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DECISION

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

FILE: B-216075 **DATE:** March 6, 1985

MATTER OF: Nathan F. Rodman - Forfeited Real Estate Deposit

DIGEST:

Under a lease with an option to purchase agreement a transferred employee forfeited the $3,500 amount paid as consideration for the option because he had not exercised the option to purchase the leased residence before he was transferred. Since agency transfer of employee appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense to the extent authorized under FTR para. 2-3.3. However, forfeited deposit may not be reimbursed as a real estate transaction expense.

The issue in this decision is whether an employee may be reimbursed money paid on a lease for an exclusive option to purchase during the lease period which he forfeited when he was transferred to a new duty station prior to the exercise of the option. We hold that the forfeited deposit may be reimbursed as a miscellaneous expense under 5 U.S.C. § 5724a(b) (1982), as implemented by the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), para. 2-3.3, but not as an expense of the sale or purchase of a residence as provided for under 5 U.S.C. § 5724a(a)(4).

This decision is in response to a request from an authorized certifying officer of the Internal Revenue Service (IRS), Southeast Region, concerning the claim of Mr. Nathan F. Rodman, an IRS employee, for reimbursement of a forfeited real estate deposit under a lease with an option to purchase agreement. On March 14, 1983, Mr. Rodman signed a 6-month lease with an option to purchase on or before October 15, 1983, in consideration of an option fee in the amount of $3,500. The purchase clause provided for a purchase price of $95,000 with credit of the option fee to be given against the purchase price. However, if the option was not exercised, the clause provided for the option fee to be retained by the owner-landlord as consideration for the granting of the exclusive option to purchase.

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Mr. Rodman lived in the leased premises, located in Fort Lauderdale, Florida, until he was requested to transfer to Sarasota, Florida, in May or early June 1983. Mr. Rodman reported for duty in Sarasota in August 1983 and vacated his Fort Lauderdale residence on September 12, 1983. He did not exercise the option to purchase and forfeited the $3,500 he had deposited under the agreement.

Mr. Rodman has informed our Office of the circumstances surrounding his decision to buy the option to purchase at the time he entered into his lease agreement and his intention to exercise that option before its expiration had he not been required to transfer. At the time that Mr. Rodman leased his Ft. Lauderdale residence he owned another house that he was trying to sell. The house that he was trying to sell was occupied by his wife with whom he was in divorce proceedings. Mr. Rodman needed his share of the equity from his former residence in order to obtain the necessary financing required to exercise the option to purchase in question. Additionally, when Mr. Rodman signed his lease agreement, interest rates were historically very high and he received advice that he might obtain more advantageous financing if he could delay purchasing. Mr. Rodman explained that he is not of independent means and would not have paid $3,500 cash on his IRS salary for the option to purchase had he not had every intention of exercising that option.

The IRS has reimbursed Mr. Rodman for the forfeited deposit as a miscellaneous expense under 5 U.S.C. § 5724a(b) and FTR para. 2-3.3 which resulted in reimbursement of $873.20 of the $3,500 forfeited. The IRS relied on our decision B-177595, March 2, 1973, in which we allowed reimbursement for a forfeited purchase deposit as an item of miscellaneous expense pursuant to a lease-purchase contract. Mr. Rodman has requested our review of the IRS determination limiting his reimbursement of the forfeited deposit.

The provisions of 5 U.S.C. § 5724a authorize payment of relocation expenses to transferred employees. Subsection (a)(4) provides, in part, for the payment of expenses of the sale of a residence, or the settlement of an unexpired lease, of the employee at the old official station, and for purchase of a home at the new official station.

The execution of a lease with an option to purchase has been held not to constitute a purchase of a residence under the meaning of section 5724a(a)(4). In the case of Marion B. Gamble, B-185095, August 13, 1976, the employee entered into a lease-purchase agreement upon arrival at his new duty station and, upon exercising his option 10 months later, sought reimbursement for the total expenses. On the question of whether such expenses were proper for reimbursement, we held that section 5724a(a)(4) does not apply to lease-purchase transactions in which only an interest in property, rather than legal or equitable title, is passed. A purchase, for purposes of section 5724a(a)(4) and the implementing regulations, consists of the conveyance of some form of ownership. A mere interest, such as the opportunity to purchase the property, does not suffice. In fact, until Mr. Rodman exercised the option to purchase, he was under no obligation to purchase the residence at all. In the present case the lease-purchase agreement did not pass title to Mr. Rodman. Therefore, payment is not authorized under 5 U.S.C. § 5724a(a)(4).

As an alternative to reimbursement under 5 U.S.C. § 5724a(a)(4), employees may be paid in certain circumstances for miscellaneous expenses incurred due to the discontinuance of one residence and the establishment of a residence at a new location. FTR para. 2-3.1. The forfeiture of a deposit made on a residence is among the expenses that have been covered. 55 Comp. Gen. 628 (1976). Paragraph 2-3.1c of the FTR states that the miscellaneous expense allowance will not be used to reimburse the employees for "expenses brought about by circumstances, factors, or actions in which the move to a new duty station was not the proximate cause."

The evidence before us establishes that Mr. Rodman's transfer to Sarasota, Florida, was the proximate cause of the forfeiture. The circumstances surrounding Mr. Rodman's decision to obtain the option to purchase and his ordered transfer as set forth above, the interest rates prevalent at the time, the circumstances of his divorce, and his need to capture the equity from his house for sale, strongly suggest that had Mr. Rodman not been requested to transfer he would have exercised the option for which just 3 months prior he had expended $3,500 to acquire.

We have disallowed reimbursement for a forfeited purchase deposit as an item of miscellaneous expense in Lillie L. Beaton, B-207420, February 1, 1983. This case is distinguishable from Mr. Rodman's because the facts of record in Lillie L. Beaton failed to establish that Ms. Beaton's transfer was the proximate cause of the forfeiture whereas, as indicated above, we are satisfied that Mr. Rodman's transfer was.

Accordingly, we will not object to the reimbursement of the option payment forfeited by Mr. Rodman to the extent authorized by para. 2-3.3 of the FTR. Mr. Rodman's claim for expenses in excess of the maximum amount reimbursable as miscellaneous expenses may not be paid.

for Shelton J. Docter
Comptroller General
of the United States