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United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Department of Energy—Disposition of Interest Earned on State Tax Refund Obtained by Contractor

File: B-302366

Date: July 12, 2004

DIGEST

The federal government is legally entitled to a refund of state taxes plus interest that the state of Washington gave to Fluor Hanford, Inc. (FHI) for taxes that FHI paid under a contract with the Department of Energy. Because the department previously reimbursed FHI for those taxes, the department is entitled to retain and to credit to its appropriations the principal portion of the state tax refund. However, the department may not retain or credit to its appropriations interest amounts paid by the state along with the refunded taxes. The interest amounts must be credited to the general fund of the Treasury as miscellaneous receipts, pursuant to 31 U.S.C. § 3302(b).

DECISION

This responds to a request from Keith A. Klein, Manager of the Richland Operations Office of the Department of Energy, for an advance decision under 31 U.S.C. § 3529 regarding amounts refunded to the department by a department contractor.¹ Fluor Hanford, Inc. (FHI), a contractor performing work for the department at the Hanford Nuclear Reservation, transmitted to the department a refund it obtained from the State of Washington for business and occupation taxes that FHI had previously paid and passed on to the department for reimbursement under its contract. The state tax refund also included interest accrued and paid under state law. Mr. Klein asks

¹ Letter from Keith A. Klein to David M. Walker, Comptroller General, Dec. 11, 2003.

whether the interest may be credited to the department's appropriations or must it be deposited into the Treasury as miscellaneous receipts.²

As explained below, we conclude that the amount of the interest should be deposited into the general fund of the Treasury as miscellaneous receipts, pursuant to 31 U.S.C. § 3302.

BACKGROUND

According to the Department of Energy, it has a management contract with FHI for cleanup activity at the Hanford Nuclear Reservation. Letter from Keith A. Klein to Thomas H. Armstrong, Feb. 9, 2004. Under that contract, the department reimburses FHI the allowable costs of the work performed, including Washington State "business and occupation (B&O) taxes." *Id.* The contract is a multiyear arrangement that the department obligated against no-year funds appropriated in fiscal years 1997 through 2001.³ *Id.*

In 2001, FHI concluded that it might be eligible for a Washington State tax credit and refund for B&O taxes that it paid to Washington State during calendar years 1997 through 2001. After researching the matter, FHI asked the department for permission to apply for the credit and refund. The department agreed and FHI applied. Eventually, the state allowed the credit and, in May 2003, refunded \$13,760,504 to FHI. Of this amount, \$11,271,317 repaid the excess B&O taxes, and \$2,489,187 was paid as interest earned under state law while the excess taxes were held by the state. FHI notified the department when it received the refund and credited the full amount of the refund to the department.⁴

² Disposition of the principal amount is not at issue here. It was credited to the department's appropriations as the refund of an amount that had previously been paid out. Letter from Keith A. Klein to Thomas H. Armstrong, Feb. 9, 2004. *Cf., generally*, 69 Comp. Gen. 260 (1990).

³ The department did not identify the appropriations it obligated. During the period from fiscal years 1997 through 2001, the department received appropriations for both "Non-Defense Environmental Management" and "Defense Environmental Restoration and Waste Management." It appears that the department used the appropriations for "Defense Environmental Restoration and Waste Management." *See, e.g.*, Appendix To The Budget Of the United States For Fiscal Year 2001, at 395 (2000).

⁴ The record shows that FHI independently concluded that the work it had performed (and the department had reimbursed) was eligible for a state tax credit and refund. FHI promptly notified the department, sought its concurrence, obtained the refund, and promptly returned the full amount to the government. Letter from Keith A. Klein to Thomas H. Armstrong, Feb. 9, 2004.

The department credited the principal portion of the refund, representing the excess B&O taxes paid, to the appropriation from which the department originally reimbursed FHI for the B&O taxes. Letter from Keith A. Klein to Thomas H. Armstrong, Feb 9, 2004. The department is holding the balance of the refund, the interest earnings, in a “suspense account” pending this decision. *Id.*

DISCUSSION

FHI and the department agree that the federal government is entitled to receive the proceeds of the entire Washington State tax refund, both principal and interest. FHI’s contract requires the department to reimburse FHI for costs incurred in the performance of its work at the Hanford Reservation, including FHI’s B&O tax payments to the state. Letter from Keith A. Klein to Thomas H. Armstrong, Feb 9, 2004. However, only actual and legitimate expenses may be reimbursed. *Id.* When Washington State determined that FHI had overpaid its state tax obligations, the excess amount that FHI had paid to the state was no longer a legitimate, reimbursable expense under the contract. As a result, the state refund of the excess taxes was required to be paid over to the federal government. *Cf., e.g., Northrop Aircraft, Inc. v. United States*, 127 F. Supp. 597 (Ct. Cl. 1955) (upholding B-105262, Dec. 26, 1951, concluding that the government was entitled to the refund of state tax principal and interest).⁵ *See also* B-127463, Mar. 28, 1957.

Citing Comptroller General case law, the department credited the principal portion of the refund to the appropriation from which it was originally paid. The issue before us in this decision is whether the Department of Energy may credit to its appropriations the interest component of the refund that FHI obtained from Washington State, or whether that interest must be deposited into the general fund of the U.S. Treasury as “miscellaneous receipts.”

Generally, under 31 U.S.C. § 3302(b), known as the “Miscellaneous Receipts Statute,” agencies are required to deposit monies they receive for the use of the United States into the general fund of the U.S. Treasury as “miscellaneous receipts.” Section 3302(b) provides:

⁵ When the government is liable for such costs as a contractor incurs,

“any reduction of a cost after reimbursement entitles the Government to a refund. In such a situation equity demands, therefore, that when the wrongdoer himself subsequently makes compensation and eliminates the cost, the Government, which paid the cost, is entitled to a refund equivalent to the amount given by the wrongdoer in restitution.”

Northrop Aircraft, Inc., supra, 127 F. Supp. at 599.

“[A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”

Violation of the Miscellaneous Receipts Statute constitutes an illegal augmentation of the agency's appropriation. B-265734, Feb. 13, 1996. There are, however, two exceptions to this rule—referred to as statutory and nonstatutory exceptions. *See generally* 69 Comp. Gen. 260, 262 (1990).

The statutory exceptions are provisions of law that authorize an agency to credit some or all of its receipts to a particular fund or appropriation (instead of the general fund of the Treasury), or authorize the agency to expend the receipts without depositing them. *See, e.g.*, B-241269, Feb. 28, 1991 (discussing provisions of the Economy Act, 31 U.S.C. §§ 1535, 1536, and the Government Employees Training Act, 5 U.S.C. § 4104); 64 Comp. Gen. 366 (1985) (by its terms, 31 U.S.C. § 3718(d) allowed the General Services Administration to pay debt collection contractors from debt collection proceeds notwithstanding the Miscellaneous Receipts Statute). The department has not cited, and we are not aware of, any statutory exceptions applicable here.

The nonstatutory exception concerns receipts that qualify as “refunds.” We have long held that agencies may credit to their appropriations refunds of amounts erroneously paid from their appropriations. For example, in a 1926 decision, we held that “if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due, such refund has been held to be properly for credit to the appropriation originally charged.” 5 Comp. Gen. 734, 736 (1926). This exception simply restores to the appropriation amounts that should not have been paid from the appropriation.⁶

We have defined refunds in this context to include “refunds of advances, collections for overpayments made, adjustments for previous amounts disbursed, or recoveries of erroneous disbursements from appropriation or fund accounts that are directly related to, and reductions of, previously recorded payments from the accounts.” 69 Comp. Gen. at 262. For example, in B-281064, Feb. 14, 2000, the nonstatutory refunds exception was applied to allow the Tennessee Valley Authority (TVA) to deposit into its fund amounts recovered under the False Claims Act as reimbursement for moneys erroneously disbursed from the TVA Fund, as well as an additional sum equivalent to the investigative costs TVA paid from the TVA Fund as a direct consequence of the false claim.⁷ *See also* B-257905, Dec. 26, 1995 (“Thus, in

⁶ *See also* 61 Comp. Gen. 537, 539 (1982); 23 Comp. Gen. 648, 649 (1944).

⁷ However, the refund exception did not extend so far as to allow TVA to retain the double and treble damages recovered under the False Claims Act. The double and
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theory, the unobligated balance of the appropriation account after the refund should be what it would have been had the amount of the obligation covered by the refund not been improperly paid.”).

This nonstatutory exception for refunds clearly applies to the principal portion of the tax refund FHI obtained for the department—to restore the affected appropriation to the state it would have been in but for the erroneous reimbursement of taxes that FHI erroneously overpaid. The department, therefore, should credit the principal portion of the refunded amount to the appropriation from which it originally made to payment to FHI. But for this exception, the department would have been required to deposit the recovered principal amount into the Treasury as miscellaneous receipts.⁸

The nonstatutory refund exception, however, does not allow the department to retain the interest paid by the state. Because the nonstatutory exception operates simply and solely to restore to an appropriation amounts that should not have been paid from the appropriation, crediting an amount in excess of that paid from the appropriation would improperly augment the appropriation. For example, in 5 Comp. Gen. at 736 we noted that an amount received as a refund or repayment may be credited to the appropriation from which it was originally paid, “provided the crediting of such moneys will not operate to augment the original amount appropriated by the Congress for the purposes for which the appropriation was made. 22 Comp. Dec. 314. *See also* 18 Comp. Dec. 430 and 22 [Comp. Dec.] 297.” Here, the interest amount of the state tax refund exceeds the amount paid from the department’s appropriation and crediting it would augment the original amounts appropriated by Congress in this regard.

The purpose of interest is to compensate for the passage of time and the loss of earnings resulting from the state’s retention of money to which it was not entitled. *Cf., e.g., Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789, 796 (7th Cir. 2001) (“compensation for the time value of money”); *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 608 (2nd Cir. 1999) (“awarding interest as compensation for the time value of ... money”); *R.L. Coolsaet Const. Co. v. Local 150, Int’l Union of Operating Engineers*, 177 F.3d 648, 661 (7th Cir. 1999), *citing P.A.*

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treble damages did not constitute the recovery of amounts previously paid from the TVA Fund. Section 3302(b) required these extra amounts to be deposited into the Treasury as miscellaneous receipts. B-281064, Feb. 14, 2000.

⁸ In this case, the affected appropriation is a no-year appropriation. In those instances in which the payment being refunded was made from a fiscal year appropriation, the agency must credit the refund to the fiscal year originally charged, even if that appropriation has now expired. *See, e.g.,* 23 Comp. Gen. 648, 649 (1944). To the extent that the affected appropriation has closed, the agency must deposit the refund into the miscellaneous receipts of the Treasury. 31 U.S.C. § 1552(b).

Bergner & Co. v. Bank One, 140 F.3d 1111, 1123 (7th Cir. 1998) (“interest ... is simply an ingredient of full compensation that corrects . . . for the time value of money”); *Motion Picture Ass'n of Am., Inc. v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992) (“interest compensates for the time value of money, and thus is often necessary for full compensation”); *In the Matter of Continental Ill. Securities Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) (the cost of delay in receiving money to which one is entitled is the loss of the time value of money, and interest is the standard form of compensation for that loss). All interest statutes share a common purpose—compensation for the loss of the use of money over some period of time, in other words, a recognition of the time value of money. Thus, by definition, interest paid on a principal amount is an amount in excess of the amount originally paid by the agency. Its retention in the agency’s accounts and expenditure without express statutory authority would augment the agency’s appropriations in violation of the Miscellaneous Receipts Statute. *Cf., e.g.*, 69 Comp. Gen. 260, 263 (but for the existence of express statutory authority, FEMA’s retention of interest on the principal amount refunded to the agency would have violated the prohibition against augmentation of appropriations).

The department argues that the interest component of the state refund merely “restores the appropriated funds to an amount adjusted for net present value.” Letter from Keith A. Klein to David M. Walker, Dec. 11, 2003. We do not find the argument persuasive. The Congress does not make appropriations on a net present value basis; it appropriates specific amounts, and only the appropriated amount is available for obligation and expenditure.⁹ Simply put, had the department not previously reimbursed FHI for the excess business and occupation taxes, its appropriation would still contain only the unadjusted excess amount—it would not have earned interest on that amount or been otherwise protected from the effects of inflation.

The department also asks whether our decision in 69 Comp. Gen. 260 (1990) might serve as precedent for allowing it to keep the interest in this case. That decision allowed the Federal Emergency Management Administration (FEMA) to keep some extra amounts paid to the government as compensation for lost interest on money owed to FEMA. It is readily distinguishable from the case at hand because FEMA, unlike the department, had statutory authority to invest its appropriations and retain the interest earned on those investments. *See* 69 Comp. Gen. at 262-263. Thus, the result in 69 Comp. Gen. 260 represents the operation of a specific statutory exception to the Miscellaneous Receipts Statute.

None of the circumstances of 69 Comp. Gen. 260 are present in the case now before us. There is no applicable statutory exception, and the department is not authorized

⁹ *See, e.g.*, 72 Comp. Gen. 164, 165 (1993) (“When Congress makes an appropriation, it is establishing an authorized program level beyond which an agency cannot operate.”).

to hold and invest its appropriations outside of the Treasury in order to accumulate earnings upon them. Instead, Congress has simply appropriated particular sums to the department to be used for cleanup of the Hanford Reservation. Once those funds have been properly expended, Congress expects the department to seek additional appropriations for that purpose. Allowing the department to retain the interest without proper legal authority would constitute an illegal augmentation of the funds appropriated to the department, and would violate the Miscellaneous Receipts Statute. *Cf., e.g.,* B-300248, Jan. 15, 2004 (“a congressional appropriation establishes a maximum authorized program level, meaning that an agency cannot, absent statutory authorization, operate beyond the level that can be paid for by its appropriations [or] circumvent these limitations by augmenting its appropriations from sources outside the [federal] government”).

CONCLUSIONS

We agree with the department that it may retain the principal portion of the Washington State repayment of B&O taxes previously reimbursed under the cost-plus contract with FHI. For purposes of the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), this amount qualifies as a “refund” of amounts previously reimbursed, but no longer owed, by the department. The principal portion of the refund should be credited to the appropriation from which the refunded B&O taxes were originally reimbursed. However, the department may not retain the interest component of the Washington State repayment. The interest amount does not reflect the restoration of a previous improper payment and its retention would constitute an improper augmentation of the department’s appropriations. The interest must be credited to the general fund of the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b).

/signed/

Anthony H. Gamboa
General Counsel