No. 119, Original

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, AND STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

SUPPLEMENT TO THE FINAL REPORT OF THE SPECIAL MASTER

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February 1, 1993

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My Final Report dated December 30, 1992, made no recommendation as to interest on any Seabrook Tax refunds ordered by the Court, for the reason that the parties had not then been heard on that issue. Promptly after filing the Final Report with the Court, I requested the parties to file memoranda addressing the question "whether the recommended refunds should carry interest and, if so, at what rate."

On January 15, 1993, the Plaintiff States in their two-sentence response to my request stated that they took no position on the question whether interest should be

added to the refund.[1] On the same date five[2] of the six Intervening Utilities filed a brief contending that the Court should award both postjudgment and prejudgment interest. Postjudgment interest, they argued, should be set at the same rate awarded by statute on money judgments issued by the federal district courts, and prejudgment interest, at a rate reflecting the cost to the utilities of borrowing the lost funds or, alternatively, at a rate equal to that prescribed by a New Hampshire statute for the refund of overpayments of New Hampshire taxes (10%).

In its brief filed on January 22, 1993, the Defendant State of New Hampshire, contending that the interest issue should not and need not be addressed, agreed that if postjudgment interest were awarded, it should be at the statutory rate applied to money judgments in the federal district courts. New Hampshire further argued that in no event should prejudgment interest be awarded, but if it were, it could most conveniently be set at the same statutory rate as postjudgment interest.

On January 29, 1993, the five Intervening Utilities, in a reply brief, proposed as a second, alternative measure of prejudgment interest the rate prescribed for postjudgment interest in federal district courts.

For the sake of completeness and to avoid later litigation on the interest question, I herewith supplement the

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[1] The Plaintiff States also stated: "If the Court orders interest on the refund, [P]laintiff States do not oppose the rate proposed by the [I]ntervenors."

[2] Intervenor Connecticut Light and Power Company did not participate in either the brief or the reply brief filed by the other five Intervening Utilities.

Recommended Conclusions of Law stated in my Final Report.

RECOMMENDATION E: The Defendant State of New Hampshire shall have no payment obligation beyond refunding, without interest, the Seabrook Tax collected by it less the amount of credit for the Business Profits Tax taken by each taxpayer.

Because of the special circumstances present in the case at bar, I recommend that the Court order neither postjudgment nor prejudgment interest on the amounts of the Seabrook Tax to be refunded by the State of New Hampshire.

There is precedent for the Court to award postjudgment interest in this original jurisdiction action, *see Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987); and, as a matter of federal law, the Court in framing full retrospective relief between the State parties would be acting consistently with existing caselaw if it added prejudgment interest on the amounts to be refunded, for the purpose of compensating the injured parties for the loss of the time-value of their funds and putting them in the positions they would have occupied if New Hampshire had never adopted its unconstitutional scheme. *See West Virginia v. United States*, 479 U.S. 305, 310 (1987) ("Prejudgment interest is an element of complete compensation"). There is, however, no statute or binding precedent

that makes either type of interest an inevitable concomitant of a money judgment in an original jurisdiction action. In the case that comes closest to being on all fours with this one – *Maryland v. Louisiana*, 451 U.S. 725 (1981) (decision on the merits); 452 U.S. 456 (1981) (decree ordering refunds) – the revenues collected from the disputed Louisiana "first-use" tax had been placed in escrow, and the refund payees received only the interest earned on the escrowed funds. We have no escrow here, and none was ever sought.

In this original action between States, the three Plaintiff States (and not the Intervening Utilities) represent the electric ratepayers, both themselves and their citizens generally, who bear the ultimate burden of the unconstitutional tax. On the interest issue, I find it of critical significance that the Plaintiff States have never asked for the award of interest, whether postjudgment or prejudgment. In response to my specific question at the First Meeting of Counsel held on May 15, 1992, counsel for the Plaintiff States stated that they were not asking for an escrow of Seabrook Tax collections, "Not today, your Honor"; and that stance, acquiesced in by the Intervening Utilities and amici curiae, never changed. At no point in the extensive briefs they filed with me or in their oral argument before me that followed on December 8, 1992, did any of the Plaintiffs including the Plaintiff States even mention interest. Most significantly, after I on my own initiative had identified the interest question in the course of drafting a Proposed Decree, the Plaintiff States – Connecticut, Massachusetts and Rhode Island – responded to my inquiry by explicitly electing to take no position on the interest question. Thus, the ratepayers,

through their representatives, have declined to claim interest on the refunds.

Although the immediate recipients of the refunds are the Seabrook owners who paid the unconstitutional tax, the ratepayers represented by the three Plaintiff States are the ones who bear the ultimate burden of the Seabrook Tax and they are likewise the ones who are entitled to receive the ultimate benefit of the refunds and of any interest on the refunds. The Plaintiff States, however, both in their own proprietary capacities and in their parens patriae role for all other affected ratepayers, have, for whatever reason sufficient to themselves, decided not to press New Hampshire for interest. That, in my opinion, concludes the matter. The Seabrook owners are merely the conduit through which the refunds will ultimately redound to the benefit of ratepayers. The Plaintiff States, and not the five Seabrook owners that as Intervening Plaintiffs are the only parties now asking for interest on the refunds, call the litigation tune on behalf of the real parties in interest, the ratepayers.

In this suit between States the spur provided by postjudgment interest for prompt satisfaction of a money judgment is hardly necessary. Without that spur, the sovereign State of New Hampshire, we may assume, will comply fully with the Court's order to pay the refunds within 30 days – if the Court sees fit to adopt my recommendation. *See* Proposed Decree, Appendix D to the Final Report.

RECOMMENDATION F: If the Court awards interest on the refunds, it should set that interest, both postjudgment and prejudgment, at the rate prescribed by 28 U.S.C. § 1961.

I now turn to the second prong of the interest issue. In the event that the Court does not accept my recommendation adverse to the award of interest on the refunds, at what rate should interest be imposed?

Although 28 U.S.C. § 1961 by its terms applies only to judgments entered by district courts, there appears to be no good reason for crafting a different rule for cases between States in which the Supreme Court is the court of first instance, as well as of last instance. New Hampshire agrees that if a refund is ordered and if postjudgment interest is imposed, the rate prescribed by Section 1961 would be appropriate. By that statute postjudgment interest is computed "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." *Id.*; *see Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990).

By its terms 28 U.S.C. § 1961 applies only to postjudgment interest on federal money judgments. Nonetheless, for the sake of convenience and of general fairness, I recommend that the very same single rate determined under Section 1961 (that is, the rate on United States Treasury bills immediately before the date of this Court's judgment) be used also for prejudgment interest. The

interest rates urged by the Intervening Utilities for prejudgment interest – namely, each Seabrook owner's cost of borrowing the lost funds at the various times involved – would require a complex accounting. Recognizing that fact, the Utilities have now suggested two alternatives, or surrogates. I reject the first – the rate of ten percent (10%) per year allowed by New Hampshire statute, N.H. Rev. Stat. Ann. § 21-J:28, for refunds of "any overpayment of taxes administered by the [D]epartment [of Revenue Administration]" – because it would not be fair to New Hampshire unless applied with conditions similar to those applied in paying interest on refunds under the New Hampshire statute; but that is not easy to do. It is, for example, far from clear that the ten percent (10%) rate on the refund is computed from the date of payment to the date of refund.[3] The Utilities' second alternative for prejudgment interest, however, does commend itself as both simple and fair. The use of the rate prescribed by 28 U.S.C. § 1961, if it is determined only once (i.e., as of the date of this Court's decree) is easy to apply and is apparently acceptable to the only parties seeking prejudgment interest.

Therefore, if the Court elects to order interest on the refunds, I recommend that in the Proposed Decree set forth as Appendix D to my Final Report the following be

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[3] No interest is allowed under N.H. Rev. Stat. Ann. § 21-J:28 if the State pays the refund "within 3 months after the due date or authorized extension date or within 3 months after the return is filed[.]" New Hampshire's brief also asserts that, by an unchallenged administrative interpretation, interest on refunds is calculated from the date the taxpayer's tax return is filed, not the date the tax was paid.

substituted for the bracketed interest provision in line 1 on page D-2: [, with interest at an annual rate determined as of the date of this judgment in accordance with 28 U.S.C. § 1961, to run from each payment date of Seabrook Tax to the date of refund thereof,].

Respectfully submitted,

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February 1, 1993