GAO

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Office of the General Counsel

B-247635

March 13, 1992

The Honorable Stuart M. Gerson
Assistant Attorney General
Civil Division
Department of Justice

Attention: Mr. Robert Kopp
Director, Appellate Staff

Dear Mr. Gerson:

This letter responds to your letter of February 12, 1992, concerning GAO's position on whether your department should seek certiorari of the decision in Texas v. United States, No. 91-8042, slip. op. (5th Cir. Jan. 28, 1992). That decision held, among other things, that section 11 of the Debt Collection Act of 1982, as amended, abrogated the federal government's long established common law authority to assess interest on delinquent debts owed by units of state and local government. While we venture no opinion at this time with respect to other aspects of that decision, we recommend that your department seek certiorari with respect to the effect of the Debt Collection Act of 1982.

As you know, section 11 of the Debt Collection Act of 1982 generally requires agencies to assess interest, late payment penalties, and administrative costs on delinquent debts owed by "persons" to the United States. Pub. L. 97-365, 96 Stat. 1749, 1755-56, codified in 31 U.S.C. § 3717 (1988). It also provides that, for its purposes, "the term 'person' does not include any agency of the United States or any state or local government." 96 Stat. at 1756, codified in 31 U.S.C. § 3701(c). This definitional provision was inserted on the floor of the Senate without explanation and there is no legislative history to explain its purpose or meaning. B-212222, Jan. 5, 1984.

As the officials charged by law with the interpretation and implementation of the Debt Collection Act of 1982, the Attorney General and the Comptroller General have not read section 11 as an abrogation of the government's long-established common law authority to assess interest against state and local governments. Federal Claims Collection Standards, 4 C.F.R. § 102.13(i)(1991); 49 Fed. Reg. 8889, 8891, 8894 (1984) (Supplementary Information Statement). See also, e.g., B-212222, Jan. 5, 1984; B-212222, Aug. 23,

1983. Instead, it has been our view that, while units of federal, state and local government are by virtue of section 11's definition of "person" exempt from the Debt Collection Act's mandate to collect interest, penalties, and administrative costs on delinquent debts, the federal government retains whatever other legal authority it might have, including its common law authority, to assess interest on delinquent debts owed by state or local governments. Id. However, the decision in Texas v. United States interprets section 11 as affirmatively prohibiting the assessment of interest and other charges on delinquent debts owed by state and local governments. From this, the court concludes that the federal common law which authorizes the assessment of interest on debts owed by state and local governments has been abrogated.

The impact of the court's decision is not limited to the assessment of interest against states. Section 10 of the Debt Collection Act addresses the use of administrative offset to collect debts owed to the United States, and contains an identical definition of "person". 96 Stat. at 1754-55, as codified in 31 U.S.C. § 3701(c). The court's reasoning, if extended to section 10, would effectively deprive the United States of the ability to use interest and administrative offset, its two most important and effective collection tools, with respect to a particularly large category of delinquent debts.

Texas v. United States is the sixth circuit court decision to be handed down on this issue. Of the previous cases, three have ruled that section 11 abrogated the federal common law with respect to interest assessments.[1] The other two cases have supported the GAO-Justice position that the government's common law authority survived the act and may be applied to collect interest on delinquent debts of state and local governments.[2] Since GAO first became aware of these cases, we have consistently urged that this issue be taken to the Supreme Court. (Copies of our previous recommendations to your department in this respect have been enclosed for your consideration.)

For the following reasons, we recommend that Justice seek certiorari of the decision in Texas v. United States:

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[1] Arkansas v. Block, 825 F.2d 1254 (8th Cir. 1987); Pennsylvania v. United States, 781 F.2d 334 (3rd Cir. 1986); Perales v. United States, 751 F.2d 98 (2d Cir. 1984) (per curiam), aff'g 598 F. Supp. 19 (S.D.N.Y.).

[2] Gallegos v. Lyng, 891 F.2d 788 (10th Cir. 1989); County of St. Clair, Michigan v. United States, No. 83-3546, slip op. (5th Cir. Dec. 7, 1984) (unpublished).

(1) The court's reasoning offers little that is new and has not persuaded us that the GAO-Justice position lacks a rational basis and is not entitled to considerable deference from the courts. (2) The circuits are clearly in conflict. (3) In a footnote in West Virginia v. United States, 479 U.S. 305, 312 n.6 (1987), the Supreme Court ventured no opinion on the issue, but clearly indicated its awareness of the ambiguity in the Act.

If you or your staff have any questions regarding our position, or if we may be of further assistance to you in this matter, please do not hesitate to contact Mr. Neill Martin-Rolsky of my staff, at 275-5644.

Sincerely,

Gary L. Kepplinger
Associate General Counsel

Enclosures