



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Requirement to Deposit Receipts from IRS
Undercover Operations into the Treasury

File: B-229631

Date: March 23, 1988

DIGESTS

1. Internal Revenue Service's short-term undercover operations may be treated as single transactions, and the amount of money that must be deposited into the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b), may be determined at the end of the operation.
2. The Internal Revenue Service needs specific legislation to carry out long-term business-type undercover operations that regularly offset income against expenditures. Absent this legislation, the failure to deposit receipts into the general fund of the Treasury would conflict with 31 U.S.C. § 3302(b). B-201751, February 17, 1981, clarified.

DECISION

The Internal Revenue Service (IRS) of the Department of the Treasury asks whether our decision B-201751, February 17, 1981, permits its undercover operations to be treated as single transactions in determining the amount of money that must be deposited into the Treasury as miscellaneous receipts, as generally required by 31 U.S.C. § 3302(b). In this regard, it wants to know whether money received by an investigator during an undercover operation may be used to offset money properly spent during the same undercover operation.

For the reasons given below, we find that the IRS may regard each short-term undercover operation as a single transaction, and it may wait until the end of the operation to determine the amount of receipts required to be deposited in the general fund of the Treasury. When the transaction is completed, the monies on hand that exceed monies originally appropriated for the operation must be deposited into the Treasury as miscellaneous receipts.

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On the other hand, if the IRS is engaged in a long-term undercover investigation, such as a business operation that regularly involves offsetting of income against expenditures, specific authorizing legislation would be necessary to retain receipts in its own account until the long-term enterprise is concluded.

BACKGROUND

In B-201751, February 17, 1981, the Treasury Department had requested our concurrence that monies received in an ongoing undercover operation conducted by the IRS did not have to be deposited as miscellaneous receipts in the Treasury under 31 U.S.C. § 3302(b) until the operation was concluded and the money was no longer needed as evidence of a crime. The Treasury Department mentioned, as examples of such operations, gambling winnings from bets placed by an IRS agent, or income generated by an undercover business established to detect tax law violators. Essentially, we agreed with Treasury's position and concluded that "requiring deposits of money accrued during an undercover operation as soon as it is received may not be practicable within the meaning of 31 U.S.C. § 484^{1/} in that it may jeopardize the success of the investigation."

Soon after our decision, the IRS implemented guidelines allowing income from an undercover operation to offset expenses of the same operation. Internal Revenue Manual, para. 9383.244 (May 18, 1984). Subsequently, the Justice Department informed the IRS Chief Counsel that the guidelines were inconsistent with the Justice Department's position, as expressed in a memorandum of its Office of Legal Counsel, dated July 27, 1978.

In that memorandum, the Justice Department concluded that section 3302(b) of title 31 required that all monies received by the Federal Bureau of Investigation (FBI) during undercover activities be paid into the Treasury. The memorandum suggested that this requirement meant that each hand in a card game constitutes a single transaction, for purposes of the deposit requirement of section 3302(b). Thus, the memorandum suggested that without specific statutory authority permitting the offsetting, these kinds of undercover operations were improper.

The Department of Justice relied on the legislative history of section 3302(b), showing that the provision was enacted to curb executive discretion in the handling of public

^{1/} Section 484 of title 31 subsequently became section 3302(b).

monies and to ensure that all expenditures would be authorized by the Congress consistent with article 1, section 9, clause 7 of the United States Constitution. Clause 7 provides the Congress with the sole authority to authorize the expenditure of public funds. The legislative history also demonstrated that section 3302 was intended to encompass revenue from "all miscellaneous sources."

The Department concluded that the FBI's broad statutory mandate to "detect and prosecute crimes against the United States," 28 U.S.C. § 533(1), was not sufficient authority to imply an exception to section 3302 for the various ways in which the FBI was using income to offset expenses in its undercover operations.^{2/} Subsequently, the Congress enacted legislation specifically authorizing the FBI and Drug Enforcement Administration (DEA) to, among other things, use proceeds from undercover operations to offset necessary and reasonable expenses incurred in such operations, without regard to section 3302 of title 31. Pub. L. No. 95-624, 92 Stat. 3459, 3465.

Consistent with its memorandum, Justice requested the IRS to revise Internal Revenue Manual, para. 9383.244, to eliminate the apparent authorization permitting offset of expenses against income in undercover operations. The IRS subsequently withdrew the guideline. However, IRS is not sure whether the Justice Department's position is correct and asks for our views.

The IRS is particularly concerned about wagering and money exchange operations. For example, if an undercover agent is given \$1,000 to enter a poker game, the IRS asks whether the entire poker game is one transaction for purposes of section 3302(b) or whether each bet must be considered as a separate transaction. Similarly, in a money exchange operation, if an undercover agent were given \$100,000 and the operation consisted of four separate exchanges, the IRS asks whether the entire operation, or each of the four separate exchanges, is one transaction for the purposes of section 3302(b).

LEGAL DISCUSSION

Article 1, section 9, clause 7 of the United States Constitution provides: "No money shall be drawn from the Treasury but in consequence of appropriations made by law."

^{2/} The Department specifically mentioned undercover businesses to investigate certain sorts of white collar and organized crime, and undercover gambling operations which involved frequent averaging of gains and losses.

Section 3302(b) of title 31 requires that all money received from whatever source for use of the United States be paid into the Treasury of the United States "as soon as practicable." The effect of section 3302(b) is to ensure that the Congress retains control of the public purse consistent with the Congress' constitutional authority to appropriate monies. See 51 Comp. Gen. 506, 507 (1972). As pointed out by the Justice Department, the legislative history of section 3302(b) supports this conclusion. We have frequently held that under section 3302(b), monies collected for the use of the United States must be covered into the Treasury as miscellaneous receipts, absent express statutory authority to the contrary. 39 Comp. Gen. 647, 649 (1960).

In B-201751, February 17, 1981, we held that money received during ongoing undercover operations need not be deposited into the Treasury as miscellaneous receipts until the operation is concluded or the money is no longer needed for use as evidence of a crime. Accord, 5 Comp. Gen. 289, 290 (1925) (money used to purchase evidence of violations of the narcotics and prohibition acts had to be deposited as miscellaneous receipts only after it had served its purpose as evidence in court). Although we did not specifically consider each type of undercover operation in B-201751, supra, we cited, as examples, gambling winnings from bets placed by an IRS agent to obtain evidence of violations of the wagering excise tax laws and income generated by an undercover business established by the agency to detect tax law violators. The emphasis in our decision was on the time at which monies had to be deposited into the general fund of the Treasury. We did not deal with the propriety of offsetting receipts against expenditures.

We agree with the Justice Department that the IRS is not authorized to carry out ongoing undercover operations that regularly offset expenses against income. The IRS does not have specific statutory authority to carry out these kinds of operations, as does the FBI and DEA as provided in recent legislation. Its criminal investigation authority is quite general. It is authorized to detect and bring to trial and punishment persons guilty of violating the Internal Revenue laws, 26 U.S.C. § 7623.

Conducting long-term business-type undercover operations that regularly offset expenses against income would conflict with the Congress' authority over public expenditures. By virtue of their scope and duration, these operations could not be viewed as single transactions after which deposit of revenues that exceed expenditures into the general fund of the Treasury would conform with section 3302(b)'s deposit requirement. This type of situation was not specifically

presented to us in the submission that led to our decision in B-201751, February 17, 1981.

On the other hand, we think that short-term operations may be considered single transactions for purposes of section 3302(b)'s deposit requirement. Examples might be card games, dice games or short-term money exchange operations which are not intended to be ongoing business enterprises. As these operations take many forms, we do not think it prudent to set forth more specific guidelines on what operations would and would not conform with section 3302. We leave that to the administrative discretion of the IRS.

For this kind of short-term, rapid fire operation, we would be inclined to take a "snapshot" of the amount of revenues received (over and above the amounts drawn from the agency's appropriation precisely for the undercover operation), at the end of the evening of gambling or the short-term money exchange enterprise, to determine the amounts required to be deposited. From this point of view, we do not believe the amounts won at each roll of the dice, regardless of whether subsequently lost on the next roll, must be included in determining the amount of funds to be deposited into miscellaneous receipts.

Consistent with our interpretation, deposit of net gains into miscellaneous receipts at the end of short-term undercover operations would not conflict with the requirement of 31 U.S.C. § 3302.

for 
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