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DECISION

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

[Claim for Delay Compensation in Patent Infringement Judgment A
United Sta

FILE: B-184053 DATE: APR 14 1980

MATTER OF: RCA Corporation CWG000074

DIGEST: 1. Judgment against United States for patent infringement may include interest as "delay compensation" since infringement is viewed as a taking by eminent domain and 28 U.S.C. § 1498 authorizes "reasonable and entire compensation." However, since determination of delay compensation is a judicial function, it may not be awarded administratively by GAO but is payable only where it has been expressly awarded by Court of Claims.

2. Where judgment of Court of Claims against United States in patent infringement suit was based on compromise stipulation under which plaintiff agreed to accept stipulated sum "in full settlement of all claims set forth in the petition," terms of judgment preclude allowance of claim for additional amount as "delay compensation."

This decision results from a claim by RCA Corporation for "delay compensation" in connection with a judgment of the 333 United States Court of Claims. Our Claims Division initially disallowed the claim, and RCA sought reconsideration. For the reasons that follow, we believe the Claims Division's disallowance must be sustained.

In May, 1975, RCA filed suit against the United States in the Court of Claims. The suit was an action for patent infringement under 28 U.S.C. § 1498(a) (1976), which provides in pertinent part:

> "(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful

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> right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.* * *"

In August, 1976, the Court entered judgment in favor of plaintiff RCA. The judgment provided as follows:

> "This case comes before the court on a stipulation of the parties filed on July 28, 1976, and signed on behalf of the plaintiff and the defendant by the respective attorneys of record, in which it is stated that a written offer was submitted by the plaintiff to the Attorney General and duly accepted on behalf of the defendant, whereby plaintiff agreed to accept the sum of $450,000.00 in full settlement of all claims set forth in the petition, and the defendant consented to the entry of judgment in that amount.
>
> "IT IS THEREFORE ORDERED that judgment be and the same is entered for the plaintiff in the sum of four hundred fifty thousand dollars ($450,000.00) and that any claims arising out of the allegations or facts pleaded in plaintiff's petition be dismissed with prejudice."

On September 30, 1976, Congress appropriated funds to pay the judgment, (*) and on October 19, 1976, our Claims Division certified the judgment to the Treasury Department for payment. Subsequently, RCA claimed an additional $7,119.88 as compensation for delay in payment between August 6, 1976, the date of the judgment, and October 22, 1976, the date of the Treasury check. RCA contends that this is part of the "reasonable and entire compensation" to which it is entitled under 28 U.S.C. § 1498, supra. RCA calculated the amount by applying an annual rate of 7.5% in accordance with Pitcairn v. United States,

(*) Prior to May 4, 1977, judgments against the United States in excess of $100,000 required specific congressional appropriations. Since that date, unless payment is "otherwise provided for," final judgments against the United States are payable, without regard to amount, from the permanent indefinite appropriation established by 31 U.S.C. § 724a.

547 F.2d 1106 (Ct. Cl. 1977), cert. denied, 434 U.S. 1051 (1978).

This is the first occasion we have had to consider a claim for "delay compensation" in a patent infringement case. We conclude that there is no legal basis for this Office to allow the claim. There are two reasons for our conclusion, one based on the nature of "delay compensation," and the other based on the subject judgment itself.

The general rule, consistently recognized by the Supreme Court, is that interest is not recoverable against the United States unless expressly provided in the relevant statute or contract. E.g., United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951). The one exception is a taking which entitles the claimant to just compensation under the Fifth Amendment. Alcea Band of Tillamooks, supra. Thus, courts commonly award interest as part of just compensation in land condemnation cases.

"Delay compensation" in patent infringement cases is a related concept. The unauthorized manufacture or use of a patented device by or for the United States is viewed as a taking by eminent domain, and 28 U.S.C. § 1498 provides the means of obtaining the just compensation mandated by the Fifth Amendment. Calhoun v. United States, 453 F.2d 1385, 1391 (Ct. Cl. 1972). The Supreme Court has recognized that "interest" may be allowed in a patent infringement suit under the "reasonable and entire compensation" formula now contained in 28 U.S.C. § 1498. Waite v. United States, 282 U.S. 508 (1931). Although the term "interest" is still frequently used in the decisions, it is awarded as part of the reasonable and entire compensation, and "is not considered as interest per se." Pitcairn, supra, 547 F.2d at 1121. In this context, it has become known as "delay compensation." It is generally awarded to the date of payment of the judgment. (See cases cited below.)

Prior to Pitcairn, the Court of Claims had, with a few exceptions, applied a 4% annual rate since 1944 in determining delay compensation. Badowski v. United States, 278 F.2d 934 (Ct. Cl. 1960); Van Veen v. United States, 386 F.2d 462 (Ct. Cl. 1967); Amerace Esna Corp. v. United States, 462 F.2d 1377 (Ct. Cl. 1972); Calhoun v. United States, supra. In Pitcairn, however, the Court held that the 4% rate had become outmoded by changing economic conditions, and established a stepped percentage rate varying from 4% for the years 1947-1955 to

7 1/2% for the years 1971-1975. 547 F.2d at 1121. RCA's claimed rate is based on this formula. For subsequent application of the Pitcairn formula, see Tektronix, Inc. v. United States, 552 F.2d 343 (Ct. Cl. 1977), 575 F.2d 832 (Ct. Cl. 1978); Leesona Corp. v. United States, 599 F.2d 958 (Ct. Cl. 1979).

In discussing the concept of delay compensation, the Court in Pitcairn said:

> "The amount due as delay compensation in this case involves a determination by this court of an appropriate base or yardstick by which to measure and thereby establish the award for delay compensation. The method of determining delay compensation should be justified by the evidence, and the rate should be responsive to the ends of justice. The ultimate test, of course, is that the plaintiff must receive just compensation." 547 F.2d at 1121.

The Court went on to point out that:

> "The determination of a proper amount of delay compensation is a judicial function. The discharge of that function requires the exercise of judgment." Id. at 1122.

It is clear from the foregoing that the Court may properly award interest as delay compensation in actions under 28 U.S.C. § 1498. However, since the determination is a judicial function, we believe the awarding of delay compensation is a matter solely for the Court's consideration, and that it is beyond our authority to award it administratively.

It is relevant in this connection that 28 U.S.C. § 1498 does not purport to establish a rate for delay compensation. In cases where both the entitlement to interest on judgments against the United States and the rate are specified by statute -- e.g., 28 U.S.C. § 2516(b) and the first proviso of 31 U.S.C. § 724a -- it is not necessary for the judgment to expressly award interest. Where interest is payable under the statutory provisions in such cases, it is computed as part of our essentially ministerial function of certifying judgments against the United States for payment under 28 U.S.C. §§ 2414 and 2517(a). See United States v. Maryland ex rel. Meyer, 349 F.2d 693, 696 (D.C. Cir. 1965). The absence of a

congressionally-established rate in 28 U.S.C. § 1498 supports the conclusion that the awarding of delay compensation is a matter solely for the Court. Accordingly, we conclude that delay compensation in judgments against the United States under 28 U.S.C. § 1498 is payable only where it has been expressly awarded by the Court of Claims.

Next, it is significant that the judgment in this case was actually a compromise stipulation. It was entered in the form of a judgment essentially to enable compliance with the payment provisions of 28 U.S.C. § 2517(a). The amount of a compromise settlement is reached through negotiation and can include whatever elements the parties may agree upon. Any perceived delay in payment could have been taken into consideration in the negotiations (we do not know whether this was in fact done here) and reflected in the compromise amount.

In Tektronix, Inc. v. United States, 552 F.2d 343 (Ct. Cl. 1977), the Court concluded that, as a general proposition, the Pitcairn rates should be applied in the future, "except where the parties stipulate otherwise." 552 F.2d at 353, n.19. Under the stipulation in this case, as incorporated in the Court's judgment quoted above, "plaintiff agreed to accept the sum of $450,000.00 in full settlement of all claims set forth in the petition." The claim set forth in RCA's original petition, filed on May 15, 1975, was for "reasonable and entire compensation" under 28 U.S.C. § 1498. Thus, the terms of the judgment seem to preclude the awarding of any additional amount.

For the foregoing reasons, we conclude that RCA's claim must be denied.

MILTON SOCOLAR

For the Comptroller General
of the United States