



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Reconsideration of Claim of Hai-Tha Truong
File: B-215118
Date: May 7, 1987

DIGESTS

1. On reconsideration of B-215118, Dec. 18, 1984, we affirm the denial of that part of Mr. Hai-Tha Truong's claim which pertained to damages for a tricot knitting machine, on the ground that it was barred by the various statutes of limitation in the laws that could have formed a basis for the claim.

2. On reconsideration of B-215118, Dec. 18, 1984, we affirm the denial of that part of Mr. Hai-Tha Truong's claim pertaining to damages for lost yarn on the ground that it was barred by the applicable statute of limitations, 31 U.S.C. § 3702(b)(1). Regardless of the statute of limitations issue, however, the claimant has not sustained the burden of proof necessary to show that the transaction giving rise to the claim was not under the Commodity Import Program, a program that gave the Agency for International Development (AID) the right to take title to goods when shipment of the goods would have conflicted with the purposes underlying the program. Furthermore, the record does not indicate the amount claimed to have been expended on the lost yarn nor whether any payments made were in dollars or piasters, the currency of the former Government of Vietnam.

DECISION

Mr. Hai-Tha Truong requests reconsideration of B-215118, Dec. 18, 1984, in which we denied his claim for \$53,573.40 on the ground that it was barred by the various statutes of limitation in the laws that could have formed a basis for his claim. The request raises additional facts and issues of law which we will discuss below. For the reasons given, we affirm our denial of his claim, in part on the same grounds and in part on other grounds.

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BACKGROUND

The record shows Mr. Truong's claim arose from loss of a shipment of 29,829 pounds of acetate filament yarn valued at \$26,934.48, and damage to one of a shipment of three tricot knitting machines valued at \$22,967.^{1/} The yarn was purchased from the Globus Export Corporation, the knitting machines from the Gastex Trading Co., Inc. The Globus Export Corporation invoice incorporated section 201.31(d) of the Agency for International Development (AID) regulation 1, 22 C.F.R. § 201.31(d)(1975). That section concerns marking of shipping containers and commodities.

The losses were not sustained by Mr. Truong directly but rather by the Hang An Cong Ty Company. Mr. Truong asserts that he was the founder of that company, and that he and his wife were the owners of it.

The ship carrying Mr. Truong's yarn apparently was diverted from Saigon, Vietnam, in late April 1975 because of the American evacuation from that country. The yarn either was shipped back to the United States and sold at auction, or was sold at auction in Malaysia or Indonesia. In either case the proceeds were deposited in the general fund of the United States Treasury. In a letter of April 2, 1981, from Mr. William H. Lim, Mr. Truong's attorney, to AID, Mr. Truong, on behalf of the Hang An Cong Ty Company, sought \$26,934.48, plus interest for the lost yarn.

The documents supporting the claim for damage to the knitting machine are somewhat conflicting. In a letter of April 23, 1981 from Mr. Lim to AID, Mr. Truong alleged that damage to one of the three knitting machines shipped to him was caused through the error and negligence of the shipper, Gastex Trading Co. That letter sought assistance from AID in locating Gastex, presumably for the purpose of presenting a claim to the company. In Mr. Truong's letter of October 26, 1985 to us, however, he alleged that the sewing machine was rendered unfit for use by the United States military, not Gastex, and in various letters to United States Government officials suggested that the sewing machine as well as the yarn was diverted from Saigon and sold at auction.

By letter of April 8, 1981, AID denied any liability to Mr. Truong for the lost yarn. The agency stated that under the Commodity Import Program (CIP) AID had a right to take title to all AID-financed commodities and to sell them and

^{1/} He also claimed \$3,672.34 in prepaid freight.

remit the proceeds to the United States Treasury. Thus it could take title to the yarn from Mr. Truong. AID also pointed out that any payment Mr. Truong made would have been to the National Bank of Vietnam in piasters and not in United States dollars.

According to AID, the Commodity Import Program (CIP) was established by grant agreement between the United States and the former Government of Vietnam consistent with the purposes of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2151 et seq. Under that program, importers such as Mr. Truong, put down 25 percent of the purchase price in Vietnamese piasters with the Central Bank of Vietnam for goods to be imported into that country. The Bank then would loan the other 75 percent to the importer, who, in turn, would establish a letter of credit for payment for the goods. Correspondingly, in the United States, AID provided complete financing in dollars to the supplier of the goods by depositing funds in an American bank. After the goods were shipped, the supplier would be paid by the bank. The monies deposited by Mr. Truong were put into a special account pursuant to section 609 of the Foreign Assistance Act, 22 U.S.C. § 2359. The money was used for United States and Vietnamese government programs.

The record contains very little documentary evidence about the amount of money Mr. Truong put up with the Vietnamese bank for the knitting machines. Furthermore, the record contains no documentary evidence about how much Mr. Truong paid for the yarn nor whether the payment was in piasters or dollars.

AID maintains that the system of commodity imports essentially was one requiring the cooperating country's continued ability and willingness to achieve the purposes underlying the basic grant agreement. When it was clear that the objectives underlying the purposes of United States assistance had been thwarted, that is, when the fall of the former Government of Vietnam became imminent, it was not intended that goods be permitted to reach Saigon.

Pursuant to the CIP, under the authorities of section 605(a) and 621 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2355(a), 2381, AID promulgated regulations known as AID regulation No. 1, 22 C.F.R. §§ 201 et seq. Section 605(a) authorizes such agencies of the United States as the President determines to retain any commodities procured under the Foreign Assistance Act instead of being disposed of to a foreign country; and section 621(b) provides that the President shall issue and enforce regulations determining eligibility of any person to receive funds made available under that Act.

Among other things, the regulations provided that AID could take title to AID-financed commodities in transit to a cooperating country if AID considered such an action necessary to assure compliance with the provisions or purposes of any Act of Congress. 22 C.F.R. § 201.44(a). If AID did take title, the regulations stated that AID would not incur any liability to an importer for the commodities. Id. § 201.44(b)(3).

AID maintains that as a participant in the CIP, Mr. Truong was bound by AID regulation 1, which was incorporated in the grant agreement. AID suggests Mr. Truong was made aware of the applicability of AID regulation 1 prior to and at the time his import license was approved by the former Government of Vietnam allowing his participation in the CIP. AID claims that the National Bank of Vietnam, as agent for the Government of Vietnam for CIP transactions, made it generally known that these transactions would be subject to AID regulations.^{2/}

AID also has informed us that all documentary support for its assertions that Mr. Truong participated in the CIP as well as the described grant agreement have been lost, presumably during or after the American evacuation in late April 1975. Mr. Truong contends alternatively that purchase of the yarn and sewing machine was not under the CIP, but that they were imported goods with rights for direct use, presumably under another program. Under this theory, AID regulation No. 1 would not apply to the purchases, and, thus, AID would not have had a right to take title to the goods. Mr. Truong also argues that under the CIP, after the shippers received the letters of credit and shipped the goods, the goods were his. Thus, even under the CIP, AID could not properly have taken title to his goods.

LEGAL DISCUSSION

When we considered Mr. Truong's claim in B-215118, Dec. 18, 1984, the record did not clearly show the relationship between Mr. Truong and the Hang An Cong Ty Company. Although

^{2/} AID also states that the license application, apparently required to be signed by every CIP importer, and which it alleges Mr. Truong signed, indicates in its heading that the import license was "Under American AID." Additionally, AID claims that section 201.21 of AID regulation 1 expressly imposed upon importers such as Mr. Truong responsibility for providing suppliers with notice that transactions were to be financed by AID pursuant to AID regulation 1.

the evidence corroborating Mr. Truong's assertions that he was the principal owner of the company is not that strong, we think the letters to AID, the Globus Export Company invoice for the yarn, and the Gastex Trading Co. invoice for the sewing machines are sufficient to show the connection between Mr. Truong and the Company. The record suggests that Mr. Truong's life in Vietnam after the fall of the former Government of Vietnam, and his subsequent journey to Indonesia, were most difficult experiences. Thus we could not expect him to retain the kind of documentary evidence that normally would be required. Accordingly, for purposes of our discussion below, we will assume Mr. Truong was the principal owner of the company.

Knitting Machine Claim

We affirm that part of our denial of Mr. Truong's claim pertaining to the damage or loss of the tricot knitting machine on the ground that the claim was barred by the various statutes of limitation that could have formed a basis for the claim. Mr. Truong's letter to AID in April 1981 did not allege that the United States was responsible for damage to the knitting machine; rather it inquired about location of the Gastex Trading Co., presumably to make a complaint about the damage to Gastex. That letter therefore would not have served to toll any applicable statute of limitations.

The earliest mention of United States responsibility for damage to, or loss of, the knitting machine would have been in late 1982 or early 1983, more than 6 years after the claim arose. Thus, for the reasons given in B-215118, Dec. 18, 1984, it would be barred.

Yarn Claim

It is well-established that when a claim is presented to this Office for settlement, filing the claim first with another Government agency does not toll running of the statute of limitations set forth in section 3702(b)(1) of title 31 of the United States Code. 62 Comp. Gen. 80, 83 (1982). The statute is tolled only when this Office receives the claim.

Although Mr. Lim's letter of April 2, 1981 to AID on behalf of Mr. Truong and Hang An Cong Ty asking AID for \$26,934.48 for the lost yarn was presented to AID within 6 years of when the claim arose--the end of April 1975 when the ship carrying the yarn was diverted from Vietnam--this fact is not sufficient to toll the running of the statute of limitations. As we indicated in B-215118, Dec. 18, 1984, Mr. Truong's claim was not filed in this Office until May 1984. Regardless of the statute of limitations issue, however, Mr. Truong's claim

covering the yarn would be denied for failure to sustain the burden of proof establishing the liability of the United States.

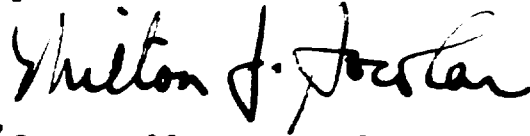
It is clear that the burden of proof in establishing liability of the United States is on the claimant. 4 C.F.R. § 31.7; B-179942, July 9, 1974. In most cases, information necessary to establish liability will be found in records maintained by the Government. Where Government records have been destroyed pursuant to law or are unavailable due to lapse of time, and there is no other documentation available from any source to establish liability of the United States, the claim must be denied. E.g., B-188041, Apr. 22, 1977.

In this instance, AID maintains that the records that would show Mr. Truong was a participant in the CIP were lost. This is true as well of the grant agreement between the former Government of Vietnam and the United States that would have described the CIP in more detail.

Notwithstanding that AID has not presented this information, Mr. Truong still has not sustained the burden of proof necessary to show that he was not a participant in the CIP. Aside from his own assertions, the record contains no supporting corroborating evidence. To the contrary, there is a reference to AID regulation 1 on the Globus Export Corporation invoice describing the transaction between Globus and the Hang An Cong Ty Company for the yarn. Although the reference is not to that part of the regulation allowing AID to take title to commodities without incurring any liability to importers, it is AID's position that this reference demonstrates that the transaction was, in fact, one that was part of the CIP. Since Mr. Truong has not presented sufficient proof that the yarn was not ordered under the CIP, we must accept AID's assertions that it was. Furthermore, we think sections 605(a) and 621 of the Foreign Assistance Act, as amended, 22 U.S.C. §§ 2355(a), 2381, provided AID with the authority to implement regulations allowing AID to take title to goods involved in CIP transactions. Accordingly, AID did have the right to take title to the yarn once it was clear that the purposes of the CIP could no longer be served, that is, when the fall of the former Government of Vietnam was imminent. Thus, AID would not be liable to Mr. Truong for the lost yarn.

We also point out that the record does not show the amount Mr. Truong paid to the Bank of Vietnam for the yarn, and whether that payment was in dollars or piasters. Since the evidence of record indicates that the transaction was made under the CIP, in all likelihood, the payment was in piasters. This raises an additional problem. Generally, a

judgment rendered in an American tribunal on a contract or agreement in a foreign currency payable in a foreign country is paid in accordance with the value of the currency at the time of judgment. Deutsche Bank Fliabile Nuremberg v. Humphrey, 272 U.S. 517 (1926); Tillman v. Russo Asiatic Bank, 21 F.2d 1023 (2d Cir. 1931), cited in B-200440, Apr. 9, 1986. It is our understanding that the piaster has no present value.



Acting Comptroller General
of the United States