



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Defense Finance and Accounting Service: Making Payments to Assignees Under a Lease Agreement After Improper Payment Has Been Made to Assignor

File: B-270715

Date: July 23, 1996

DIGEST

1. Although lease assignment did not comply with the notice requirement of the Assignment of Claims Act, the record establishes that the agency was aware of, assented to and recognized the assignment of the payments under the lease contract. Therefore, the agency should pay money owed under contract to the assignees but improperly paid to the assignor. See cases cited.
2. When an agency pays a party other than the assignee when an assignment has been recognized, it pays at its peril. Therefore, assignee is entitled to payment even though the agency has not yet recovered the erroneous payments from the assignor.
3. The making of the payment to the assignees does not relieve the Air Force accountable officers of liability for the erroneous payment. As a result of 31 U.S.C. § 3528(d), Air Force certifying officers are not statutorily liable for improper certifications, and hence not subject to relief from liability by the Comptroller General. The liability and relief therefrom, if any, of Air Force certifying officers is governed by Air Force regulation.
4. Under 31 U.S.C. § 3526, an agency's accounts must be settled within 3 years of the date when they are substantially complete and ready for audit. For purposes of an improper payment to an assignor (instead of to the assignee), an agency's accounts are substantially complete and ready for audit as of the date of payment. To protect the governments rights to collect from any accountable officers liable for the improper payment and to permit consideration of any requests for relief, pursuant to 31 U.S.C. § 3526(g), we are suspending the statute of limitations with regard to this matter.

DECISION

The Defense Finance and Accounting Service (DFAS), Department of Defense, requests an advance decision on the propriety of a payment made to a

lessor/assignor under a lease contract assigned to two financial institutions. Specifically, DFAS asks about the enforceability of the lease assignment and the accountability of responsible parties involved in making the lease payment. Further, should we determine that the payment was improper, DFAS asks when the 3-year statute of limitations for settlement of accounts contained in 31 U.S.C. § 3526(c) began to run. For the reasons discussed below, we conclude that the assignment of lease payments is valid and enforceable since the agency was aware of and recognized the assignment through its past payments to the assignees. Therefore, the agency is liable to the assignees for the amount of the improper payment to the assignor and the accountable officers involved are financially liable to the government. For purposes of our settlement of accounts authority, the 3-year period begins to run on the date the Air Force made the improper payment to the assignors. Hence, in this case, the 3-year period of limitation started to run on May 9, 1994. To protect the interests of the government and the accountable officers, we are suspending the statute of limitations to permit the submission of any appropriate requests for relief of the accountable officers involved in this matter.

BACKGROUND

On December 16, 1985, the Department of the Air Force entered into a build-lease agreement with an Italian construction company, Societa Italiana per gli appalti costruzioni S.p.A. (SIAC), owned by Mr. Guiseppe Spampinato, to provide housing units for assigned personnel at the Comiso Air Base, Italy (Comiso). SIAC agreed to build the housing development with third party financing in return for the Air Force's promise to enter into a firm 10-year lease for an annual rent of Swiss Franc 10,189,920 upon proper completion of the housing development. SIAC completed the housing development and the lease period commenced on May 26, 1988.

On October 21, 1988, Air Force and the lessor, SIAC, agreed to amend the lease agreement to modify the standard Assignment of Claims clause. The bilateral modification specifically provided for the assignment of lease payments to two financial institutions. As part of the financing arrangements, SIAC assigned to the Banca Nazionale del Lavoro (BNL), acting on behalf of itself and two other banks, 87.5 percent of each annual rent payment and Banco di Napoli International, S.A. (BNI) the remaining 12.5 percent. SIAC assigned the lease payments to the respective banks to liquidate loans provided to finance completion of the build-lease contract. In addition, a company called IRITECHNICA guaranteed repayment of the loan made by BNL to SIAC.

According to the record, the contracting officer, the Civil Engineer at the Air Force's Europe Office (USAFE), acknowledged receiving a copy of the assignment documents and a cover letter entitled "Notice of Assignment" on November 1, 1988. There is no record that the assignment document or the Notice of Assignment was

provided to the responsible finance office. However, for the years 1988 through 1993, the annual lease payments were effected in accordance with the terms of the assignment, 87.5 percent to BNL and 12.5 percent to BNI.¹ Accordingly, the Air Force disbursing functions had constructive knowledge of the assignment as evidenced by its course of conduct in making payments consistent with the terms of the assignments.

On March 23, 1994, SIAC filed an invoice for the advance yearly rental payment for the lease period beginning May 26, 1994. The invoice referenced the Notice of Assignment and was identical to previous invoices. SIAC filed this invoice at the San Vito AS office since this office assumed caretaker responsibilities for the Comiso office, which closed in 1991. However, around the time of the questioned payment, the Air Force transferred the disbursing responsibilities of the San Vito office to the 26 Air Force Station at Ramstein Air Base (26 AFS) as part of an ongoing USAFE-wide regionalization of accounting and finance responsibilities. The 26 AFS received a copy of the invoice on May 3, 1994. On May 4, 1994, Ms. Schneider, an employee at the 26 AFS, received a call from Ms. Elana Rivera² who asserted that this year's rental payment was due April 1, 1994, and was therefore past due. Ms. Rivera inquired into whether Mr. Spampinato could pick up the checks in person at 26 AFS as opposed to the standard electronic transfers requested in the invoice. According to Ms. Schneider, Ms. Rivera never mentioned the proper payee or the assignment. Ms. Schneider believed that Ms. Rivera was an employee of the San Vito Civil Engineering Squadron.

Pursuant to Ms. Schneider advice, SIAC faxed a letter on company letterhead signed by a SIAC clerk on May 4, 1994, requesting the 26 AFS to "effect the payment . . . by handing two checks to our Sole Director, Mr Spampinato." This letter contained no reference to the assignment nor the proper payees, although it did reference the previous invoice of March 23, 1994, and the requirement for two checks. Ms. Schneider gave the invoice and the May 4, 1994 letter to SSgt. Robert Burke to prepare a payment voucher. SSgt. Burke prepared two vouchers, each for payment to SIAC. According to the record, SSgt. Burke admits to not reading the invoice carefully, as well as not realizing that there was an assignment. SSgt. Burke did not obtain a copy of the lease agreement or a receiving report. At the time of the payment, the payment files at San Vito were in transit to 26 AFS. The only documents in the 26 AFS file were the invoice and May 4, 1994 letter.

¹The 6th year payment was erroneously made entirely to BNL, who, upon the Air Force's request, transferred 12.5 percent of the payment to BNI.

²Ms. Rivera, an employee of Mr. Spampinato's through another company, EDILCAT, which provides maintenance on leased housing at San Vito Air Station, denies speaking with Ms. Schneider.

TSgt. Monica Pearson certified the voucher as being correct and proper for payment on or shortly after May 5, 1994. According to the record, TSgt. Pearson indicated that she would not have looked for a receiving report because that document would have been in a file at San Vito. The certified vouchers were subsequently provided to the disbursing function for preparation of the checks. The check preparer noticed the requirement for two payments to the same individual and combined the amounts for payment by a single check payable to SIAC. On May 9, 1994, after ensuring that there were no discrepancies between the payment vouchers and the check and after verifying Mr. Spampinato's identification, the cashier, Capt. Kenneth Goodman, provided the check to Mr. Spampinato. Mr. Spampinato cashed the check on May 16, 1994, at a bank in Milano, Italy. Mr. Spampinato has acknowledged keeping the money for uses other than satisfying the two banks. As a result, BNL, BNI, and IRITECHNICA now seek to enforce the assignment and obtain the 1994 payment.

The Air Force subsequently conducted an investigation into the payment; however, the Air Force could not locate the relevant payment file. According to TSgt. Rivera, the husband of Elana Rivera, who had responsibility for the physical transfer of the files from San Vito to 26 AFS, he transferred the relevant payment file regarding the SIAC assignment along with the other files to 26 AFS. However, individuals at the 26 AFS testified that no file exists. The investigation failed to reveal any suspicious or improper relationship between the Riveras, and EDILCAT, SIAC, or Mr. Spampinato.

DISCUSSION

Enforceability of Assignment

The Assignment of Claims Act (Act) provides for assignments of money due or to become due under a contract to financial institutions under certain conditions. 31 U.S.C. § 3727. The Act allows the assignment of money due if the following conditions are met:

- (1) the contract does not forbid an assignment;
- (2) unless the contract expressly provides otherwise, the assignment
 - (A) is for the entire amount not already paid;
 - (B) is made to only one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing; and
 - (C) may not be reassigned; and

(3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract. 31 U.S.C. § 3727(c).

In this case, the original lease agreement permitted assignment of the rental payments and the lease agreement was further amended to expressly provide for the assignment to two financing institutions, BNL and BNI. Both BNL and BNI qualify as assignees under the Act since the money that the institutions advanced to SIAC were actually used in, or at least made available for, the performance of the contract. See B-216549, Dec. 5, 1984, and cases cited therein.

The statute requires the assignee to provide notice of the assignment to both the appropriate contracting officer and the disbursing officer. The assignees (BNL and BNI) served notice and received acknowledgement thereof, on the USAFE Civil Engineer, who, for leasing actions, functions as the contracting officer. However, there is no record of notice being provided to any disbursing office. The requirements of the Act must be strictly construed to accomplish the purposes of the Act of preventing multiple claims on the government and of making unnecessary the investigation of alleged assignments. American Financial Associates, Ltd., 5 Cl. Ct. 761, 768 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985); B-234103, August 24, 1989. However, the courts have consistently recognized that "the Government can choose to recognize an assignment notwithstanding the bars of the Act." See, e.g., Tuftco Corporation v. United States, 614 F.2d 740 (Cl. Ct. 1980); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983); American Financial Associates, Ltd., 5 Cl. Ct. 761 (1984).

Thus, in Tuftco, the court upheld the claim of an assignee that was not a financing institution and had failed to provide notice in the form required by the Assignment of Claims Act. In holding that the government had waived the requirements of the Assignment of Claims Act, the court relied on the fact that the contracting officer had acknowledged the assignment in writing and the agency had made the first of the required payments under the contract to the assignee. The court explained that "[i]t is unnecessary to identify any one particular act as constituting recognition of the assignments by the Government. It is enough to say that the totality of the circumstances presented to the court establishes the Government's recognition of the assignments by its knowledge, assent, and action consistent with the terms of the assignments." 614 F.2d at 746. (Emphasis added.)

We have applied the Tuftco waiver standards in determining whether an assignment that did not satisfy all of the requirements of the Assignment of Claims Act bound the government. In Centennial Systems, Inc., 61 Comp. Gen. 53 (1981), we relied on the Tuftco decision in holding that an assignment bound the government where the

agency involved was aware of and had "recognized" the assignment, even though notice of the assignment was not given to the agency as required under the Act. Applying those same waiver standards to the case at hand, we conclude that although the disbursing officer never received the required notification, he was fully aware of and recognized the assignments by making multiple payments to the assignees consistent with the terms of the assignment.

We realize that the files regarding the assignments were in transit at the time of the 1994 payment, however, the original invoice submitted for the 1994 payment referenced the assignment which should have prompted additional investigation to determine the validity of the payment. In addition, an agency's complicated or inept systems are not a valid defense. See Central National Bank of Richmond v. United States, 91 F. Supp. 738 (Ct. Cl. 1950). The totality of the circumstances leaves no doubt that the assignment was recognized and therefore valid and enforceable.

Air Force's Liability

If the government pays a party other than the assignee when an assignment has been properly filed, it pays at its peril. When such an error occurs, the United States remains liable to the assignee for the amount of the payment. Tuftco, 614 F.2d at 747; Central National Bank, 91 F. Supp at 741; 61 Comp. Gen. 53, 55 (1981). The United States may not refuse to pay the assignee on the grounds that it has not effected recovery of the erroneous payment from the assignor. Therefore, BNL and BNI are entitled to receive their respective payment from the Air Force for those amounts erroneously paid to SIAC.

Discharging the Air Force's obligation to the assignees does not relieve the assignor of the obligation to repay those amounts that it received in contravention of the assignment. Since the assignor has received and used government funds to which it was not entitled, the government has and should continue to assert a claim and collect those erroneous payments from SIAC or Mr. Spampinato. Central National Bank, 91 F. Supp. at 741. See also the Federal Claims Collection Standards, 4 C.F.R. Chap. II, as amended, 49 Fed. Reg. 8889 (1984).

Accountable Officer's Liability

The making of the payment to the assignee does not relieve the accountable officer(s) of liability for the improper payment. An accountable officer is any government officer or employee who by reason of his employment is responsible for or has custody of government funds. 62 Comp. Gen. 476, 479 (1983); 59 Comp. Gen. 113, 114 (1979). Also, see GAO, Policy and Procedures Manual for the Guidance of Federal Agencies, (GAO-PPM), tit. 7, chap. 7 (1993). There may be more than one accountable officer in a case and the concept of accountability is not limited to the person or persons in whose name the account is officially held. In

each case, it is necessary to examine the particular facts and circumstances to determine who had responsibility for or custody of the funds during the relevant stages of the transaction.

The person or persons who made the improper payment is financially liable to the government in the first incidence. 62 Comp. Gen 476, 479 (1983). In addition, the person in whose name the account is officially held at the time the erroneous payment is made is also liable for the loss. Id. In the instant case, this would include Capt. Goodman, the disbursing officer acting as the cashier, and Major Philip D. Weinberg, Accounting and Finance Officer at 26 AFS, as the official holder of the account.

TSgt. Pearson, is not subject to liability and relief as a certifying officer under 31 U.S.C. § 3528 as that section does not apply to disbursements of a military department of the Department of Defense. However, Air Force regulation 177-101, paragraph 6-13, imposes pecuniary liability on its certifying officers for improper certifications.

The other officials involved who had a role in authorizing and preparing the voucher in question (Ms. Schneider and SSgt. Burke) are not accountable officers for purposes of 31 U.S.C. §§ 3527 and 3528.

Request for Relief and Statute of Limitations

Under 31 U.S.C. § 3527(c), this Office is authorized to relieve an accountable officer from liability for an improper payment if it is determined that the payment was not the result of bad faith or lack of reasonable care by the officer. This Office has limited authority to relieve military certifying officers, although not applicable here. Therefore, our authority to grant relief, if requested, is limited to Capt. Goodman and Major Weinberg.

We are required to settle and adjust all accounts within 3 years after the date that we receive them. 31 U.S.C. § 3526(c). We consider the 3-year statute of limitations prescribed in section 3526(c) to begin to run on the date that an account is substantially complete and ready for audit. B-213720, Sept. 26, 1986. See also 7 GAO-PPM § 8.7. In cases involving improper payments to assignors, where notice of the assignment was evident, the 3-year period begins on the date the payment is made. B-226176, May 26, 1987. Our rationale is that where the agency has a copy of the assignment all the documents needed to raise a charge in the account are in its possession when the check is issued. Id.

Air Force personnel were aware of the assignment, and the Air Force had in its possession all of the information and documentation necessary to determine the impropriety of the payment to SIAC at the time of the payment in question. Thus,

the 3-year period specified in 31 U.S.C. § 3526(c) began on May 9, 1994, the date the check was issued to SIAC. To permit the Air Force to seek relief or to resolve the liability of the accountable officers in this matter, as appropriate, pursuant to 31 U.S.C. § 3526(g), we are suspending the statute of limitations with regard to this matter.

/s/Robert P. Murphy
for Comptroller General
of the United States