

DOCUMENT RESUME

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Payment of Damages, Costs, and Private Legal Expenses of Government Officers and Employees Who Are Sued Under Section 7217 of the Internal Revenue Code of 1954. B-137762; B-143673. May 16, 1977. 13 pp.

Decision by Robert P. Keller, Acting Comptroller General.

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The Assistant Secretary for Administration of the Department of the Treasury requested an advance decision on two questions relating to suits that may be brought by taxpayers against officers and employees of the Federal Government. The liability of a Government officer or employee for damages and costs for unauthorized disclosure of tax returns or tax return information may be assumed by the United States and paid from general operating appropriations under certain circumstances. Department of Justice appropriations are available to pay legal fees, including private attorneys fees, incurred by Government officers or employees in defending suits filed under section 7217 of the Internal Revenue Code when specified circumstances exist. (Author/SC)

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**DECISION**



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

FILE: B-137762; B-143673

DATE: **May 16, 1977**

**MATTER OF: Payment of Damages, Costs, and Private Legal Expenses of Government Officers and Employees Who Are Sued Under Section 7217 of Internal Revenue Code of 1954**  
**DIGEST:**

1. The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, I.R.C. (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it is administratively determined that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954).
2. Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization.
3. The liability of a Government officer or employee for punitive damages under section 7217, I.R.C. (1954), may be assumed by the United States under section 7423(2), I.R.C. (1954), provided it is administratively determined that the officer or employee was acting in the due performance of his official duties at the time the unauthorized disclosure was made.
4. Department of Justice appropriations are available to pay legal expenses, including private attorneys fees,

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incurred by Government officers or employees in defending suit filed under section 7217, I.R.C. (1954), when the Department determines that officer or employee was acting within the scope of his employment; that United States has an interest in defending the officer or employee; and that representation by the Department is unavailable for some valid reason.

The Assistant Secretary for Administration, Department of the Treasury, requested an advance decision on two questions relating to suits that may be brought by taxpayers against officers and employees of the Government under section 7217 of the Internal Revenue Code of 1954 (hereinafter, the Code). The Assistant Secretary's first question concerns the application of section 7423(2) of the Code, as interpreted in 40 Comp. Gen. 95 (1960), to damages and litigation costs assessed against a Government officer or employee under section 7217 when, in the due performance of his official duties, the officer or employee discloses a taxpayer's return or return information in violation of section 6103 of the Code. In addition, the Assistant Secretary asks, if the Department of Justice declines to represent a Government officer or employee for some reason, whether appropriations are available to pay legal expenses incurred by the officer or employee in retaining private counsel to defend a suit brought under section 7217.

Section 7217 is a new provision, added to the Code in section 1202 of the Tax Reform Act of 1976. Pub. L. No. 94-455, 90 Stat. 1520, 1687. It grants a taxpayer a civil cause of action for damages against any person who knowingly, or by reason of negligence, discloses the taxpayer's return or return information in violation of section 6103 of the Code. Under section 7217, a defendant may be liable for actual damages, the costs of litigation, and, in the case of willful disclosure or disclosure resulting from gross negligence, punitive damages. In no case, however, may a court award a plaintiff less than \$1,000 for each instance of unauthorized disclosure.

In his request for an advance decision, which was coordinated with and joined in by the Department of Justice, the Assistant Secretary states that the definitions of return and

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return information in section 6103(b) are "broad and sweeping." He adds that the possibilities of suits against Government officers and employees under section 7217 has created an "ominous atmosphere" among Internal Revenue Service (IRS) and Justice Department personnel who handle tax returns and tax information on a daily basis as part of their official duties. Thus, the Assistant Secretary asks whether, under section 7423(2) of the Code, the Secretary of the Treasury is authorized to pay damages and costs assessed against an officer or employee of the Government under section 7217, if the unauthorized disclosure was made while acting in the due performance of his official duties.

Section 7423(2) provides that the Secretary of the Treasury or his delegate, in accordance with prescribed regulations, is authorized to repay--

"All damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the due performance of his official duty under this title."

We have stated that this provision "clearly was intended to exempt any Government officer or employee from liability for civil damages recovered against him in the performance of official duty in relation to the general matters concerning administration of the internal revenue laws." 53 Comp. Gen. 782, 783 (1974); 40 Comp. Gen. 95, 97 (1960).

In 40 Comp. Gen. 95 (1960), we held that the liability of an IRS district director and a Justice Department employee for damages awarded by a Federal court in connection with their handling of certain tax litigation could be assumed by the United States under the terms of section 7423(2). The holding was based on the broad authority contained in section 7423(2) and the administrative determination that the defendants were acting in the due performance of their official duties under the Code. Subsequently, we employed the same rationale in approving payments under authority of section 7423(2) to satisfy judgments obtained against IRS officers and employees for intruding upon an individual's constitutional rights and utilizing an improper method for computing a tax deficiency. 53 Comp. Gen. 782 (1974); B-168211, Dec. 30, 1969.

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Although we can see no reason, based on the language of the provision and our prior decisions, why section 7423(2) should not be interpreted to apply generally to suits filed under section 7217, it should be noted that an award of damages and costs under section 7217 may differ in one important respect from the awards at issue in our earlier decisions. In each of our past decisions, the Government officer or employee who was reimbursed under section 7423(2) was liable for damages arising from the performance of official duties "in relation to the general matters concerning administration of the internal revenue laws." 53 Comp. Gen. 782, 783. (1974); 40 Comp. Gen. 95 (1960). An award of damages and costs under section 7217, on the other hand, may be made against Government officers and employees whose official duties may not encompass "tax administration" as defined in section 6103(b)(4) of the Code. Other subsections of section 6103 authorize certain agencies and departments of the Government to obtain returns and return information for purposes wholly unrelated to tax administration. See §6103(i), (j), (l), I.R.C. (1954). The officers and employees of such departments and agencies, because of their access to returns and return information, are susceptible to suit under section 7217 for unauthorized disclosure of the returns and return information. In our view, however, their liability for damages and costs assessed under section 7217 cannot be assumed by the United States pursuant to section 7423(2), since their official duties generally derive from statutes other than the Code and thus in all probability do not fall within the general area of tax administration.

Although we do not believe that section 7423(2) protects every Government officer and employee whose access to returns and return information makes him a potential defendant in a suit filed under section 7217, it is generally recognized that where an officer or employee of the Government is sued because of some official act done in the discharge of an official duty, the expenses incurred by him in the discharge of such duties should be borne by the United States. See, e.g., 44 Comp. Gen. 312, 314 (1960), B-176229, October 5, 1972. Cf. 31 Comp. Gen. 246 (1952). In 44 Comp. Gen. 312 (1964), we held that it was proper for the United States to pay a contempt fine imposed on an agent of the Federal Bureau of Investigation who, on specific instructions of the Attorney General and in accordance with departmental regulations and instructions, refused to answer certain questions in violation of an order of a Federal

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court. The determining factor in that case was that the offense for which the agent was charged and fined "arose by reason of the performance of his duties as an employee \* \* \* and his compliance with [departmental] regulations and instructions, and was without fault or negligence on his part." 44 Comp. Gen. at 314. See B-186680, October 4, 1976. Employing similar reasoning, we concluded in B-176229, October 5, 1972, that a judgment against a Department of Interior employee could not be paid by the United States where it did not appear that the employee's liability "arose by reason of either the performance of his official duties as an employee \* \* \* or because of compliance with the Department's policy, instructions or regulations, nor pursuant to order of his superiors in the Department." See also B-176229, May 1, 1973. Thus, depending upon the facts and circumstances surrounding the unauthorized disclosure, it may be proper for the United States to assume the liability of Government officers or employees for damages and costs under section 7217 even though the officer or employee is not protected by section 7423(2) of the Code.

A more difficult question is whether appropriations will be available to pay damages and costs assessed under section 7217 against Government officers and employees not protected by section 7423(2). It is well established that "the appropriations or funds provided for regular governmental operations or activities, out of which a cause of action arises, are not available to pay judgments of courts in the absence of specific provision therefor." 34 Comp. Gen. 221 (1954); 2 Comp. Gen. 821 (1923). It appears, therefore, that the availability of appropriations will depend upon the existence of a specific statutory authorization to pay judgments.

We anticipate that in many cases, due to the absence of a specific provision authorizing the payments of judgments, appropriations will not be available to pay damages and costs assessed under section 7217 against Government officers and employees who are not covered by section 7423(2). However, due to the number of Government agencies and departments authorized under section 6103 to obtain returns and return information for purposes unrelated to tax administration, we believe that the availability of each agency's or department's appropriations to pay damages and costs awarded under section 7217 should be determined on a case-by-case basis. In those cases in which general operating appropriations are not available,

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it will be necessary to request from the Congress specific appropriations to pay the damages and costs awarded.

With respect to those Government officers and employees who are protected by section 7423(2), our past decisions have applied the general rule regarding the use of general operating appropriations to pay judgments and concluded that IRS appropriations could not be used to pay damages awarded against its employees. 53 Comp. Gen. 782 (1974); 40 Comp. Gen. 95 (1960); B-143673, November 11, 1976. See also B-168211, December 30, 1969. We proceeded to hold, however, that the damages could be paid from the indefinite appropriation established by 31 U.S.C. 724a, on the ground that section 7423(2) effectively converts judgments against individual employees into judgment obligations of the United States. Specifically, in 40 Comp. Gen. 95, 97 (1960), we stated:

"With reference to the source of funds available for payment of the judgments, it is well settled that the appropriations or funds provided for regular governmental operations or activities, out of which a cause of action arises, are not available to pay judgments of courts in the absence of specific authority therefor. See 34 Comp. Gen. 221; 15 *id.* 933; 2 *id.* 821. The appropriation 'Salaries and Expenses, Internal Revenue Service' contains no provision for the payment of judgments, and we are aware of no other provision of law which would so authorize its use. Hence, this appropriation is not properly chargeable with such expenses.

"However, under the terms of 31 U.S.C. 724a, the Congress has established a permanent appropriation for the payment, not otherwise provided for, of judgments (not in excess of \$100,000) rendered by the district courts and the Court of Claims against the United States which have become final. While the judgments entered against [the employees] are not judgments rendered against the United States, the statutory

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provisions quoted above [section 7423(2)] for assumption of liability and for payment by the United States of such judgments may, for practical purposes, be considered as converting the judgments into a judgment obligation of the United States properly payable from the permanent appropriation provided therefor."

Upon further reflection, we now believe that 40 Comp. Gen. 95 (1960) and its progeny were wrongly decided with respect to the source of funds available to pay damages and costs under section 7423(2). In our view, section 7423(2), authorizing the Secretary to repay such damages and costs, does constitute specific authority for the use of general operating appropriation to pay judgments rendered against Government officers and employees--including judgments obtained under section 7217 of the Code--for actions taken in the due performance of their duties in matters relating to tax administration. Thus, in the future, we will raise no objections to the use of general operating appropriations to pay such expenses. Our prior decisions construing section 7423(2) are hereby overruled to the extent that they conflict with this decision.

There is a second feature distinguishing awards of damages and costs under section 7217 from the awards at issue in our prior decisions: the element of punitive damages. None of our past decisions addressed the propriety of paying punitive damages under section 7423(2). As we stated earlier, however, a defendant in a suit filed under section 7217 may be liable for punitive damages in the case of willful or grossly negligent disclosure of returns or return information.

The primary distinction between actual and punitive damages lies in the purposes for which they are awarded. Actual damages generally serve to compensate a plaintiff for his losses or injuries. Punitive damages, on the other hand, "are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." W. L. Prosser, Law of Torts, §2 (3d ed. 1964).

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Based on the purpose that normally underlies an award of punitive damages, it might be argued that Congress intended awards of punitive damages to be outside the scope of section 7423(2) since, if punitive damages are payable under authority of section 7423(2) from appropriated funds, rather than by the Government officer or employee personally, the punitive and deterrent values of the damages would be frustrated. For several reasons, however, we reject this argument.

Section 7423(2) expressly authorizes the repayment of "[a]ll damages and costs \* \* \*." (Emphasis added.) The plain meaning of "[a]ll damages" seems to encompass both actual and punitive damages, and there is no indication in the legislative history of section 7423(2) that Congress intended to distinguish types of damages. We also are reluctant to interpret section 7217 to contain an implied amendment of section 7423(2), because there is no clear evidence of an intent to amend section 7423(2) in the language or legislative history of section 7217, and it is well established that, as a general rule, later statutes should not be interpreted to amend existing statutes by implication.

Finally, we do not believe there is an irreconcilable conflict between an award of punitive damages under section 7217 and payment of those damages pursuant to section 7423(2). Section 7423(2) does not require the Secretary of the Treasury or his delegate to repay damages and costs in any particular set of circumstances. The authority contained in section 7423(2) is discretionary, not mandatory. Moreover, awards of punitive damages may have a punitive or deterrent effect even when they are paid pursuant to section 7423(2). As we stated previously, payments of damages and costs under section 7423(2) are to be made from general operating appropriations. In our opinion, this may provide departmental officials with an incentive to take corrective actions needed to ensure that past offenses are not repeated.

For these reasons, we cannot interpret section 7423(2) so narrowly as to preclude the payment of punitive damages in all cases. It is our view that whether punitive damages awarded under section 7217 are payable under authority of section 7423(2) will depend on whether the facts and circumstances of the unauthorized disclosure support a determination that

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the officer or employee was acting in the due performance of his official duties. We expect that in many cases in which punitive damages are awarded under section 7217, it will be administratively determined that the officer or employee was not acting in the due performance of his official duties at the time the unauthorized disclosure was made. Punitive damages may be awarded under section 7217 only where the misconduct of the person making the unauthorized disclosure is willful or grossly negligent, and the legislative history of section 7217 indicates that unauthorized disclosures based on a good faith, reasonable interpretation of section 6103 are not actionable. See S. Rep. No. 94-938, 94th Cong., 2d Sess. 348-49 (1976). We are not prepared to conclude, however, that an award of punitive damages under section 7217 may not be paid pursuant to section 7423(2) as a matter of law.

In summary, the liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217 may be assumed by the United States under authority of section 7423(2) whenever it is determined administratively that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his official duties in matters relating to tax administration. In such circumstances, payment may be made from general operating appropriations since section 7423(2) constitutes specific authority to use those funds to pay such judgments. It is our opinion, however, that section 7423(2) does not apply to any damages and costs assessed under section 7217 against Government officers or employees whose official duties do not relate to "tax administration" as defined in section 6103(b)(4) of the Code.

The Assistant Secretary's second question also relates to the payment of expenses incurred by Government officers and employees as a result of their being sued under section 7217 of the Code. Specifically, he asks, if the Department of Justice declines to represent a Government officer or employee for some valid reason, whether appropriations are available to pay legal expenses, including private attorneys fees, incurred by the officer or employee in defending a suit filed under section 7217.

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In an informal meeting with representatives of the Treasury and Justice Departments, we were told that, in accordance with established policy, the Justice Department intends to represent Government officers and employees who are sued under section 7217 for actions taken in the scope of their official duties. The Justice Department believes, however, that defending an officer or employee in such a suit may, under certain circumstances, place its attorneys in a conflict-of-interest situation. For example, a suit with no legal merit may be filed against a Government employee under section 7217 at the same time that the Department is investigating the employee for possible violation of section 7213(a) of the Code, making it a felony to unlawfully disclose a return or return information. The Justice Department representatives maintained that, in such circumstances, the Department would be obligated to refuse to defend the suit filed under section 7217, even though the United States would have an interest in defending the employee in that suit, and the employee would be compelled to retain private counsel to protect his interests. Moreover, unless appropriations are available to pay the legal expenses incurred by the employee, the employee would be required to bear the costs of defending the suit.

Shortly after our meeting, the Department of Justice published proposed regulations in the Federal Register setting out the policies and procedures of the Department with respect to legal representation of Federal employees by the Department and by private attorneys at Federal expense. See 42 Fed. Reg. 5695 (Jan. 31, 1977) (to be codified in 28 C.F.R. §§50.15, 50.16). Under these regulations, when an employee is sued in an individual capacity for actions that are employment-related, the matter should be referred to the Justice Department, which will determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing legal representation is in the interests of the United States. If a negative determination is made, no representation may be provided. With two exceptions, however, the Justice Department will undertake to defend an employee if it reasonably appears that the employee's actions were performed within the scope of his employment and representation of the employee is in the interests of the United States.

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The two exceptions prescribed in the proposed regulations, when representation by the Department of Justice should be withheld even though the circumstances otherwise may warrant Department representation, are (1) when the employee is the target of a criminal investigation by one of the Department's prosecuting divisions, but no decision to seek an indictment or issue an information has yet been made; and (2) when there is a conflict between the legal and factual positions of various employees in the same case and the Department determines it is advisable to withhold representation so as not to prejudice particular defendants. In these circumstances, the proposed regulations provide that the employee may be represented by private counsel at Federal expense. The proposed regulations require, however, that before the Department will pay for representation by private counsel, it must approve the counsel to be retained. In addition, the proposed regulations require that the payments cease whenever there is a change in the special circumstances underlying the exceptions or in the facts underlying the Government's obligation to defend the employee.

It is well established that,

"\* \* \* in the absence of specific authority by the Congress for departments and establishments of the Government to resort to litigation in the courts in the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the Government, to institute, prosecute and defend actions in behalf of the United States in matters involving court proceedings and to defray the necessary expenses incident thereto from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings." 46 Comp. Gen. 98 (1966); 44 Comp. Gen. 463 (1965).

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See also 5 U.S.C. §3106; 28 U.S.C. §§515-519. Moreover, we have held in past decisions that so long as the Government has an interest in the suit, if representation by the Justice Department is sought but is unavailable, appropriated funds may be used to pay the legal expenses, including private attorney fees, incurred by a Government officer or employee in defending a suit arising out of actions taken in the scope of his employment. 55 Comp. Gen. 408 (1975); 53 Comp. Gen. 301 (1973).

Based on our discussion with Treasury and Justice Department representatives and on the Justice Department's proposed regulations, it is our understanding that the Department of Justice intends to pay the private legal expenses of Government officers and employees who are sued under section 7217 of the Code only after determining that the actions of the officer or employee were performed within the scope of his employment; that representation of the officer or employee is in the interests of the United States; and that Department representation is unavailable for some valid reason, such as a conflict of interest. In light of our prior decisions, we believe the Department's payment of the private attorneys fees and other legal expenses incurred by the officer or employee will be proper under these circumstances. To hold otherwise would be contrary to the general rule that such litigation expenses should be borne by the United States rather than the employee. See Konigsberg v. Hunter, 308 F. Supp. 1361, 1363 (W.D. Mo. 1970); 6 Comp. Gen. 214 (1926).

The only remaining issue to resolve concerns the use of specific appropriations to make these payments. In our view, providing legal representation to Government officers and employees who are sued for acts taken within the scope of their employment--whether the representation is undertaken by Department of Justice attorneys or, when Department representation is unavailable, by private counsel--is an appropriate legal activity of the Justice Department so long as the United States has an interest in defending the suit. Thus, we believe that appropriations available to pay for representation of officers or

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employees by Government attorneys also may be used to pay for representation of Government officers and employees by private counsel under the circumstances described in this decision.

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Acting Comptroller General  
of the United States