, as follows:
>
> > "(1) an allowance for taxes which operate to reduce his disposable income in comparison with the disposable incomes of those employees who are not citizens of the United States; and
> >
> > "(2) an overseas (tropical) differential not in excess of an amount equal to 25 percent of the aggregate amount of the rate of basic compensation so established and the amount of the allowance provided in accordance with paragraph (1) of this section."

The President of the United States by 2 C.Z.C. 155 was assigned responsibility for coordinating policies of the respective departments and issuing implementing regulations relative to the tax allowance and tropical differential. That responsibility was delegated to the Secretary of the Army on December 12, 1958, in Executive

Order No. 10794, 23 F.R. 9627, and the Secretary's delegated authority was renewed on August 18, 1964, in Executive Order No. 11171, 29 F.R. 11897.

The tropical differential was authorized for U.S. citizen employees as a means of compensating them for leaving their home environment in the United States, living in a confined area having a tropical climate, assuming additional personal costs involved in periodic returns to the United States, and for other related reasons. Payment of the differential had historically dated back to the time when the Panama Canal was built, and between 1958 and 1964 it was paid at the rate of 25 percent of salary for each U.S. citizen employee. Starting in 1964 the Secretary of the Army revised the policies and regulations concerning payment of the tropical differential, with the result that it was reduced in rate from 25 to 15 percent of salary and was generally authorized for only one member of a family when both husband and wife were U.S. citizen employees. Some U.S. citizen employees affected brought judicial actions challenging the validity of these revisions to the regulations, but the courts denied them relief and ruled that the Secretary of the Army had acted properly in the exercise of his discretionary authority. See Leber v. Central Labor Union, 383 F.2d 110 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968); and Hendricks v. United States, 210 Ct. Cl. 266 (1976).

The tax allowance was based on the difference between rates of income taxes imposed by the United States and the Republic of Panama, and was designed to prevent U.S. citizen employees from having comparatively less disposable income after paying relatively higher taxes than their non-U.S. citizen counterparts. Regulations issued by the Secretary of the Army authorized payment of the tax allowance in an amount equivalent to the excess of the income tax which the typical U.S. citizen employee normally would expect to pay to the U.S. Government on his salary, including the tropical differential, over the amount of income tax the typical Panamanian citizen employee would normally pay to the Panamanian Government on the same salary, without the tropical differential. See 35 C.F.R. 253.134 (1978 ed.). The tax allowance was periodically recomputed

as necessary to conform with changes in the tax laws of either the Republic of Panama or the United States. The allowance was first authorized for U.S. citizen employees in 1958 under the laws and international agreements previously described, which had also stipulated that the same basic wage would be paid to U.S. and non-U.S. citizen employees alike who held the same grade classification.

The computation of the tax allowance and the basic wage for grade classifications in Panama was a reverse process in which an adopted U.S. Government pay scale was used. The actual computation of the tax allowance for a graded position involved taking a salary from a corresponding U.S. Civil Service pay scale (i.e., the General Schedule, etc.), adding the tropical differential, and computing the tax on the sum for a typical U.S. citizen employee. The Panamanian tax for a typical Panamanian citizen was computed on the same pay scale without inclusion of a tropical differential, and subtracted from the computed tax for the typical U.S. citizen employee to calculate the amount of the tax allowance. The tax allowance was then subtracted from the adopted U.S. Government pay scale to arrive at the basic wage of a grade level for agencies in Panama. The non-U.S. citizen employees received this reduced basic wage and the U.S. citizen employees received the full wage (reduced wage plus tax allowance). Since the tax allowance was computed as a reduction in the basic wage, any decrease in the amount of the tax allowance, or its complete elimination, would have resulted in a corresponding increase in the basic wage in Panama.

2. 1977 Treaty and 1979 Law

In 1977 a new international agreement, the Panama Canal Treaty, was concluded. It calls for the United States to transfer control of the Canal to the Republic of Panama over a 20-year period beginning on October 1, 1979. On that date the Panama Canal Company and the Canal Zone Government ceased to exist under the terms of the Treaty and were replaced by a new U.S. Government agency, the Panama Canal Commission. Concerning the pay of Commission employees, paragraph 6 of Article X of the 1977 Treaty provides that:

> "6. With regard to wages and fringe benefits, there shall be no discrimination on the basis of nationality, sex, or race. Payments by the Panama Canal Commission of additional remuneration, or the provision of other benefits, such as home leave benefits, to United States nationals employed prior to entry into force of this Treaty, or to persons of any nationality, including Panamanian nationals who are thereafter recruited outside of the Republic of Panama and who change their place of residence, shall not be considered to be discrimination for the purpose of this paragraph."

The Panama Canal Act of 1979, Public Law 96-70, approved September 27, 1979, 93 Stat. 452, was enacted in furtherance of the 1977 Treaty. Subsection 3303(a)(1) of the Act, 93 Stat. 499, repealed title 2 of the Canal Zone Code effective October 1, 1979. Revised rules governing wage and employment practices, designed to replace those which were repealed and to provide for an orderly transition, are contained in subchapter II of chapter 2, title I of the Act (sections 1211 through 1225, 93 Stat. 463-468). Section 1217 of the Act, 93 Stat. 465, replaces 2 C.Z.C. 146 and provides in pertinent part that:

> "SEC. 1217. (a) In addition to basic pay, additional compensation may be paid, in such amounts as the head of the agency concerned determines, as an overseas recruitment or retention differential to any individual who--
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> "(1) before October 1, 1979, was employed by the Panama Canal Company, by the Canal Zone Government, or by any other agency in the area then known as the Canal Zone;
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> "(2) is an employee who was recruited on or after October 1, 1979, outside of the Republic of

> Panama for placement in the Republic of Panama;
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> * * * * *
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> "if, in the judgment of the head of the agency concerned, the recruitment or retention of the individual is essential.
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> * * * * *
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> "(c) Additional compensation under this section may not exceed 25 percent of the rate of basic pay for the same or similar work performed in the United States by individuals employed by the Government of the United States."

Legislative documents relating to the enactment of this provision contain the following comments regarding its purpose:

> "* * * Section 146 [2 C.Z.C. 146] is then revised to conform to the new Treaty provisions concerning additional remuneration that may be paid as overseas recruitment and retention differentials (a) to persons employed prior to the Treaty effective date and (b) to persons thereafter recruited outside of Panama for a position in Panama. * * * The present section authorizes a tax allowance intended to equalize the take-home basic compensation of United States citizens and non-United States citizens and an overseas 'tropical' differential, with an overall ceiling of 25 percent. The proposed revision would allow payment in such amounts (not to exceed 25 percent of the prevailing United States wage rate) as the head of the agency concerned determines should be paid as overseas recruitment and retention differentials. Without this authority to pay incentive

> differentials, the Panama Canal Commission, as well as other United States Government agencies in the Republic of Panama, might have difficulty in recruiting and retaining both United States and non-United States citizens, particularly in certain critical skills, which are necessary for the continued effective operation of the Canal and essential support activities." H.R. Rep. No. 94, Part II, 96th Cong., 1st Sess. 100.

To similar effect, see also H.R. Rep. No. 98, Part I, 96th Cong., 1st Sess. 54-55 reprinted in 1979 U.S. CODE CONG. & AD. NEWS 1057, and S. Rep. No. 255, 96th Cong., 1st Sess. 25-26.

Section 1223 of the Panama Canal Act, 93 Stat. 467, gives the President of the United States responsibility and authority for administering the revised wage and employment practices prescribed in subchapter II of chapter 2, title I of the Act, and it permits the delegation and redelegation of that authority. On November 29, 1979, in Executive Order 12173, 44 F.R. 69271, the President directed that all regulations adopted under former title 2 of the Canal Zone Code remain in effect unless or until amended, to the extent that such regulations were not inconsistent with the Panama Canal Treaty and the Act. The President also delegated his powers and responsibilities to the Secretary of Defense, with certain exceptions not material here. This delegation was renewed on March 26, 1980, and May 27, 1980, in Executive Orders 12203 and 12215, 45 F.R. 20451 and 36043. The Secretary of Defense in turn redelegated the responsibility to the Secretary of the Army.

Federal officials concerned with the administration of United States agencies in the Republic of Panama determined that regulations contained in 35 C.F.R. 253.134 and 253.135 authorizing the 15-percent tropical differential and the tax allowance for U.S. citizens employed on September 30, 1979, were effective notwithstanding the repeal of 2 C.Z.C. 146. However, at its September 17, 1979 meeting in Balboa Heights, the interagency Civilian Personnel Policy Coordinating Board of

the Canal Zone had recommended discontinuance of the tax allowance in 1980, as is reflected in the following entry from the minutes of the meeting:

> "4. OLD BUSINESS
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> * * * * *
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> "f. Tax Allowance. The Board reviewed and discussed three proposals to eliminate the tax allowance. It was agreed to recommend elimination of the tax allowance effective October 1, 1980 contingent on the necessary Congressional appropriations."

The Secretary of the Army accepted this recommendation after reviewing the budgetary effects it would have, and rescinded the regulation authorizing the tax allowance (35 C.F.R. 253.134) effective the first day of the first pay period beginning after October 1, 1980, i.e., on October 5, 1980. A "pay savings" provision was added to the regulations to prevent any U.S. citizen employee from experiencing a reduction in pay due to the termination of the tax allowance. See 45 F.R. 59150, September 8, 1980. The 15-percent tropical differential prescribed by regulation was not affected by this action and continued to be payable to qualified U.S. citizen employees. See 35 C.F.R. 253.135 (1981 ed.).

Backpay Claims for Pay Periods Prior to October 1, 1979

Non-U.S. citizen employees claiming backpay for pay periods prior to October 1, 1979, suggest that the method then used to compute the tax allowance was improper. Essentially, they contend that the regulations issued by the Secretary of the Army (35 C.F.R. 253.134 (1978 ed. and earlier editions)) were invalid because they were inconsistent with the governing provisions of the 1955 Memorandum of Understandings and 2 C.Z.C. 146, quoted above, in that the regulations provided for computation of the U.S. citizen employee income tax element on the basis of the employee's salary

plus the tropical differential. Inclusion of the tropical differential in the calculation had the effect of increasing the amount of the tax allowance, and thus of reducing the basic wage for positions in the Canal Zone. The claimants suggest that the purpose of the tax allowance authorized under the 1955 Memorandum and 2 C.Z.C. 146 was to equalize the disposable, after-tax basic salaries of U.S. and non-U.S. citizen employees. They submit that this equalization never occurred under the implementing regulations because the tropical differential included in the computation there prescribed was not actually a part of the basic salary of any employee and was never paid to non-U.S. citizen employees. In support of this contention they quote from the cover letter accompanying our Congressional report entitled, "Study of Various Personnel Policies of the Canal Organization and Other Federal Agencies in the Canal Zone" (FOD-75-14), May 28, 1975, B-114839, in which we said, "Since only U.S. citizen employees receive the tropical differential, it could be concluded that, pursuant to the intent of the [1955] memorandum, the tropical differential should not be included in the basic wage for computing the tax allowance."

In our 1975 report, we considered this same issue, which was then raised by representatives of non-U.S. citizen employee interest groups, and we stated in greater detail at pages 14 and 15:

> "Basically the question is: Should the tropical differential received by U.S. citizen employees be included with base salary in computing the tax allowance paid to such employees? On the one hand the 1955 memorandum provided that the basic wage be uniform for U.S. and non-U.S. employees. Since only U.S. citizen employees receive the tropical differential, it could be concluded that, pursuant to the 1955 memorandum, the tropical differential was not intended to be a part of the basic wage for computing the tax allowance. On the other hand, in the Senate hearings leading to

> the passage of the act [Public Law 85-550], the then-Governor of the Canal Zone testified in the Senate hearings on S. 1850 before the Committee on the Post Office and Civil Service, U.S. Senate, 85th Cong., 1st Sess. 30 (1957), leading to the passage of the act, that:
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> > 'The tax liability factor is an amount equivalent to the excess of the income tax which the typical United States citizen employee normally would expect to pay the United States Government on his base salary or wages plus the tropical differential over the amount of income tax the typical Panamanian citizen employee would normally pay to the Panamanian Government on his base salary.' (Underscoring supplied.)
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> "Thus, since the Congress was aware of this interpretation when it passed the act, we cannot say that it is improper to include the tropical differential as a part of base salary in computing the tax allowance, even though some language in the 1955 memorandum indicates that the opposite result may have been contemplated."

The method of computing the tax allowance described to the Congress in 1957 was exactly the same as adopted by regulation in 1958 following the enactment of statutory authorization, and that method was consistently and uniformly used thereafter until the allowance was discontinued in 1980. The construction of provisions of treaty and statute, as expressed in implementing regulations issued by those charged with their execution, must ordinarily be sustained in the absence of any showing of plain error, particularly when the regulations have been long followed and consistently applied with legislative assent. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Matter of Jackomis, 58 Comp. Gen. 635, 638 (1979); 49 Comp. Gen. 510, 516-517 (1970); 48 Comp.

Gen. 5, 9 (1968); 74 AM. JUR. 2D Treaties sec. 21, 25 (1974); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION sec. 49.05 (4th ed. C.D. Sands 1973). Hence, we are unable to conclude that the longstanding method of computing the tax allowance, which was consistently prescribed between 1958 and 1980 by the regulations here in question, unlawfully contravened the 1955 Memorandum of Understandings and 2 C.Z.C. 146. We therefore affirm the findings of our report FOD-75-14, May 28, 1975, quoted above. Accordingly, we disallow the backpay claims submitted covering pay periods prior to October 1, 1979.

Backpay Claims for Pay Periods Between October 1, 1979, and October 5, 1980

The non-U.S. citizen employees claiming backpay for pay periods between October 1979 and October 1980 suggest that the tax allowance should have been completely eliminated effective October 1, 1979, under paragraph 6 of Article X of the Panama Canal Treaty of 1977, quoted above, and section 1216 of the Panama Canal Act of 1979, 93 Stat. 465, which directs that "rates of basic pay * * * shall be applied without regard to whether the employee or individual concerned is a citizen of the United States or a citizen of the Republic of Panama." The claimants contend that continuation of the tax allowance after October 1, 1979, for U.S. citizens employed prior to that date constituted unlawful discrimination under those provisions of treaty and statute, and that as a result their basic wages were improperly depressed during the following year.

However, paragraph 6 of Article X of the Treaty expressly provides that "[p]ayments by the Panama Canal Commission of additional remuneration" to U.S. nationals employed prior to October 1, 1979, shall not be considered discriminatory, and section 1217 of the Act, quoted above, specifically authorizes payment of an additional "retention differential" to those individuals in amounts of up to "25 percent of the rate of basic pay for the same or similar work performed in the United States by individuals employed by the Government of the United States." Although section 1217 refers to a single "differential," the legislative history of the

statute demonstrates that it was designed to encompass the then existing 15-percent tropical differential as well as the tax allowance based on international differences in tax rates. The legislative history also shows that the revision was intended to allow such continued additional payments in the form of incentive differentials as were administratively determined to be appropriate, provided that such payments did not exceed an overall prescribed limit of 25 percent of the prevailing United States wage rate. Hence, we conclude that the President had discretionary authority to continue payment of the tax allowance as a retention differential after October 1, 1979, under the Treaty and the Act for U.S. nationals employed prior to that date, since there is no indication that the allowance together with the 15-percent tropical differential which was also continued, when combined, exceeded the overall 25-percent limitation referred to in the statute. Moreover, the continuation of the tax allowance for U.S. citizens employed prior to October 1, 1979, did not result in their receipt of higher rates of basic pay or wages than their non-U.S. citizen counterparts, so that we are unable to conclude that payment of the tax allowance contravened the requirement of section 1216 of the Panama Canal Act that rates of basic pay be applied without regard to nationality. Accordingly, we disallow the backpay claims submitted covering the pay periods from October 1, 1979, to October 5, 1980.

Backpay Claims for Pay Periods After October 5, 1980

The U.S. citizen employees claiming backpay for pay periods after October 5, 1980, suggest that the Secretary of the Army acted unlawfully in terminating the tax allowance on that date. They contend that the Secretary violated subparagraph 2(b) of Article X of the Panama Canal Treaty of 1977, which provides:

> "2. * * * (b) The terms and conditions of employment to be established will in general be no less favorable to persons already employed by the Panama Canal Company or the Canal Zone Government prior to the entry into force of this Treaty, than

those in effect immediately prior to that date."

They contend that the Secretary also violated subsection 1231(a) of the Panama Canal Act of 1979, 93 Stat. 468, which provides:

> "SEC. 1231(a)(1). With respect to any individual employed in the Panama Canal Company or the Canal Zone Government--
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> "(A) who is transferred--
>
> "(i) to a position in the Commission * * *
>
> * * * * *
>
> "the terms and conditions of employment set forth in paragraph (2) of this subsection shall be generally no less favorable * * *.
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> * * * * *
>
> "(2) The terms and conditions of employment referred to in paragraph (1) of this subsection are the following:
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> "(A) rates of basic pay;
>
> "(B) tropical differential;
>
> "(C) premium pay and night differential;
>
> "(D) reinstatement and restoration rights;
>
> "(E) injury and death compensation benefits;
>
> "(F) leave and travel;
>
> "(G) transportation and repatriation benefits;

"(H) group health and life insurance;

"(I) reduction-in-force rights;

"(J) an employee grievance system, and the right to appeal adverse and disciplinary actions and position classification actions;

"(K) veterans' preference eligibility;

"(L) holidays;

"(M) saved pay provisions; and

"(N) severance pay benefits."

Subsection 1231(a) of the Act was designed to give effect to Article X(2)(b) of the Treaty. See H.R. Rep. No. 98, Part I, 96th Cong., 1st Sess. 56, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 1058. The benefits intended to be continued were those specifically enumerated in subparagraph 1231(a)(2) of the Act. See Matter of Panama Canal Commission, B-205811, August 18, 1982. The tax allowance is not among those enumerated benefits. Furthermore, although the claimants suggest that their enumerated right to basic pay was affected by termination of the tax allowance, that allowance was not actually a part of their basic rate of pay. Rather, it was an ancillary element of compensation payable in addition to their basic salary or wages. Hence, we are unable to conclude that termination of the tax allowance contravened Article X(2)(b) of the Treaty or subsection 1231(a) of the Act.

Our view is that payment of the tax allowance to these claimants after September 30, 1979, was permissible under section 1217 of the Panama Canal Act, but only so long as the President of the United States or his delegates continued to authorize it in the exercise of the discretionary authority vested in them by the Act. We are unable to find any basis for a conclusion

that the Secretary of the Army was precluded from exercising his delegated discretionary authority to terminate the tax allowance effective October 5, 1980. Compare Leber v. Central Labor Union and Hendricks v. United States, cited above. Hence, we conclude that their entitlement to the tax allowance terminated on that date.

Accordingly, we disallow all of the claims submitted in this matter.

for Milton J. Socolar
Comptroller General
of the United States