

ACTION ON DECISION

Re: *Fluor v. United States*
Venue: Fed. Cir.
Docket No.: 96-5130
126 F.3d 1397 (Fed. Cir. 1997)

Issues:

Whether the taxpayer owes interest under section 6601(a) on the underpayment of its 1982 tax liability, notwithstanding that such underpayment subsequently was eliminated by a carryback, under section 904(c), of excess foreign tax credits from its taxable year 1984.

Discussion:

An audit revealed that Fluor, an affiliated group of corporations, underpaid its federal income taxes for its tax year ending October 31, 1982. In Fluor's 1984 tax year, it paid foreign taxes that generated a foreign tax credit under section 901. Because the full amount of its 1984 foreign tax credit could not be used in 1984, Fluor pursuant to section 904(c), carried a portion of the tax credit back to its 1982 tax year. The effect of the carryback was the elimination of Fluor's 1982 tax deficiency.

The Federal Circuit determined that the corporation owed underpayment interest for the period of time that the deficiency was due and unpaid, even though the credit carry back subsequently eliminated the deficiency. ("deficiency interest issue"). The Federal Circuit further held that the deficiency was eliminated as of the end of the taxable year in which the federal tax credit arose, not the due date of the return for that year. ("computation issue"). Accordingly, the accrual of interest ended as of the close of the taxable year in which the carryback became available.

Section 6601(a) is the general provision for interest on underpayments. It requires a taxpayer to pay interest on any underpayment from the time the payment is due until it is paid or otherwise satisfied. At the time payment was due for its 1982 taxes, Fluor did not make the required payment. The government was deprived of that money for the period between the time the 1982 tax deficiency should have been paid and the time the deficiency was satisfied by operation of the foreign tax credit.

The deficiency interest and computation issues were addressed by the Tax Court in a reviewed opinion in Intel v. Commissioner, 111 T.C. No. 4 (July 30, 1998). There, the Tax Court followed Fluor on the deficiency interest issue in holding that an underpayment, *i.e.*, a deficiency, is not reduced by a foreign tax credit carryback for purposes of computing interest, but did not follow Fluor on the computation issue as to the date when the interest stops accruing. As to the computation issue, the Tax Court held that, for years after the enactment of section 6611(g) [now section 6611(f)(2)], interest accrues through the due date of the return for the year in which the foreign tax credit arose.

Intel represents the Service's position on both the deficiency interest and computation issues. Section 6601(a) imposes interest on all underpayments of tax, absent a clear legislative expression to the contrary, because a taxpayer who does not timely pay its taxes has the use of the government's funds. Whether excess foreign tax credits may be carried back cannot be determined until the taxpayer has filed its return and made an election to do so. Therefore, the due date of the return is the time when the foreign tax credit becomes available to reduce an earlier year's deficiency and the due date concludes the taxpayer's use of the government's funds. This result is symmetrical with the cutoff date under section 6611(f)(2) for overpayment interest attributable to a foreign tax credit carryback.

The Service's position, as to the deficiency interest and computation issues, was codified in the Taxpayer Relief Act of 1997 (TRA of 1997) Pub. L. 105-34, § 1055(a), 111 Stat. 944, with the revision to section 6601(d). Section 6601(d)(2) applies to foreign tax carrybacks arising in taxable years beginning after August 5, 1997.

Although we disagree with the Federal Circuit's opinion on the computation issue, i.e., the date underpayment interest stops running, we recognize the precedential effect of the decision on cases appealable to the Federal Circuit, and therefore will follow it with respect to cases within the Federal Circuit. We do not, however, acquiesce to the opinion as to the computation issue and will continue to litigate our position in cases in other circuits.

Recommendation:

Nonacquiescence

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