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Authority of Forest Service to Pay Penalties and Interest Assessed for Delay in Paying Tax on Employee's Possessory Interest

Number: B-251228

Date: 1993-07-20

Matter of: Authority of Forest Service to Pay Penalties and Interest Assessed for Delay in Paying Tax on Employee's Possessory Interest File: B-251228 Date: July 20, 1993

APPROPRIATIONS/FINANCIAL MANAGEMENT Appropriation Availability Purpose availability Penalties CIVILIAN PERSONNEL Compensation Taxes Penalties Reimbursement The Forest Service is not authorized to use appropriated funds to pay penalties and interest assessed by Nevada County, California, against a Forest Service employee for a delay in payment of possessory interest tax due while the employee occupied government-owned quarters. The penalties and interest assessed are personal liabilities of the employee and not the federal government.

DECISION Ms. Lora Close, a certifying officer at the United States Department of Agriculture, Forest Service, San Francisco, California, requested our decision on whether she may pay penalties and interest assessed by Nevada County, California, against Ms. Denise Schmitz, an employee of the Forest Service. The penalties and interest were assessed because possessory interest taxes assessed against Ms. Schmitz were not timely paid. For the reasons discussed below, the Forest Service may not pay the penalties and interest.

BACKGROUND

Under 5 U.S.C. Sec. 5911(b) (1988), the Forest Service rents government- owned housing to employees assigned to duties in national forests. The state of California authorizes counties to tax possessory interests (including rental interests) in nontaxable property. Since the rental properties made available to Forest Service employees in California are tax exempt, the possessory interests of Forest Service employees in those properties are subject to the California possessory interest tax. See, e.g., United States v. County of Fresno, 429 U.S. 452 (1977).

In November 1990, Ms. Schmitz moved into a rental house in the Tahoe National Forest, located in Nevada County, California. The house had previously been rented by Ms. Sandy Huffer, another Forest Service employee. In September 1991, Ms. Schmitz received a bill assessing the possessory interest tax on her rental interest in the house for the fiscal year of July 1, 1990, to June 30, 1991.

Although the possessory interest tax was imposed on Ms. Schmitz and mailed to her government-owned quarters, Ms. Schmitz forwarded the bill to the Forest Service for direct payment to the county. Ms. Schmitz's action was consistent with a July 10, 1989, memo from Mr. Michael Duffy, Director, Fiscal, Accounting

and Law Enforcement to all Region 5 Forest Supervisors stating there was no objection to the Forest Service paying possessory interest taxes directly to counties. Mr. Duffy's memo did not refer to any authority in support of this position and was contrary to long established Forest Service policy, which provided for the Forest Service to reimburse employees who provided evidence of having paid possessory interest taxes. 41 C.F.R. Sec. 114-52.310.[1]

Ms. Lora Close, the disbursing officer at the Tahoe National Forest, initially questioned the bill with the Nevada County Assessor, thinking it was a duplicate because a possessory interest tax assessed against Ms. Huffer for the same property and fiscal year had been paid. The Nevada County Assessor provided information that assured Ms. Close that the California possessory interest tax applied to the rental interests that Ms. Schmitz and the preceding renter each had in the house during the fiscal year ended June 30, 1991. Ms. Close then paid the tax bill. However, this payment was rejected because it did not include the penalty and interest that had accrued while the bill was under dispute. After unsuccessfully trying to have the penalty and interest waived, the Forest Service asked for our opinion on whether it may pay the penalty and interest charges.

DISCUSSION

The Forest Service rents quarters inside national forests to its employees. 5 U.S.C. Sec. 5911(b). The rates charged for these quarters are based on the reasonable value of the quarters to the employee, 5 U.S.C. Sec. 5911(c), and on the prevailing rates for comparable private housing in the same general area, 41 C.F.R. Sec. 114-52.106 (1991).[2] The Forest Service deducts the rent from the employee's salary for each 2-week pay period in which the employee occupies such quarters.

The national forests owned by the federal government are tax-exempt by reason of the Supremacy Clause of the United States Constitution, see e.g., United States v. Allegheny County, 322 U.S. 174 (1944), and no tax may be imposed either on the land itself or on the United States. However, California law authorizes counties in California to impose an annual use or property tax on possessory interests in improvements on tax-exempt land. The Supreme Court has held that the state may tax federal employees on their possessory interests since the "legal incidence" of the tax falls neither on the federal government nor on federal property. United States v. County of Fresno, 429 U.S. 452 (1977).

Since prevailing rental rates for comparable housing include an element representing property taxes imposed on owners of private rental property, government employees essentially would be taxed twice by paying possessory interest taxes in addition to government rents based on prevailing rates. Therefore, we have not objected to a rental rate scheme that discounts for possessory interest taxes paid by government employees for their use of government-owned quarters. B-194420, Oct. 15, 1981. Agencies are authorized to reimburse employees-tenants for possessory interest tax payments either by offset against future rent payments or by lump sum payments. 41 C.F.R. Sec. 114-52.310 (1991). The Forest Service policy and procedures for implementing this authority are in the Forest Service Handbook (FSH), 6509-11K which provides, in pertinent part:

"46.34 - Refund Payments. Refund voucher preparation and procedures are covered in Forest Service supplement to National Finance Center Procedures Voucher and

Invoice Payments Manual-- Title II (NFC), FSH 6509.31, Chapter 6.5, section 4. Refunds may be made for the following reasons:

"4. Possessory-interest tax imposed by a State, county, or local taxing authority, which is based upon tenant's use and occupancy of Forest Service-owned quarters. Authorize and pay such refunds only when payroll deductions from employees were made into the appropriate quarters reimbursement account. Support refund-payment vouchers with a copy of possessory interest tax bill, plus evidence employee has made payment."

As a Forest Service employee renting tax exempt quarters, Ms. Schmitz was liable for paying the possessory interest tax assessed against her. In addition, if the payment was not made by the due date, interest and penalties would be assessed against her. Since the tax and the related penalties and interest were not obligations of the government but of Ms. Schmitz, the government may not use appropriated funds to pay these interest and penalties in the absence of a statutory provision or agreement requiring payment. We know of no such statutory provisions or any agreement either for direct payment of the interest or penalties or to reimburse an employee for these charges.

As a general proposition, no authority exists for the federal government to use appropriated funds to pay fines or penalties incurred as a result of its activities or those of its employees. See 65 Comp.Gen. 61 (1985) and cases cited therein. Moreover, the fact that Ms. Schmitz incurred interest and penalties as a result of good faith compliance with the instructions of a Forest Service official does not provide the Forest Service with the legal authority to make the payments. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) (holding that the use of an equitable doctrine to justify otherwise unauthorized payments would be improper since it would render a nullity the appropriations clause of the Constitution).[3]

In a letter to Forest Service district rangers dated February 11, 1993, Mr. John H. Skinner, Forest Service supervisor, stated that, effective immediately, the Tahoe National Forest will no longer make direct payments to counties for possessory interest taxes. We also understand that Mr. Michael Duffy, Regional Director of Fiscal and Public Safety will be issuing directions for complying with FSH 6509.11K, 46.34. These actions should preclude this type of situation from recurring.

1. In this regard, a July 5, 1991, letter from the Director of Fiscal and Public Safety, Washington Office, Forest Service, advised the Regional Forester for Region 4 that reimbursing employees for possessory interest taxes was proper but that there was no authority to pay the tax directly to the county.

2. OMB Circular No. A-45 sets forth the basic policies and administrative guidance to be used by executive agencies in establishing and administering rental rates and other charges for government-furnished or leased rental quarters and related facilities.

3. The appropriations clause of the United States Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, Sec. 9, cl. 7.