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

FILE: B-217215 **DATE:** *March 20, 1986*

MATTER OF: State of Oklahoma--Liability for Interest on Debt

DIGEST: The State of Oklahoma is liable for interest on debts owed under the Elementary and Secondary Education Act where the United States Department of Education made written demand upon the State for payment of the debt and advised State that interest would be charged. The State argued that it was not liable for interest because the Department failed to give adequate notice of its intent to assess interest and had not issued final regulations governing the collection of interest. The Department substantially complied with then-existing notice provisions of the Federal Claims Collection Standards. In addition, the Department's failure to publish final regulations on its policy for assessing interest does not relieve Oklahoma of its interest liability because the State had actual notice of the interest policy.

The Oklahoma State Department of Education (Oklahoma) requested our opinion on whether it is liable for interest demanded by the United States Department of Education (the Department) on debts owed under titles I and IV of the Elementary and Secondary Education Act (Act).[1/] For the reasons stated below, we conclude that Oklahoma is liable for the interest.

BACKGROUND

The Department is demanding interest on two separate debts. One debt represents an audit disallowance under title I of the Act of $514,675 which was subsequently sustained by the Education Appeal Board (EAB). The other debt represents a title IV audit disallowance of $3,358.90. Oklahoma has paid the principal amount of both debts. It has also paid the interest on the title IV debt under protest.

1/ Oklahoma requested our decision with the understanding that it would retain, either before or after the issuance of our decision, whatever recourse to the courts it would otherwise have had. In subsequent correspondence, Oklahoma asked us to confirm this understanding. The State is correct.

By letter dated May 6, 1982, the Department notified Oklahoma of the adverse EAB decision on the title I debt, and demanded payment of the full amount. The Department's letter also stated, "If payment is not received within 30 days, interest will be assessed for each 30 days or fraction thereof." The letter also gave the name and phone number of a collection officer in the Department's Accounts Receivable Section to whom Oklahoma could refer any payment questions it might have.

Following receipt of the Department's demand letter, Oklahoma decided to file a Petition for Review of the Department's decision with the United States Court of Appeals for the Tenth Circuit. On June 8, 1982, Oklahoma requested the Department to stay collection of the title I audit disallowance pending a decision by the Court of Appeals. In a letter dated August 12, 1982, the Department advised Oklahoma that it would stay collection of the debt as requested, but it stated, "You are advised that if the Court of Appeals sustains the indebtedness to the Department of Education, repayment must be made in accordance with our letter of May 6, 1982." The court of appeals subsequently decided in the Department's favor on the underlying debt, but did not address the subject of interest.

At the time of its demand, the Office of Education had not adopted regulations governing the collection of interest on debts. The Federal Claims Collection Act (FCCA) of 1966, (the 1966 provisions are now found in 31 U.S.C. §§ 3701 and 3711) provided that in collecting claims of the United States Government, "The head of an executive or legislative agency acts under * * * regulations prescribed by the head of the agency; and * * * standards that the Attorney General and the Comptroller General may prescribe jointly." 31 U.S.C. § 3711(e). The Department issued a notice of proposed rulemaking in April 1980 which indicated that the Department would charge interest whenever a debt was not paid within 30 days after the final administrative decision that the debt is due. 45 Fed. Reg. 21303-06.

However, final regulations were never issued. This was apparently because of the subsequent issuance of OMB Circular A-50 and the enactment of the Debt Collection Act of 1982 which amended the FCCA substantially. These two developments prompted the Department to issue a revised notice of proposed rulemaking. 49 Fed. Reg. 28,264 (1984). The revised proposed rule states that the Department will charge interest during any administrative appeals process. The Department had indicated that it is currently in the process of issuing final regulations on charging interest.

ISSUES

Oklahoma contends that it is not liable for the interest assessed on two grounds. It argues that it need not pay interest on its debt because the Department failed to give adequate notice of its intent to assess interest. The State also argues that the absence of final regulations governing the collection of interest bars the Department from assessing interest.

DISCUSSION

1. The Department's right to assess interest

The Supreme Court has long held that a creditor has the right, not dependent upon statute, to charge interest by way of compensation on unpaid debts. Young v. Godbe, 82 U.S. (15 Wall) 562, 565 (1873). This right to assess interest against debtors generally extends to the Government. Billings v. United States, 232 U.S. 261 (1914). The Government's right to interest is based upon principles of justice and equity in the enforcement of an obligation and there is no requirement for statutory authority. Royal Indemnity Co. v. United States, 313 U.S. 289 (1941). The Government's common law right to collect interest may apply when the debtor is a unit of state government. Board of Commissioners v. United States, 308 U.S. 343 (1939). Although states are specifically exempt from the provisions of section 11 of the Debt Collection Act of 1982, which requires agencies to assess interest on debts, it is the position of the Attorney General that the Government's common law right to assess interest against states remains. This position is expressed in the Federal Claims Collection Standards, the regulations issued jointly by GAO and the Department of Justice to implement the debt collection legislation. See 4 C.F.R. § 102.13(i)(2), added by 49 Fed. Reg. 8889, 8901 (Mar. 9, 1984), and the accompanying Supplementary Information statement, 49 Fed. Reg. at 8894.

We are aware of two court decisions to the effect that the Debt Collection Act prohibits the United States from assessing interest against states. In one case, Perales v. United States, the United States District Court for the Southern District of New York concluded that an assessment of late payment interest charges by the Department of Agriculture against the New York agency responsible for administering the food stamp program was not authorized by the common law. The United States Court of Appeals for the Second Circuit summarily affirmed the District Court decision. 751 F.2d 95 (2d Cir. 1984) (per curiam), aff'g 598 F. Supp 19 (S.D.N.Y. 1984).

In Pennsylvania v. Block, Nos. 85-5186 through 5198 & 85-5269 through 5271, slip op. (3rd Cir. Jan. 6, 1986), the Court held that the Secretary of Agriculture had no authority to assess interest on a debt owed by a state under the Food Stamp Act. The Court looked to two DCA provisions, codified at 31 U.S.C. §§ 3701(c) and 3717, to reach its decision. 31 U.S.C. § 3717(a)(1) entitled "Interest and penalty on claims," provides:

> "The head of an executive or legislative agency shall charge a minimum rate of annual interest on an outstanding debt on a United States Government claim owed by a person * * *." (Emphasis added.)

31 U.S.C. § 3701(c) limits the definition of "person" as follows:

> "In sections 3716 and 3717 of this title, 'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government."

In brief, the Court held that the "plain meaning" of these DCA provisions abrogates any common law right the Government may previously have had to assess interest against the states.

The Department of Justice is currently in the process of petitioning the court of appeals for a rehearing in Pennsylvania v. Block. Unless and until the Department determines to conclude seeking judicial review on the question of the Government's common law right to interest against states surviving the DCA, we believe that it would be inappropriate for this Office to follow a rule which is contrary to the Department's position in the Pennsylvania case.

2. Notice requirements under the common law

There is no common law requirement that a Government creditor notify its debtor that it intends to assess interest. What is necessary is that the creditor agency make demands for payment of the underlying debt. See e.g., United States v. Seaboard Surety Co., 339 F.2d 1 (2d Cir. 1964). Clearly, the Department made such a demand in its May 6 letter, thereby meeting the common law notice requirement.

3. Effect of the Federal Claims Collection Standards

Since there was no common law requirement for a specific interest notice, we look to the Federal Claims Collection Standards as they existed at the time of the Department's two 1982 letters (i.e., the pre-Debt Collection Act version of the regulations). The FCCS notice requirements in effect in 1982 were somewhat more stringent than the common law requirements. Found at 4 C.F.R. § 102.2 (1982), the FCCS requirements were stated as follows:

> "Appropriate written demands shall be made upon a debtor of the United States in terms which inform the debtor of the consequences of his failure to cooperate. In the initial notification, the debtor should be informed of the basis for the indebtedness, the applicable requirements or policies for charging interest and reporting delinquent debts to commercial credit bureaus, and the date by which the payment is to be made (date due). The date due should be specified and, normally, should be not more than 30 days from the date of the initial notification * * *."

Thus, the FCCS notice provision applicable when the Department assessed interest differed from the common law in that it required agencies to inform debtors of requirements or policies for charging interest.

In our view, the Department substantially complied with the FCCS requirement. The Department's policy was not to assess interest during EAB review, but to do so beginning 30 days after the Board's final decision. The Department's letters of May 6 and August 22, 1982, adequately notified Oklahoma of these policies. The first letter notified Oklahoma that the EAB had reached its final decision that the debt was due. As noted, it also stated that interest would be assessed if payment was not received within 30 days, and it gave the name and phone number of its collections officer for the state to contact if it had any question about the matter.

The second letter indicated that the Department would stay collection of the debt pending judicial review but contained no indication that the assessment of interest also would be stayed. On the contrary, the letter stated, "You are advised that if the Court of Appeals sustains the indebtedness to the Department of Education, repayment must be made in

accordance with our letter of May 6, 1982." Since the May 6 letter stated that interest was being assessed, the most reasonable reading of the August 22 letter is that interest was continuing to accrue. In any event, if Oklahoma was in any way uncertain on the question, it could easily have called the Department collection officer named in the May 6 letter for clarification.

The two 1982 letters from Education did not mention the applicable rate of interest. Logically, even though not explicitly required in the regulations, a notice of interest requirements should include the applicable rate. In this sense, it may be said that there was not strict compliance with the notice provisions of the FCCS as they then existed. The potential consequences of this omission are illustrated in this case by the fact that Oklahoma apparently received two different figures from different Department officials at different times. We think the Department should bear the consequences of this confusion by reducing its interest claim to the lower amount ($141,535.63). However, the fact remains that the Department did notify Oklahoma that interest would be charged and that it would begin to accrue 30 days after the May 6, 1982 letter. Also, a telephone call to the contact identified in that letter would have disclosed the rate. Therefore, while the Department's notice was not as detailed as it should have been, we still think there was substantial compliance with the notice provisions of the FCCS.

Having said this, we nevertheless suggest that the Department, in its regulations, require that interest notices specify the rate to be applied.

4. Effect of Department's failure to publish final regulation

The Department's failure to publish final regulations on its policy for assessing interest does not relieve Oklahoma of its interest liability because the State had actual notice of the Department's interest policy.

The Department's promulgating regulations pursuant to the Federal Claims Collection Act is covered by 5 U.S.C. § 552 (1982), the Administrative Procedure Act (APA). Under section 552, in order to collect interest the Department generally would be required to publish its interest assessment policy as part of its debt collection regulations in the Federal Register because it constitutes a statement of general policy adopted by the agency. 5 U.S.C. § 552(a)(1)(D). Recognizing that the purpose of the APA publishing requirement is to provide guidance to the public, section 552 states:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

Citing this language, the courts have held that an agency's failure to publish a regulation stating a policy does not invalidate agency action under that policy with respect to any party who has actual knowledge of it. Conservation Law Foundation of New England, Inc. v. Clark, 590 F. Supp. 1467, 1475 (D. Mass. 1984); Yassini v. Crosland, 618 F.2d 1356, 1361 (9th Cir. 1980); Whelan v. Brinegar, 538 F.2d 924, 927 (2d Cir. 1976); Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D.Ill. 1970). See also generally, Donovan v. Wollaston Alloys, Inc., 695 F.2d 1, 9 (1st Cir. 1982); Pitts v. United States, 599 F.2d 1103, 1107 (1st Cir. 1979) (generally, failure to publish does not necessarily invalidate agency action).

In the context of this decision, the reason for the final regulations would be to apprise debtors of the Department's interest assessment policies so as to prevent the debtors from finding themselves liable for interest unexpectedly when, had they known of the policy, they might have paid their debt sooner and avoided interest liability. The Department's failure to publish a final regulation did not prejudice Oklahoma in this case because the agency's proposed regulations, combined with its two letters, served to notify the State of its interest policy in time to allow the State to avoid liability for interest by paying the debt principal. Accordingly, under the rule of the cases cited above, Oklahoma is not relieved of its interest liability due to the Department's failure to finally publish its assessment policy in the Federal Register since the State had actual notice of that policy.

for Milton J. Socolar
Comptroller General
of the United States