

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

October 17, 2001

GSBCA 15629-RELO

In the Matter of ERNEST B. FITZPATRICK, III

Ernest B. Fitzpatrick, III, Three Lakes, WI, Claimant.

Susan C. Lauga, Office of the Chief Financial Officer, Department of Agriculture, New Orleans, LA, appearing for Department of Agriculture.

BORWICK, Board Judge.

The Department of Agriculture requests a 31 U.S.C. § 3529 decision and asks three questions concerning reimbursement of real estate expenses involving Ernest B. Fitzpatrick, III's construction of a modular home at his new duty station.

The record presented to us by the agency shows the following. Claimant transferred in the interest of the Government from Bergland, Michigan, to Eagle River, Wisconsin. The agency granted claimant real estate transaction expenses. Claimant reported for duty on March 17, 1997, and stayed in temporary quarters for the spring and summer of 1997, looking for affordable housing. He decided to purchase land and build a home.

On June 14, 1997, claimant purchased land in Three Lakes, Wisconsin. The settlement sheet for the land purchase shows that claimant incurred, among other expenses, a \$12 recording fee and a \$36 transfer fee.

On or about August 21, 1997, claimant secured a construction loan to finance his purchase of a modular home from a company called Cottages to Castles. The settlement sheet indicates that claimant incurred, among other expenses, a \$250 application deposit, a \$546.25 loan origination fee, a \$300 appraisal fee, a \$45 credit report fee, a \$12.75 flood determination fee, a \$560 title insurance fee, and a \$14 tax fee.

On March 1, 1998, the lender renewed the construction loan. Claimant incurred a \$50 settlement charge and a \$50 loan origination fee. On June 1, 1998, the lender renewed the loan again. Claimant incurred another \$50 settlement charge and another \$50 loan origination fee.

Claimant's letter of January 8, 1999, to the agency suggests that only the upper part of the house was of modular construction. What claimant calls "the constructed portion" was

the lower level of the bi-level house. In his submission to the Board of August 16, 2001, claimant states he "purchased a modular home, had it placed on land I had purchased, then as soon as the home met requirements of being substantially completed, the construction loan was rolled over to a mortgage." Whether or not his home was fully or partially modular, claimant paid to Cottages to Castles a sales tax of \$1287.55 for the modular home itself. Claimant also lists other sales taxes for construction material.

On or about October 1, 1998, claimant rolled over the construction loan to a mortgage and incurred a \$150 appraisal fee, a \$20 credit reporting fee, a \$100 title insurance fee, a \$38 recording fee, and a \$70 credit reporting fee.

On February 28, 1999, claimant submitted a voucher to the agency seeking reimbursement of \$5431.90 of real estate transaction expenses, including sales taxes of \$1287.55 for the purchase of the modular home from Cottages to Castles.

In its request for a 31 U.S.C. § 3529 decision the agency has asked the Board three questions:

(1) Since a modular home is purchased in pieces and shipped to a specific site for construction, should it be considered a mobile home, new construction, or an existing residence?

(2) Should sales tax and the materials used for construction be reimbursed on the purchase of a modular home?

(3) If the modular home is considered to be an existing residence or new construction, should reimbursement be determined based on one final settlement statement or should we use the four different ones submitted by [claimant]?

The Federal Travel Regulation (FTR) defines "mobile home" as:

Any type of house trailer or mobile dwelling constructed for use as a residence and designed to be moved overland, either by self-propulsion or by towing. Also a boat when used as the employee's primary residence.

41 CFR 302-1.4(i) (1997).

In its literature, Cottages to Castles explains the difference between a mobile (or manufactured) home and a modular home. Cottages to Castles states that manufactured or mobile homes are required to be constructed on a non-removable steel chassis. Siting of mobile homes is often restricted by building or zoning regulations. Cottages to Castles states that modular homes, in contrast, are constructed to the same building codes required by state, county, or local municipalities for a site-built home and, by virtue of their method of construction, are not restricted in the same ways as mobile homes, by building codes or zoning regulations.

A similar distinction is drawn in statute. Upon proper certification by the manufacturer, structures that are designed only for erection or installation on a site-built

permanent foundation, that are not designed to be moved once erected or installed, and are designed and manufactured to comply with (a) a nationally recognized model building code or an equivalent local code, (b) a state or local modular building code recognized as generally equivalent to a building code for site-built housing, or (c) minimum property standards promulgated by the Secretary of Housing and Urban Development under the National Housing Act, are excluded from the coverage of the Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401-5426 (1994), which prescribes federal construction and safety standards for manufactured or mobile home dwellings. 42 U.S.C.A. § 5403(h) (West Supp. 2001); 24 CFR 3282.12(a) (2000); Texas Manufactured Housing Association v. Nederland, 101 F.3d 1095, 1098-99 (5th Cir. 1996).

The wording of the agency's first question readily suggests the answer to the question. Since claimant's modular home was shipped in pieces to a specific site for construction, it does not fall within the FTR's definition of mobile home, that is, a trailer or dwelling that is designed to be moved overland, either by self-propulsion or by towing. Claimant's home was simply one that was constructed in whole or in part by means other than the traditional stick-built method at the site.

The agency's second question is whether claimant is entitled to reimbursement of sales taxes incurred in the purchase of a modular house. In this instance, claimant purchased the land, contracted for part of the construction, and actually assisted in other parts of the construction. It is clear that claimant constructed his residence as opposed to purchasing an existing one. The FTR provides that a transferred employee may be reimbursed for expenses required for the purchase, including construction, of one dwelling at his or her duty station. 41 CFR 302-6.1 (1997). Reimbursable items include "expenses in connection with construction of a new home which are comparable to expenses that are reimbursable in connection with the purchase of an existing residence." 41 CFR 302-6.2(d)(1)(x). However, expenses that result from construction of a residence are not reimbursable. 41 CFR 302-6.2(d)(2)(vi).

We have construed these provisions of the FTR to mean that an employee who chooses to construct a home at the new duty station will be permitted to recover real estate expenses to the same extent as an employee who purchases an existing house. Where each stage of the building process involves a number of expenses which would appropriately be reimbursed in connection with the purchase of an existing residence, the employee may be reimbursed only once for each type of expense that is allowable under the regulations. In this regard, expenses incurred incident to permanent financing on the completed house are most representative of expenses an employee would incur to purchase an existing residence, and entitlement determinations should be based primarily on an examination of that settlement. When similar fees and expenses are incurred more than once as a result of the decision to construct a new home rather than buy an existing one, the duplicate fees are considered to have resulted from construction of the new home and are not reimbursable. David G. Winter, GSBCA 14429-RELO, 98-1 BCA ¶ 29,631; Brent T. Wahlquist, GSBCA 14613-RELO, 97-2 BCA ¶ 29,095.

Here, claimant chose to construct a new home rather than to purchase an existing home. Claimant incurred the sales tax during an intermediate stage in the construction of a new home. Thus, it is apparent from the existing record that the payment of the sales tax was

an expense resulting from the construction of the residence. See Brent T. Wahlquist; Carl Trueblood, B-221686 (May 8, 1986) (transaction privilege tax a cost of construction of new house).

There is an additional reason why reimbursement of the sales tax would not be allowable. Although transfer taxes are allowable items of reimbursement for sale or purchases of residences, 41 CFR 302-6.2(d)(1)(iv), we cannot conclude that the sales tax claimant paid to Cottages to Castles is comparable to a transfer tax on the purchase of an existing home made allowable under the FTR. The sales tax is imposed "for the privilege of selling, leasing, or renting tangible personal property." Wis. Stat. Ann. § 77.52. The transfer tax is imposed on every conveyance not exempted or excluded under this subchapter." Wis .Stat. Ann. § 77.22(1). The sales tax is a levy on the vendor's privilege of selling tangible personal property, while the transfer tax is a levy on the conveyance of real estate. The expenses are not comparable.

The third question is answered by our discussion above. The agency must base its decisions primarily on the examination of the settlement statement for permanent financing, but may refer to the other settlement statements in making its determinations.¹

ANTHONY S. BORWICK
Board Judge

¹ Apparently, the agency has determined to deny claimant the full amounts requested for appraisal fees, loan origination fees, title insurance, certifications, credit reporting fees, recording fees, building permit application, start-up permit, and utility certification. These matters were not within the scope of the agency's referral for a 31 U.S.C. § 3529 decision. Furthermore, claimant has not filed his own claim contesting the agency's determination on these matters, nor has the agency explained the basis for its determination. We therefore do not consider these issues.