

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and)
Joseph Henchman, on behalf of)
themselves and all others similarly)
situated,)

No.: 1:14-cv-01523-RCL

Plaintiffs,)

v.)

United States of America,)

Defendant.)

**UNITED STATES’ UNOPPOSED MOTION TO REVIVE
AND/OR RESTORE CERTAIN CANCELED UNOBLIGATED APPROPRIATIONS**

The United States respectfully moves the Court to issue an order making available unobligated appropriations for fiscal years 2011 to 2017, as necessary, in order to satisfy the IRS’s finally determined liability for payment to plaintiffs for the IRS portion of the PTIN fee for those same seven fiscal years.¹ The United States’ motion is directed solely at the *sources* of funds that may be used to satisfy the IRS’s finally determined liability in this matter. This motion does not raise, in any respect, any argument regarding the *amount* of the IRS’s liability. Counsel for the parties have conferred and Plaintiffs do not oppose this motion’s requested relief.

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¹ Any IRS liability for the Vendor (Accenture) portion of the PTIN fee is not relevant for this motion.

**PROCEDURAL BACKGROUND
AND APPROPRIATIONS LAW STATUTORY OVERVIEW**

Of the approximately \$231 million total collections for the IRS portion of the PTIN fee for fiscal years 2011–2017, the Defendant has conceded that \$110,322,017 was excessive under law. Although the Defendant reserves the right to appeal, pursuant to the Court’s Order, Defendant has estimated the Court-Ordered additional refund for the IRS portion of the fee for those seven fiscal years to be \$51,032,080. *See* ECF No. ___.

To the extent that the Court determines that a portion of the PTIN fee was in excess of what was authorized by law and should be refunded, the refund should be made from the account to which the fee to be refunded was credited to avoid an improper augmentation of that account. *See generally, Principles of Federal Appropriations Law (3d ed.)*, Vol. I, at 12-168, 14-41. However, as discussed in more detail below, by operation of law, the accounts for fiscal years 2011–2017 from which the PTIN user fee refunds should be made have been closed and the balances in those accounts have been canceled. Consequently, the balances in the closed accounts to which the PTIN user fees were credited are no longer available to pay any refunds due from the litigation, unless the Court uses its equitable powers to suspend the cancellation of those funds.

Each fiscal year, the Congress provides an appropriation to the IRS. At the end of the fiscal year, any unobligated appropriation for the year moves into “expired” status. 31 U.S.C. § 1553(a); *Principles of Federal Appropriations Law (3d ed.)*, Vol. I, at 5-67

(“Annual appropriations that are unobligated at the end of the fiscal year for which they are appropriated are said to ‘expire’ for obligational purposes.”).²

Although “expired” appropriations are not available for new obligations, the appropriations remain available during the five following fiscal years to liquidate and adjust obligations:

During the 5-year period, the expired account balance may be used to liquidate obligations properly chargeable to the account prior to its expiration. The expired account balance also remains available to make legitimate obligation adjustments, that is, to record previously unrecorded obligations and to make upward adjustments in previously recorded obligations.

Principles of Federal Appropriations Law (3d ed.), at 5-72; 31 U.S.C. § 1553(a) (“[a]fter the end of the period of availability for obligation . . . and before the closing of that account . . . the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly charged to that account”).³

² Appropriations may be single-year appropriations, multiple-year appropriations, or “no-year” appropriations. *Principles of Federal Appropriations Law (3d ed.)* Vol. I, at 5-4 to 5-7. Further, IRS has specific authority to retain user fees to supplement its annual appropriations accounts. The Treasury, Postal Service, and General Government Appropriations Act of 1995 (Pub. L. 103-329), codified in a note to 26 U.S.C. § 7801. As relevant here, all unobligated appropriations for fiscal years 2011–2017 were either single-year or two-year appropriations, and these accounts were supplemented with the PTIN fees. Any refund would be due from these appropriation accounts which “expired” after their respective time period.

³ Using this authority to adjust obligations properly chargeable to an expired account, the IRS in September 2020 and again in September 2021 obligated and disbursed over \$28 million in “expired” appropriations for fiscal years 2014–2017 to satisfy, in part, the IRS’s conceded liability for those four fiscal years. The United States (pursuant to two stipulations with the Plaintiffs) then transferred those funds to Plaintiffs’ escrow account for this matter. See ECF No. 175 at 15, n.9.

After five fiscal years have elapsed, “expired” unobligated appropriations move to “canceled” status:

On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.

31 U.S.C. § 1552(a). In the absence of other legal authority that would revive or restore such “canceled” funds, the “canceled” funds are not available for obligation or expenditure for any purpose. 31 U.S.C. § 1552(a). The Court, however, may use its equitable powers to make the unobligated balances available to satisfy liability from the corresponding fiscal year account.

More than five fiscal years have now passed since the close of fiscal year 2017. Consequently, all IRS unobligated appropriations for fiscal years 2011 through 2017 have been “canceled.” Thus, the IRS cannot now legally obligate and disburse them to Plaintiffs’ escrow account in order to assist in satisfying its finally determined liability here.

Defendant therefore moves this Court to exercise its equitable authority and issue an order making these unobligated balances available to satisfy the IRS’s liability for the IRS portion of the PTIN fee for fiscal years 2011 through 2017.

ARGUMENT

Plaintiffs filed their original complaint on September 8, 2014. *See* ECF No. 1. Although the IRS’s unobligated appropriations for fiscal years 2011–2012 “expired” by that date, none of those appropriations had yet been “canceled” pursuant to 31 U.S.C. §

1552(a). The 2013 appropriation expired shortly after the complaint was filed, on September 30, 2014, and would cancel 5 years after expiration. In addition, any unobligated appropriations for fiscal years 2014–2017 had not yet “expired,” much less been “canceled,” as of the date the complaint was filed.

The D.C. Circuit “reaffirmed the power of the courts to order funds be held available beyond their statutory lapse date if equity so requires.” *Nat’l Ass’n of Reg’l Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977); see also *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 56 (D.C. Cir. 1977) (quoting *Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1387 (D.D.C. 1973)). Specifically, even though a court does not have equitable authority to revive and/or restore canceled funds in situations where the “budget authority lapsed before [the] suit was filed,” by contrast, *Costle* instructs that “a court may act to prevent the expiration of budget authority which has not terminated at the time suit is filed” *Id.* at 584, 588. And where the District Court had equitable jurisdiction over the canceled budgetary authority as of the date the complaint was filed, the Court is empowered to revive or restore funds later, and even after “the funds . . . revert[ed] to the general Treasury.” *Conn. v. Schweicker*, 684 F.2d 979, 998 (D.C. Cir. 1982).

Accordingly, the Court has the equitable jurisdiction to revive and/or restore those funds “canceled” subsequent to the filing of Plaintiffs’ complaint. “Under the controlling case law, the critical question is whether the budget authority has already lapsed before the suit has been filed.” *Schweicker*, 684 F.2d at 997. Under *Costle*, the

Court looks to whether it had jurisdiction to act when the complaint was filed. 564 F.2d at 588. Thus, the *Principles of Federal Appropriations Law* concludes that:

the crucial test is not whether the court actually acted before the budget authority expired, but whether it had jurisdiction to act. As long as the suit is filed prior to the expiration date, the court acquires the necessary jurisdiction and has the equitable power to “revive” expired budget authority

Principles of Federal Appropriations, at 5-85. As stated above, as of the date the complaint was filed (here September 8, 2014), no unobligated appropriations for fiscal years 2011–2017 had been “canceled,” and some of them had not yet “expired.”

Because no unobligated appropriations for fiscal years 2011–2017 had been “canceled” as of the date of the complaint, this Court had (and still has) the equitable authority to issue an order making canceled funds available when equity so requires.

Nat’l Ass’n of Reg’l Councils, 564 F.2d at 588; 31 U.S.C. § 1502(b) (“A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance.”).

Accordingly, the Court should exercise its equitable authority and issue an order making the canceled funds available to the IRS to satisfy its obligation in this litigation. In this instance, the United States has conceded that over \$110 million in PTIN fees were improperly collected during the seven relevant fiscal years. Now, the Court has ordered an additional \$51 million refund for those years. The IRS had canceled unobligated appropriations for each of those seven fiscal years to satisfy the conceded and ordered liability for those same fiscal years. The Court should therefore exercise its equitable

authority to make the canceled funds available to the IRS, allowing the IRS to draw upon these “canceled” unobligated appropriations to pay the liability, either as conceded by the United States, or as finally determined and ordered in this pending matter. Moreover, because these canceled funds are appropriations from the years for which fees are being refunded, using cancelled funds would be consistent with the original appropriation and accounting. For example, allowing the IRS to draw upon unobligated funds from fiscal year 2014 to refund 2014 amounts collected and to be refunded (either by concession or by Court order) is specifically permitted by 31 U.S.C. § 1553(b), even when the accounts are closed, and would align the refund for fiscal year 2014 with the account that benefitted from the fees collected.

CONCLUSION

For the foregoing reasons, the United States requests that the Court grant the United States’ unopposed motion to make the canceled, unobligated funds available to satisfy the liability for the fee refunds.⁴

(Signature block on the following page.)

⁴ Pursuant to LCvR 7(m), counsel for the United States has discussed the relief requested by this Motion with Plaintiffs’ counsel. Plaintiffs’ counsel has advised that they are unopposed to the relief sought.

Dated: January 23, 2024

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Court's ECF system on January 23, 2024, which system serves electronically all filed documents on the same day of filing to all counsel of record.

/s/ Emily K. McClure _____
EMILY K. MCCLURE
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