

DECISION

19785
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-194420

DATE: October 15, 1981

MATTER OF: Refund Rental Fees Collected from Forest Service
Employees for Use of Government-owned Quarters

DIGEST: While the administrative policies pertaining to use of Government-owned quarters by Government employees may be prospectively modified in accordance with Office of Management and Budget (OMB) Circular No. A-45, they may not be amended so as to operate retroactively to decrease or increase a tenant's right already vested or fixed, except to correct obvious errors. 33 Comp. Gen. 174 (1953). Therefore, while there would be no objection to OMB approving prospectively a rental rate scheme which discounts for the state possessory interest taxes paid by Forest Service employees on Government-owned quarters, Agriculture does not have authority to refund rental fees already collected.

The Department of Agriculture requested an advance decision concerning whether the Department may refund part of the rental fees collected from employees of the Forest Service for their use of Government-owned quarters. We were also asked, if such a refund is authorized, whether Agriculture may charge the funds to its current appropriation being credited with quarters rental. We conclude that while a prospective rate change, approved by the Office of Management and Budget (OMB), is permitted by OMB Circular No. A-45, which establishes the basis for determining rental rates on Government-owned quarters, refund by Agriculture of rental fees already collected from employees is not authorized.

The Forest Service provides rental quarters for its employees at many locations inside national forests under authority in 5 U.S.C. § 5911(b). The rates charged for these quarters are based on the reasonable value of the quarters to the employee. 5 U.S.C. § 5911(c). According to Agriculture, the rental rates are based on surveys of private rates for housing comparable to Forest Service quarters. The rates "reflect those the employees would expect to encounter in the private rental market, and not the actual cost to the Government of furnishing the quarters." This is in accordance with OMB policy governing charges for rental quarters. OMB Circular No. A-45.

California law permits counties to impose a tax on the possessory interest in improvements (such as a tenant's interest in his leasehold) on tax-exempt land. (Sections 104-107, California Revenue and Tax Code, and section 21(b), title 18, California Administrative Code.) Such taxes have been imposed by California counties and Forest Service employees paid them under protest beginning in 1967. These employees, together with the United States, sued for a refund

116655

~~018940~~

in California state courts. After challenging the tax for more than 8 years in the state courts, the employees argued to the Supreme Court that the tax operates to discriminate against the Federal Government and its employees in violation of the Supremacy Clause of the United States Constitution.

The Supreme Court held that the tax was not barred by the Supremacy Clause as a state tax on the Government or Federal property. United States et al. v. County of Fresno, 429 U.S. 452 (1977). In specifically answering the employees argument, the Supreme Court said:

"* * * [H]ere the State of California imposes a property tax on owners of nonexempt property which is 'passed on by them to their * * * lessees.' Consequently, the [employees] who rent from the Forest Service are no worse off under California tax laws than those who work for private employers and rent houses in the private sector." 429 U.S. at 465.

In its submission to us, Agriculture maintains that the employees are, in fact, worse off than their counterparts in the private sector because the employees, in effect, paid tax on the same quarters twice. The submission states that Forest Service rental rates were based on private rates, which included an element representing property taxes imposed on the owners of private rental property and passed through to tenants in rental charges. Because the employees paid these rates, and also paid county possessory interest taxes on their leaseholds, "the economic burden of the tax on an employee is inflated." Accordingly, Agriculture proposes to refund "an amount equal to the possessory interest taxes paid" since 1967, when the employees first protested payment of the taxes.

OMB Circular No. A-45 states as a "Basic rent principle" in paragraph 6 that "basic rental rates will be set at rates prevailing for comparable private housing in and adjacent to" an established community or region as defined therein. Where an established community or region is not available for comparison purposes, the Circular permits other methods of establishing rentals, such as appraisals by independent appraisers. However, the basic approach remains the same. Rental rates for Government-owned quarters are to be comparable to rates charged for comparable non-Government housing. While owner property taxes may be one of the elements which bear on the establishment of private rental rates, the Circular does not contemplate any deductions from rentals for this element in situations where, as here, a county imposes a possessory interest tax on occupants of Government-owned quarters.

Although the Circular recognizes in paragraph 6(c) that "there are cases in which the direct application of the principle of

comparability with private rents might result in either higher or lower rental rates than 'the reasonable value of the quarters', it strictly limits additions and deductions to specific situations set out in paragraph 6(c), which do not include deductions for taxes paid by tenants. ^{1/} Additions or deductions other than those allowed by paragraph 6(c) are allowed by paragraph 6(d)(4) only upon approval by OMB following a written request by the landlord agency. Paragraph 6(d)(4) provides as follows:

"(4) Exceptions. Efforts have been made in the preparation of this Circular to allow for the unusual circumstances that exist with respect to rental quarters. Alternatives to the requirements included in this Circular will therefore be prescribed only upon written request in those very unusual circumstances where it is demonstrated to the Director of the Bureau of the Budget that the application of the provisions of this Circular would not result in a rental rate equivalent to the 'reasonable value' of the quarters to the occupant. Whenever alternative requirements may be prescribed by the Director of the Bureau of the Budget, the agency concerned will be notified in writing."

In this case, apparently because of the court challenge of the state possessory interest tax, no action was taken by Agriculture during the period for which refunds are contemplated to change the rental rates for Government-owned quarters in California in accordance with paragraph 6(d)(4) of the OMB Circular. Further, the rental rates were apparently agreed to and paid by the occupants for the period in question on the assumption that the court challenge would be successful.

The question of whether an agency may refund rental fees was addressed in 33 Comp. Gen. 174 (1953). While that decision dealt with an earlier version of OMB Circular No. A-45, the reasoning therein is equally applicable to Agriculture's proposal to refund part of the rental fees collected from Forest Service employees. We stated in 33 Comp. Gen. 174, 176 in this connection:

^{1/} The implementing regulation, Forest Service Manual paragraph 6445.4 (December 1974, Amendment 43), also strictly limits additions and deductions to specific situations set forth in Manual paragraphs 6445.41 through 6445.46, which do not include deductions for taxes paid by tenants.

B-194420

"* * * it must be held that while * * * statutory regulations or the administrative policies of housing rentals may be subject to modification from time to time under [OMB] Circular No. A-45, consistent with applicable law, they may not be amended so as to operate retroactively to decrease or increase a tenant's right already vested or fixed, except to correct obvious errors.* * *"

Compare 55 Comp. Gen. 243 (1975), 56 Comp. Gen. 1015 (1977), and the cases cited therein.

Also, in 32 Comp. Gen. 315, 317 (1953), we explained our rule against giving amended regulations retroactive effect, as follows:

"* * * While the Congress is empowered to enact legislation retroactively increasing or creating new Government obligations, it is not to be supposed, in the absence of definite statutory provision, that the Congress has intended to grant such authority to administrative officials. To recognize such an administrative authority would mean that the Government's obligation under existing and preexisting regulations would never be fixed or finally settled. That is not to say, of course, that regulations required by statute may not, when first issued, [be] made retroactive in proper cases to the date contemplated by the statute. * * *"

The applicable statutory provision in this case, 5 U.S.C. § 5911(f), provides the President with the discretionary authority to prescribe regulations governing the determination of rates and charges for Government-owned quarters. Section 5911(f) does not contemplate that regulations prescribed under its authority will be given retroactive effect. 2/

2/ Presidential authority under 5 U.S.C. § 5911(f) to issue regulations implementing the law was delegated to OMB (then Bureau of the Budget) by Executive Order No. 11184, October 13, 1964, 29 Fed. Reg. 14155 (1964) and by Executive Order No. 11609, July 22, 1971, 36 Fed. Reg. 13747 (1971). The current version of OMB Circular A-45 was issued October 31, 1964, and was revised in 1968 and 1974.

B-194420

While, as suggested above, prospective approval by OMB of a rental rate which would discount for the state possessory interest tax would be permissible and Agriculture therefore could have sought a revision in rental rates for the period in question, it did not do so. Further, as indicated in 33 Comp. Gen. 174, supra, the rights of the tenants and the Government vested upon payment of the established rent by the tenants and occupancy of the quarters.

Accordingly, we conclude that the suggested refunds are not authorized.

for Milton J. Fowler
Comptroller General
of the United States