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DECISION

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

FILE: B-210176 **DATE:** February 7, 1984

MATTER OF: Department of Energy retrieval of moneys erroneously paid into United States Treasury under consent order settlements of alleged violations of petroleum price and allocation regulations

DIGEST:

1. Department of Energy exceeded its statutory authority to collect and dispose of funds obtained in consent order settlements of alleged violations of petroleum price and allocation regulations by depositing funds in Treasury as miscellaneous receipts without prior efforts at restitution to overcharged purchasers. Funds were erroneously deposited and are subject to retrieval by Energy under 31 U.S.C. § 1322 for distribution following administrative proceedings under 10 C.F.R. § 205.280 et seq.

2. Department of Energy should compile a list of consent orders which provided for deposit of settlements of alleged violations of petroleum price and allocation regulations in Treasury as miscellaneous receipts without prior efforts at restitution to overcharged customers. The list should identify potentially overcharged customers, and be published in the Federal Register as a Notice inviting claims for payment with supporting evidence from such customers. Reasonable claims should be referred for administrative proceedings under 10 C.F.R. § 205.280 et seq. Pending consent orders should be amended to include administrative proceedings for claimants. Funds remaining undistributed after administrative proceedings are to be deposited in miscellaneous receipts account of Treasury.

This decision to the Secretary of Energy results from a Congressional request of December 3, 1982, in which we were asked to determine whether moneys paid directly into the United States Treasury as miscellaneous receipts, pursuant to a 1980 consent order between Sun Company, Inc. and the Department of Energy settling alleged violations of petroleum price and allocation regulations, should be retrieved and deposited in an escrow account for possible subsequent distribution by Energy to overcharged customers of Sun. The requester was concerned about and wanted our response to apply as well to funds deposited in the Treasury as a result of Energy's continuing practice of including similar payment provisions in more recent consent orders.

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We studied a legal memorandum provided by the requester in light of relevant legislative history, judicial precedents, our own decisions, and pertinent legal journals. For the reasons set forth below, we conclude that funds deposited as miscellaneous receipts without prior efforts at restitution are subject to retrieval by Energy under 31 U.S.C. § 1322 for distribution following appropriate administrative proceedings.

BACKGROUND

The underlying rationale for our opinion here rests on the conclusions reached in our previous opinions, B-200170, April 1, 1981, 60 Comp. Gen. 15 (1980), and in our May 1983 decision to the Secretary of Energy on the use of consent orders to distribute petroleum overcharge settlement funds, 62 Comp. Gen. 379 (1983). In that decision we found, among other things, that Energy had used consent orders improperly in a number of cases by making, or allowing the oil companies to make, distributions of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges. As a result, we found, payments were made by oil companies and by Energy to institutions (including the Treasury) that were not actually injured by the overcharges and lacked an appropriate connection to the overcharges. In addition, and more importantly, overcharged customers were denied an opportunity to present claims through Energy's established administrative procedures. 62 Comp. Gen. at 380.

These conclusions are rooted in our established view of Energy's authority to distribute overcharge settlements as a limited, implied authority to effect restitution by distributing the funds only to consumers injured by the overcharges, or to classes of consumers with a clear connection to the overcharges. B-200170, April 1, 1981; 60 Comp. Gen. 15, 22, 24, supra. As set forth in our May 1983 decision, 62 Comp. Gen. at 383, our view of Energy's obligation to identify and make refunds to those overcharged was, in effect, corroborated by the Temporary Emergency Court of Appeals (which is the exclusive appellate forum for questions arising under the petroleum price and allocation regulations) in its statement: "Suffice it to note that the Government has a duty to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717, 723 (TECA) cert. denied, 103 S. Ct. 172 (1982) (hereinafter, Citronelle v. Edwards). The court also pointed out that where it is possible to determine the purchasers of overpriced oil, and through these to attempt to locate consumers ultimately

overcharged as a result, "[i]t follows that payment to the United States Treasury is not restitution in the true sense of the word, or in the objectives of the statutes here involved." Id., at 722.

In our May 1983 decision we reviewed our analysis of Energy's Subpart V regulations for the distribution of overcharge funds when the recipients or amounts of refunds cannot be readily identified (10 C.F.R. §§ 205.280-205.288), and reiterated our belief that the use of these Subpart V procedures is mandatory in every such instance. We held that:

> "[w]henever settlement funds cannot be distributed readily to identifiable overcharged consumers or classes of consumers, Energy lacks authority to agree to a consent order provision that distributes overcharge settlement funds directly, or in which distribution is to be made by the oil company, without first attempting to find claimants through [Subpart V] proceedings." 62 Comp. Gen. at 386.

We took issue with Energy's frequent assertions (in court and in preambles to consent orders) that identification of purchasers is impossible in cases where price and allocation programs had national cost effects. We briefly discussed some recent decisions from Energy's Office of Hearings and Appeals (OHA) establishing procedures for refunds in cases where overcharges affected virtually all users of petroleum products, and where petroleum products passed through many hands before reaching the ultimate consumer. 62 Comp. Gen. at 390-91. On this basis, we stated, "whenever there is any question as to the identity of the recipient or the amount of payment, then the case must be referred to OHA." Id. at 390.[1/]

[1/] This view was adopted recently by a Federal district court faced with a question involving the distribution of overcharges where the overcharges most likely had been passed along to the ultimate consumers, where it was impossible to ascertain the precise injury to each, and where even the identification of the amount of overcharges would be extremely complex at best. In Re: The Department of Energy Stripper Well Exemption Litigation, No. MDL 378 (D. Kan. filed September 13, 1983).

DISCUSSION

As stated above, we have determined that the direct payment provisions of numerous consent orders were improper. We now consider whether these improper provisions rendered the payments to the Treasury "erroneous" within the meaning of the relevant statute and if so whether and to what extent such funds may be retrieved from the Treasury.

The Direct Payments were Erroneously Deposited as Miscellaneous Receipts

The first question to be resolved is whether the improper direct payment consent order provisions rendered the payments "erroneously" received and deposited within the terms of 31 U.S.C. § 1322(b)(2) (formerly 31 U.S.C. § 725q and 725q-1), which states in relevant part:

> "(b) [N]ecessary amounts are appropriated to the Secretary of the Treasury to make payments from—
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> * * * * *
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> "(2) the United States Government account 'Refund of Moneys Erroneously Received and Covered' and other collections erroneously deposited that are not properly chargeable to another appropriation."

The terms "erroneously received" used in the former statute, and "erroneously deposited" in the current codification have no statutory definition, and none has been identified in our review of applicable case law.

In previous decisions we have agreed that erroneous collections had been made, and that refunds were appropriate. For example, in a case involving fees collected by the Securities and Exchange Commission (SEC) and deposited as miscellaneous receipts, the SEC determined that the fees had been improperly collected according to criteria set forth in subsequent Supreme Court decisions involving similar fees. We concluded that refund of the fees was authorized by 31 U.S.C. § 725q. 55 Comp. Gen. 243 (1975). In a more recent decision involving certain fees collected by the Department of the Interior, the Federal courts held these fees were not required to be collected under applicable statutes, and were erroneously collected as a result. The court ordered Interior to refund the fees. 61 Comp. Gen. 224 (1982).

It is interesting to note that the SEC determination of error in its collection of fees was based on judicial decisions establishing criteria for the collection of fees by other agencies. In the matter at issue here, courts have construed statutes directly applicable to Energy's actions and authority, and have, in effect, established legal requirements to be followed by Energy in its attempted collections and distributions.

In view of our series of decisions and of these judicial decisions mandating efforts by Energy to attempt to ascertain and make distributions to those overcharged, and given OHA's recent efforts to provide an administrative forum for claimants under even those programs with national cost effects, we believe that criteria have evolved outlining the proper limits of Energy's authority to collect and dispose of overcharge funds. At no time, however, has this authority extended to the use of consent order provisions directing the payment of funds into the miscellaneous receipts account without prior attempts to satisfy Energy's duty to make restitutionary refunds to overcharged purchasers or those closely connected to the overcharges. For this reason, all such payments were erroneously deposited as miscellaneous receipts in the Treasury.

Retrieval of Erroneously Deposited Funds

The general rule governing refunds of erroneously collected funds is set forth in our decision at 17 Comp. Gen. 859 (1938). This decision states:

> "It is only when collections erroneously covered into the Treasury as miscellaneous receipts are involved and the refund is not properly chargeable to any other appropriation that there is for consideration charging the appropriation 'Refund of moneys erroneously received and covered.'" Id. at 860.

In this case the funds at issue were not originally appropriated by Congress, but rather were paid by oil companies to settle allegations of price and allocation overcharges, and were deposited as miscellaneous receipts. Thus, the only appropriation properly chargeable is 31 U.S.C. § 1322(b)(2). Since the funds were erroneously deposited, they can be retrieved and refunded under this statute upon issuance by the Secretary of Energy of an appropriate order. Before the Secretary can initiate any refunds, however, further administrative proceedings will be necessary.

We do not suggest that the Secretary should initiate the retrieval process immediately, or that all of the consent order funds currently in the miscellaneous receipts accounts can in fact be refunded to appropriate individuals, classes or states. The Secretary should, however, direct the Economic Regulatory Administration or OHA to compile at the earliest possible date a list of all consent orders under which alleged violations of price and allocation regulations were settled by the payment of funds into the Treasury without an attempt to effect restitution to purchasers. This list should include the identity of the company or companies agreeing to each consent order as well as all known major purchasers from such companies.

This list should be published in the Federal Register as a Notice, inviting purchasers in the chain of distribution under each consent order who believe they can establish a claim to a share of those funds to present their claims and supporting evidence to Energy within a reasonable time, for example, 60 days. Upon receiving the claims, Energy should examine the evidence and refer all reasonable claims to OHA for Subpart V proceedings.

Future consent orders should provide for payments into the Treasury as miscellaneous receipts only following attempts by Energy to effect restitution to injured purchasers, including referral to OHA where such purchasers are not otherwise identifiable.

Any funds determined by OHA to be undistributable under its current standards should remain in the Treasury as miscellaneous receipts, in accordance with our previous decisions on this issue, 62 Comp. Gen. at 391; 60 Comp. Gen., at 26-27. On this point, we note the following statement of the court in the Stripper Well decision, with respect to appropriate remedies for funds found to be undistributable after referral to OHA:

> "[A] direct refund to the United States Treasury would serve equitable and restitutionary goals. While such a remedy would not aid energy consumers as directly as refund to the states for use in energy programs, it would have certain advantages. It would involve virtually no administrative expense and would benefit the public at large by increasing federal revenues. Since mobile transportation is an all encompassing way of life in our nation, those injured may well be the public at

large. Hence such a distribution would probably serve the purpose of aiding the injured party. It would also, of course, fulfill the restitutionary goal of requiring plaintiffs to disgorge their judicially-determined illegal gains." Stripper Well, slip opin. at 16.

CONCLUSION

On the basis of our previous analysis of recent actions by Energy in settling cases with alleged violators of Federal petroleum price and allocation regulations, we concluded that Energy had been using consent orders improperly in a number of cases by allowing the distribution of overcharge refunds without prior efforts to identify those overcharged and the amounts of overcharges. We concluded that these actions exceeded Energy's statutory authority to enforce compliance with its regulations, 62 Comp. Gen. at 388-391, and that Energy acted without authority to avoid its Subpart V procedures by agreeing to consent order provisions that distributed settlement funds directly to the miscellaneous receipts account of the Treasury and elsewhere without prior efforts to locate injured parties.

We now conclude that payments made to the Treasury pursuant to these unauthorized consent order provisions were erroneously deposited into the Treasury as miscellaneous receipts, and under 31 U.S.C. § 1322(b)(2) are subject to retrieval and to refund to overcharged purchasers if or when distribution plans are adopted following OHA proceedings.

Using its authority to effect restitution by the means of Subpart V proceedings, Energy should reconsider the direct payment consent order provisions it has entered, and compile a list of all such consent orders, including the companies involved and known major purchasers from them. It should publish the list as a notice in the Federal Register inviting the claims of potentially overcharged purchasers, refer reasonable claims to OHA for Subpart V proceedings, and when distribution plans are adopted by OHA, should order the retrieval and refund of moneys to identified injured parties. Any funds which cannot be distributed under this system should remain as miscellaneous receipts.

Since this decision contains recommendations for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of

1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendations.

Milton J. Socolar
for Comptroller General
of the United States