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DECISION



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

FILE: B-221982

DATE: August 18, 1986

MATTER OF: Equal Employment Opportunity Commission--Withholding of Taxes from Judgments

- DIGEST:**
1. The Equal Employment Opportunity Commission (EEOC) is not required to withhold employee payroll taxes or pay employer excise taxes under the Railroad Retirement Tax Act, 26 U.S.C. §§ 3201-3233, when it distributes judgment proceeds to the employees of railroad companies unless provided for in the judgment.
 2. The Equal Employment Opportunity Commission (EEOC) appropriation is not available to pay employment taxes on amounts distributed to employees from back pay judgments paid to the EEOC in enforcement actions brought by the EEOC. Appropriations can be used only for their intended purposes. Payment of these taxes cannot be viewed as a "necessary expense" under EEOC's appropriations because it would not contribute to fulfilling the purposes for which those appropriations were made.

The Equal Employment Opportunity Commission (EEOC) has requested our decision on whether the EEOC may pay certain employment taxes from its appropriated funds. The Internal Revenue Service (IRS) has determined that under the Railroad Retirement Tax Act, 26 U.S.C. §§ 3201-3233 (1982) (RRTA), the EEOC must pay employer excise taxes, and should have withheld employee payroll taxes, on judgment proceeds it distributed to 220 former employees of 2 railroad companies. The proceeds were deposited with the EEOC when it settled an age discrimination case against those companies. We hold that the EEOC is not required to withhold employee taxes when the judgment involved does not provide for withholding. We also hold that the EEOC's appropriations are not available to pay either tax.

STATEMENT OF FACTS

On March 9, 1984, a judgment which incorporated the terms of a settlement reached between the parties was rendered in

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the case of Equal Employment Opportunity Commission v. The Baltimore and Ohio Railroad Company and the Chesapeake and Ohio Railway Company, No. N-74-637 (D. Md. 1984). Under the judgment, the companies were to pay to the EEOC \$3.5 million, \$3 million in settlement of Age Discrimination in Employment Act back pay claims of former employees and \$500,000 in interest on the back pay. Under the judgment, the EEOC was required to distribute the funds to the 220 former employees according to a specified formula. In making these distributions, the EEOC was required to withhold Federal income taxes. By the end of 1984, the EEOC had withheld a total of \$630,005 and distributed the balance of the settlement funds to the employees.

On March 22, 1985, the EEOC asked for a ruling from the IRS on whether the EEOC or the railway companies were responsible for paying the employee's and employer's portions of any other taxes on the back pay awards. On December 23, 1985, the IRS replied that the EEOC was responsible for paying employer's excise and withholding the employee's taxes under the RRTA. The EEOC then wrote to our Office to determine whether it could pay out of its appropriations both the employer excise taxes and the employee taxes which were not withheld from judgment proceeds.^{1/} Although the IRS has not stated that EEOC must pay the employee taxes which were not withheld, the EEOC has assumed it is liable for these payments.

SUMMARY OF IRS POSITION

The IRS position is based on two separate conclusions. First, the IRS holds that the distributions of the settlement proceeds to the railroad employees were taxable as wages under the applicable statutes, regulations, and IRS rulings. Second, the IRS holds that the EEOC, as the party which controlled the payment of the judgment proceeds to the employees, was the "employer" responsible for the withholding and excise taxes.

^{1/} The EEOC also asked whether certain employer excise taxes under the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-367 (1982), could also be paid out of EEOC's appropriated funds. The Railroad Retirement Board, which administers this Act, has not asserted this tax against the EEOC. If the Board does assert this tax, our analysis of the excise taxes under the RRTA will control the availability of appropriated funds. The language of the applicable sections of these two acts are substantially similar and our analysis of the two would be identical.

The latter conclusion is based on the IRS's reading of section 3401(d)(1) of the Internal Revenue Code (26 U.S.C. § 3401(d)(1) (1982)) and several cases which construe that section. Section 3401(d)(1) provides that, for income tax withholding purposes, the person who controls the payments of wages to employees is the employer responsible for withholding. In Otte v. United States, 419 U.S. 43 (1974), the Supreme Court construed § 3401(d)(1) to uphold a district court order requiring a trustee in bankruptcy to withhold Federal income taxes from the payment of wages due to former employees of the bankrupt. The Court also held that the definition of "employer" for Federal income tax purposes should be applied to require the trustee to withhold amounts required under the Federal Insurance Contribution Act (FICA), 26 U.S.C. §§ 3101-3126 (1982). In In Re Armadillo Corporation, 410 F. Supp. 407 (D. Col. 1976) aff'd, 561 F.2d 1382 (10th Cir. 1977), the district court applied Otte to require a trustee in bankruptcy to withhold both Federal income and FICA taxes from payments of wages to former employees of the bankrupt. The court then expanded this holding to require the trustee, as the employer for FICA purposes under Otte, to pay the FICA excise tax on employers.

The IRS has applied these cases by analogy to hold that the EEOC controlled the payment of wages to the railroad companies' former employees. IRS therefore concludes the EEOC is required to withhold Federal income tax under 26 U.S.C. § 3402 (1982), withhold the RRTA tax on employees under Otte, and to pay the RRTA excise tax on employers under In Re Armadillo. Since only the Federal income taxes were withheld by the EEOC, the IRS apparently considers the withholding and excise taxes under the RRTA to be due from the EEOC.

GAO ANALYSIS

At the outset, we of course accept the determinations of the IRS as to what is or is not taxable under the various tax laws it administers. Our comments are directed solely at the obligations of the EEOC under the circumstances presented, and at the availability of its appropriations. Because the issues involved are not limited to this one case, we think it is important, before reaching the appropriations issue, to address the EEOC's obligations in more general terms.

1. Requirement That EEOC Withhold Taxes

To begin with, we note that the EEOC's powers to enforce the Age Discrimination in Employment Act, 29 U.S.C. § 626(b)

(1982), are the same as those granted to the Secretary of Labor to enforce the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1982). These powers include the ability to bring suit in any court of competent jurisdiction, and to deposit any sums recovered on behalf of an employee into a special account to be paid "directly to the employee or employees affected." If applied literally, this authority to accept and distribute proceeds paid by defendants might prohibit payment by EEOC to anyone other than employees, including the United States. Under this interpretation the EEOC would lack authority to withhold any employee taxes.

However, we do not believe that this authority need be so strictly construed. The authority of the courts to order income tax withholding under the Fair Labor Standards Act awards has long been upheld. E.g., Martin v. HMB Construction Co., 279 F.2d 495 (5th Cir. 1960). We have previously stated our views that back pay awards are properly subject to taxation and therefore withholding when the judgments entered so provide. B-124720/B-129346, Sept. 23, 1981.

However, we do not agree with the IRS that withholding is required even though the judgment does not expressly provide for it. A similar situation was considered in our decision B-124720/B-129346, supra. In that case the IRS sought reversal of a prior decision that GAO would not deduct amounts for income tax withholding when certifying back pay judgments against the United States. We declined to reverse our decision on the grounds that the judgments, which had become final, did not provide for withholding. These judgments were fully binding on the parties and could not be altered by GAO. See, B-124720/B-129346, supra. In our view, this principle applies equally in this case. We believe that EEOC's involvement in the distribution of judgment proceeds under 29 U.S.C. § 216(b) is analogous to GAO's function in certifying the payment of judgments against the United States. Here the judgment only provided for Federal income tax withholding and had become final. EEOC was then bound to comply with the terms of the judgment and could not withhold amounts under the RRTA.

We do not think that the Otte and In Re Armadillo decisions, on which the IRS relies, alter this conclusion. As we pointed out in B-124720/B-129346, supra, the Otte case involved a ruling by the referee that the trustee in bankruptcy was not required to withhold, which was reversed by the district court prior to becoming final. Likewise, the decision of the bankruptcy judge in Armadillo that the trustee was not liable for FICA excise employers taxes was reversed by the

district court prior to becoming final. These cases are therefore inapplicable to the situation in this case where the judgment has become final and does not provide for withholding.

To accept the IRS conclusion is to place the EEOC in the position of risking court-imposed sanctions for violating the terms of the judgment. As we stated in our 1981 decision, the time to raise a tax withholding issue is before the judgment has become final. If this has not been done, even though the Government may have lost a significant collection device, unilateral action by a Government agency which is at variance with the terms of the judgment is not the solution.

2. Availability of Appropriated Funds

Even if we were to conclude that the EEOC was required to withhold and pay the taxes as asserted by the IRS, we would still be required to hold that the EEOC appropriation is not available to pay these taxes. 31 U.S.C. § 1301(a) (1982) limits the use of appropriated funds to the purposes for which they were appropriated. The annual EEOC appropriation provides funds for the necessary expenses of the EEOC as authorized by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. See, e.g., 99 Stat. 1136, 1160 (1985).

Under 31 U.S.C. § 1301(a), an expenditure is proper if it is expressly authorized in the appropriation act or some other applicable statute, or if it can be viewed as reasonably necessary to carry out the purposes of the appropriation. E.g. 6 Comp. Gen. 619 (1927); 56 Comp. Gen. 111 (1976). Our review of the EEOC authorizing legislation and appropriation does not reveal any authority to pay the taxes asserted by the IRS. Thus, the expenditure would be authorized only if it could be justified as a "necessary expense" of the EEOC. While the payment would certainly further a purpose of the IRS, we cannot see how it would materially contribute to fulfilling the objects of EEOC's appropriation, i.e., to administer and enforce certain anti-discrimination laws. In the absence of specific legislative authority, therefore, we hold that these taxes cannot be paid from the EEOC appropriation. See 54 Comp. Gen. 205 (1974).

CONCLUSION

The EEOC cannot pay the Railroad Retirement Tax Act withholding tax on employees and excise tax on employers out of its appropriation. Despite the IRS's assertion that the EEOC

was the employer for tax purposes when it distributed judgment proceeds to employees it represented, the final judgment did not provide for withholding and EEOC cannot unilaterally change the terms at the request of the IRS.

In litigating similar cases in the future, we recommend that the EEOC consider all relevant taxes and seek to assure that they are reflected in any judgment or settlement. EEOC management should take appropriate steps to bring this matter to the attention of its litigating personnel.

for Milton J. Workman
Comptroller General
of the United States