

FOREIGN CLAIMS SETTLEMENT COMMISSION  
OF THE UNITED STATES  
WASHINGTON, D.C. 20579

Tax Offset

IN THE MATTER OF THE CLAIM OF

SIMMONS COMPANY

Under the International Claims Settlement  
Act of 1949, as amended

# 38  
Claim No. CU - 2303

Decision No. CU . 3337

PROPOSED DECISION

This claim against the Government of Cuba, under Title V of the International Claims Settlement Act of 1949, as amended, for \$732,761.00 was presented by SIMMONS COMPANY based upon the nationalization by the Government of Cuba of the business of the Cuban branch of its former wholly owned subsidiary, Simmons International. Ltd.

Under Title V of the International Claims Settlement Act of 1949, [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Section 504 of the Act provides, as to ownership of claims, that

(a) A claim shall not be considered under section 503(a) of this title unless the property on which the claim was based was owned wholly or partially, directly or indirectly by a national of the United States on the date of the loss and if considered shall be considered only to the extent the claim has been held by one or more nationals of the United States continuously thereafter until the date of filing with the Commission.

Section 502(1) of the Act defines the term "national of the United States" as "(B) a corporation or other legal entity which is organized under the laws of the United States, or of any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity."

An officer of the claimant corporation has certified that claimant was organized in Delaware and that at all pertinent times, more than 50% of the outstanding capital stock of claimant has been owned by United States nationals. Another officer of claimant has stated that 10% of its outstanding corporate stock is owned by nonnationals of the United States. The Commission holds that claimant is a national of the United States within the meaning of Section 502(1)(B) of the Act.

The Commission finds on the basis of evidence of record that claimant was the sole shareholder of Simmons International Ltd., which was organized in the State of New Jersey and had an operating branch in Cuba.

On October 24, 1960, the Government of Cuba published in its Official Gazette Resolution 3, pursuant to Law 851, which listed as nationalized Simmons International Ltd. The Commission finds that the business in Cuba, carried on in a branch office by Simmons International Ltd., then wholly owned by claimant herein, was nationalized by the Government of Cuba on October 24, 1960, within the meaning of Title V of the Act.

The record contains a copy of a Certificate of Dissolution By Unanimous Consent of All Stockholders dated November 19, 1964, and Resolution of the Board of Directors of Simmons International Ltd., dated November 23, 1964, whereby Simmons International Ltd., was dissolved and all of its assets subject to the liabilities, were distributed in kind to its sole stockholder, SIMMONS COMPANY, of Delaware (claimant), as a distribution in complete liquidation of Simmons International Ltd., and in complete cancellation of all of its capital stock. The Commission finds that SIMMONS COMPANY is the legal successor in interest and vested with the claim which arose in favor of the former Simmons International Ltd.

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value or cost of replacement.

Among the documentation submitted are balance sheets for Simmons International Ltd., (Cuban branch), for July 31, 1960 and October 31, 1960, deeds for the real estate, and detailed summaries and schedules reflecting the financial position of Simmons International Ltd. (Cuban branch) for the period immediately preceeding the loss. The balance sheet for the period ending October 31, 1960 shows the following:

ASSETS

Current Assets

Cash	\$ 127,075.00
Accounts Receivable	
Trade	158,464.00
Other	4,060.00
Inventories	
Finished Stock	25,709.00
Work in Process	9,609.00
Materials	133,398.00
In Transit	5,138.00
Total Inventories	<u>\$ 173,854.00</u>
Prepaid Expenses	<u>2,325.00</u>
Total Current Assets	\$ 465,778.00
Investments	4,500.00
Deposits	10,538.00
Fixed Assets - Cost	304,338.00
Less: Reserve for Depreciation	<u>52,393.00</u>
Net Fixed Assets	<u>\$ 251,945.00</u>
Total Assets	<u><u>\$ 732,761.00</u></u>

LIABILITIES

Accounts Payable	\$ 489.00
Accrued Expenses	2,548.00
Accrued Salaries and Wages	7,194.00
Accrued Taxes	6,305.00
Accrued Income Tax	<u>33,667.00</u>
	\$ 50,203.00
Head Office Account - November 30, 1959	592,456.00
Profit and Loss - 11 months to October 31, 1960	<u>90,102.00</u>
	<u>\$ 682,558.00</u>
Total Liabilities	<u><u>\$ 732,761.00</u></u>

The Commission has carefully considered all the evidence of record, taking into account the basis of valuation most appropriate to the property and equitable to the claimant, and concludes that the value of the assets of Simmons International Ltd., taken by the Government of Cuba as reflected in the October 31, 1960, balance sheet is the most appropriate basis of valuation. Accordingly, the Commission finds that the assets of the Cuban branch of Simmons International Ltd., at the time of nationalization had a total value of \$732,761.00.

Pursuant to the dissolution of Simmons International Ltd., on November 23, 1964, claimant succeeded to all of the assets of that Company, subject to its liabilities. Accordingly, claimant assumed the obligations of Simmons International Ltd. By virtue of these circumstances and the fact that the Cuban branch was not a legal entity organized under the laws of Cuba, the Commission would not deduct any of the outstanding liabilities in determining the amount of loss sustained within the meaning of Title V of the Act. However, certain of the items in the balance sheet warrant closer study.

It appears that the item in the October 31, 1960 balance sheet identified as "Head Office Account" was maintained merely as a control account between the parent and the branch and does not constitute a liability as that term is generally understood. Therefore, the aggregate amount of liabilities of the branch was \$50,203.00. The record shows that these liabilities included: (1) \$10,231.00 for accounts payable, accrued expenses, and salaries and wages, apparently payable to Cubans; and (2) \$39,972.00 for accrued taxes payable to the Government of Cuba.

Clearly, the liabilities due the Cubans in the amount of \$10,231.00, having been assumed by claimant, should not be deducted from the total value of the branch's assets. However, the taxes admittedly payable to the Government of Cuba are distinguishable from those other liabilities

inasmuch as this is a claim against the Government of Cuba. The question thus presented is whether these taxes should be deducted in determining the amount of loss under Title V of the Act.

The concept of set-off is well known in American and international law. (I Hackworth, Digest of International Law 391 (1940); Id. at II, 487, 489; I Whiteman, Damages in International Law 248-274 (1937).) Moreover, the Commission has applied this concept in previous claims programs authorized under other titles of the International Claims Settlement Act of 1949, as amended, which, like Title V, also required determinations to be made "in accordance with applicable substantive law, including international law."

Under Title III of the Act, the Commission was authorized to determine certain claims against the Soviet Government. Pursuant to the Litvinov Assignment of November 16, 1933, the United States acquired certain assets of the Soviet Government situated in the United States. In a suit by the United States against a bank which held part of these assigned assets, the bank was successful in its defense that the suit was barred by the statute of limitations. Accordingly, the Commission offset that bank's award on its claim against the Soviet Government under Title III of the Act to the extent of the amount the bank had retained as a result of its successful defense. (See Claim of Guaranty Trust Company of New York, Claim No. SOV-41460, Decision No. SOV-3041, 10 FCSC Semiann. Rep. 224, 226 (Jan.-June 1959).) Similarly, the concept of set-off was applied in reducing the award in another claim under Title III of the Act. (See Claim of First National City Bank of New York, Claim No. SOV-41261, Decision No. SOV-3126, 10 FCSC Semiann. Rep. 246, 255 (Jan.-June 1959).)

Having carefully considered this entire matter in the light of its statutory duty to determine the amount and validity of claims against the Government of Cuba, the Commission holds that claimant's loss should be offset by \$39,972.00, the amount of taxes the Cuban branch owed the Government of Cuba on the date of loss.

Accordingly, the Commission finds that Simmons International Ltd. sustained a loss in the amount of \$692,789.00 within the meaning of Title V of the Act as a result of the nationalization of its assets in Cuba by the Government of Cuba on October 24, 1960, and that claimant succeeded to the claim for the loss in that amount.

The Commission has decided that in certification of losses on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see the Claim of Lisle Corporation, FCSC Claim No. CU-0644), and in the instant case it is so ordered.

CERTIFICATION OF LOSS

The Commission certifies that SIMMONS COMPANY succeeded to and suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Six Hundred Ninety-Two Thousand Seven Hundred Eighty-Nine Dollars (\$692,789.00) with interest thereon at 6% per annum from October 24, 1960 to the date of settlement.

Dated at Washington, D. C.,  
and entered as the Proposed  
Decision of the Commission

NOV 27 1968

*Leonard v. B. Sutton*

Leonard v. B. Sutton, Chairman

*Theodore Jaffe*

Theodore Jaffe, Commissioner

*Sidney Freidberg*

Sidney Freidberg, Commissioner

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

Notice: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g) as amended, 32 Fed. Reg. 412-13 (1967).)