



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-212222

February 11, 1986

The Honorable Richard K. Willard
Assistant Attorney General
Civil Division
Department of Justice

Attention: Mr. Robert Kopp
Director, Appellate Staff

Dear Mr. Willard:

This letter responds to an informal inquiry from [redacted] of your staff concerning GAO's position on whether to seek rehearing or appeal of the recent decision in Pennsylvania v. Block, Nos. 85-5186 through 5198 & 85-5269 through 5271, slip op. (3rd Cir. Jan. 6, 1986). As relevant here, the court held that the Secretary of Agriculture had no authority to assess interest on a debt owed by a state under the Food Stamp Act. The case required the court to interpret language in section 11 of the Debt Collection Act of 1982, Pub. L. No. 365, 97th Cong., 2d Sess., 96 Stat. 1749, 1756, 31 U.S.C. § 3701(c) (1982), which provides that "[f]or the purposes of this subsection, the term 'person' does not include any agency of the United States or any state or local government." The decision interpreted that language to abolish the Government's common law authority to assess interest on debts owed by state and local governments. We disagree and urge rehearing or appeal (as appropriate) of the decision.

GAO and the Justice Department determined in the Federal Claims Collection Standards (FCCS), 4 C.F.R. ch. II (1985), that section 11 should be given what both agencies agreed was its plain and ordinary meaning. Consequently, the FCCS indicated that the language used constituted an exemption from the Act's coverage, rather than a prohibition that displaced the Government's long-established common law authority to assess interest against state and local governments. The FCCS prescribe the same interpretation for an identical definition of "person" contained in section 10 of the Debt Collection Act (concerning administrative offset), as well as for a similar set of exemptions (concerning debts or payments arising under the Social Security Act, the Internal Revenue Code, and the tariff laws) that are prescribed in section 8 of the Act. See 4 C.F.R. §§ 102.13(i), 102.3(b)(4) 102.19; 49 Fed. Reg. 8889,

8891, 8894 (Mar. 9, 1984) (supplemental statement). In addition, the Comptroller General previously issued several decisions that reach the same conclusions. See B-212222, Jan. 5, 1984; B-212222, Aug. 23, 1983; 62 Comp. Gen. 599, 601-02 (1983); B-209669, Dec. 17, 1982. (Copies of these decisions are enclosed for your convenience.)

First, although these statutory regulations and official interpretations by GAO and the Department of Justice were brought to the attention of the court, its decision accords little, if any, weight to them. See Pennsylvania, slip op. at 16-18. As you know, GAO and Justice have historically borne the primary responsibility for supervising the Government's debt collection activities, including implementation of the Federal Claims Collection Act of 1966 which the Debt Collection Act amended. Consequently, unless it can be shown to be arbitrary and capricious, the GAO-Justice interpretation of those acts is entitled under the usual precedents to considerable weight. E.g., Northeast Bancorp v. Board of Governors, ___ U.S. ___, 105 S.Ct. 2545 (1985); Securities Industry Ass'n v. Board of Governors, ___ U.S. ___, 104 S.Ct. 3003, 3009 (1984). In our opinion, the GAO-Justice position is reasonable and correct, and the court erred in failing to accord it much greater weight.

Second, the decision refers to Milwaukee v. Illinois and Wisconsin, 451 U.S. 304 (1981), for the proposition that "where Congress has legislated," the need for Federal common law is abolished. Pennsylvania, slip op. at 17. However, in Milwaukee, the Supreme Court explicitly rejected the suggestion that its rule amounted to the "automatic displacement" of Federal common law whenever legislation is enacted. 451 U.S. at 315 n.8. The Court explained that:

"* * * the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by common law." Id. at 315 n.8 (emphasis added).

Putting it another way, the Court said that the proper approach is to determine "whether the legislative scheme 'spoke directly to [the] question' * * *." Id. at 315.

In view of the precise language used in section 11, we cannot agree that that Congress "spoke directly to" this issue in the Debt Collection Act. Nor can we find any indication in

Pennsylvania that the court actually conducted an "assessment of the [Act's] scope" in order to ascertain that fact for itself. Instead, the decision simply characterizes the Act as "comprehensive" and "unambiguous." In our view, those characterizations assume the conclusion on the issues to be decided under Milwaukee.

Third, the decision in Pennsylvania indicates that it gives the disputed language its "plain and ordinary meaning." (Oddly, the decision does not even quote the language at issue.) Although this is the same principle that GAO and Justice applied, the decision reaches a diametrically opposed conclusion. We continue to believe that the plain language of the Act does no more than exempt debts owed by state and local governmental bodies from the scope of the sections in which that definition occurs. Since the disputed provision contains no reference to the common law or to prohibiting interest (or administrative offset) against the states, we simply do not understand how the interpretation offered in Pennsylvania was derived. In our view, the statute's silence is "eloquent." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979). Had it intended to say more, Congress certainly could have done so. E.g., Milwaukee, 451 U.S. at 329 n.22.

Nevertheless, even were we accept the decision's interpretation of the Act as a reasonable alternative, we submit that this would demonstrate nothing more than the fact that reasonable minds may disagree concerning the meaning of that language. As we have already noted, the mere existence of another reasonable interpretation is not itself sufficient grounds for a reviewing court to substitute its judgment for that of the agencies responsible for administering an act.

Fourth, on page 18, the decision places some reliance upon Perales v. United States, 751 F.2d 95 (2d Cir. 1984) (per curiam), aff'g 598 F. Supp. 19 (S.D.N.Y. 1984), which it says is the only other decision to consider this issue. We suggest that this reliance is misplaced. In Perales (which consisted of a summary affirmance of the lower court's decision) it was held that the applicable statutory and regulatory provisions:

"* * * make clear that claims do not have to be paid, and cannot be collected, until a state agency forgoes an appeal or receives a final determination from the Appeals Board. [Those statutes and regulations] lead to the conclusion that [the Food and Nutrition Service] is not empowered to impose late payment interest

penalties on state agencies, particularly for any period of time prior to the state agency's waiver or exhaustion of an administrative appeal." Perales, 598 F. Supp. at 25.

From this passage it appears to us that the subsequent discussion in Perales of the definition of person in section 11 of the Debt Collection Act of 1982 should be regarded as "dicta." Moreover, we note that, based on Califano v. Yamasaki, 442 U.S. 682 (1979), the FCCS expressly require agencies to suspend collection (including the assessment of interest) whenever the debt to be collected is subject to "mandatory" administrative review or waiver statutes or regulations. 4 C.F.R. §§ 102.13(h), 104.2(c)(1).

Fifth, the second and third circuits are not the only circuits that have considered these matters. For example, in the sixth circuit, there is an unpublished decision, County of St. Clair, Michigan v. United States, No. 83-3546, slip op. (6th Cir. Dec. 7, 1984) (per curiam) (copy enclosed), which reaches a conclusion consistent with the GAO-Justice position. Cf. also United States v. West Virginia, 764 F.2d 1028 (4th Cir. 1985).

Sixth, established principles of statutory construction dictate that statutory constructions which produce absurd or unreasonable results should be avoided, especially when they are at variance with the purpose and policy of the legislation as a whole. E.g., Perry v. Commerce, 383 U.S. 392, (1966); 2A Sutherland, Statutes and Statutory Construction, §§ 45.12, 47.38; 61 Comp. Gen. 461, 486 (1982). We think the decision in Pennsylvania does not conform with these principles.

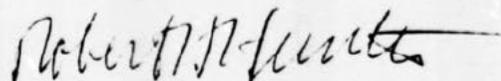
If allowed to stand, the decision in Pennsylvania (and Perales) will seriously jeopardize the viability of the Government's debt collection activities against state and local governments by both explicitly and implicitly depriving the United States of its two most effective collection tools-- interest assessments and administrative offset. There is nothing in the legislative history of the Debt Collection Act of 1982 to support the conclusion that this was the intent of Congress. To the contrary, that result clearly flies in the face of the Act's "major purpose" which was to facilitate "substantially improved" debt collection activities. See S. Rep. No. 378, 97th Cong., 2d Sess. 1 (1982). Thus, the import of Pennsylvania is that Congress destroyed major elements of the Government's debt collection authority in a statute whose stated purpose was to enhance that authority.

In conclusion, while the intent of Congress concerning the disputed provision is not as clear as we would like, we believe the language used is clear, and that it should be accorded its plain and ordinary meaning, consistent with the overall intent and purposes of the Debt Collection Act. We believe that the decision in Pennsylvania is contrary to established principles of statutory construction, and inconsistent with the rule prescribed by the Supreme Court in Milwaukee. Finally, we believe that the GAO-Justice interpretation of the disputed provision is reasonable and consistent with the basic purposes of the Debt Collection Act, and is entitled, under the usual precedents, to considerable deference by the courts, unless it is shown to be arbitrary and capricious, which was not done in either case.

At most, all the Pennsylvania court did was demonstrate that it is possible to reach a different result. This should not be enough to overcome statutory regulations issued not by a single agency but jointly by the two agencies with established expertise in and responsibility for the subject matter.

For these reasons, we strongly urge the Department of Justice to seek a rehearing or appeal (as appropriate) of the decision in Pennsylvania. Should this effort be unsuccessful, we further urge that the Pennsylvania decision not be viewed as controlling in other circuits. If you or your staff have any questions concerning our position in this matter, please feel free to contact Mr. Neill Martin-Rolsky of my staff at (202) 275-5544.

Sincerely yours,



Robert H. Hunter
Assistant General Counsel

Enclosures