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B-238201 April 15, 1991

Number: B-238201

Date: 1991-04-15

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Mr. Malcolm E. Hill 1409 West 112th Place Chicago, Illinois 60643

Dear Mr. Hill:

On December 28, 1989 and January 19, 1990 you sent letters to this office about what you perceived as the improper "accrual" of fiscal year 1988 funds by the General Services Administration (GSA), Region 5, Chicago, for real estate taxes on the Mount Vernon Federal Building. After reviewing your submission and discussing the matter with GSA officials, /1/ it appears that the funds were properly recorded.

According to your submission the question of whether funds were improperly recorded by GSA arose from the following circumstances. Under the Purchase Contract Program, 40 U.S.C. Sec. 602a, GSA entered into arrangements to purchase buildings in Cook County and Jefferson County, Illinois, on an installment basis. Although federal property is usually exempt from state and local taxation, under the provisions of 40 U.S.C. Sec. 602a(d), federal interests in real property under the Purchase Contract Program "shall be subject to State and local taxes until title to the same shall pass to the Government of the United States." Cook County submitted tax bills to GSA under this law as well as an Illinois statute, Ill. Rev. Stat. ch. 120, pare. 500.4, which allowed taxation of property the United States permits or may permit to be taxed. GSA then contested these taxes in federal court and in 1984, the United States Court of Appeals for the Seventh Circuit held that Cook County's levy of property taxes constituted unconstitutional discriminatory taxation against the Federal Government, United States v. County of Cook, Illinois, 725 F.2d 1128 (7th Cir. 1984).

In response, the Illinois legislature amended another law, Ill. Rev. Stat., ch. 120, para. 500.9a, to authorize the taxation of government property purchased by installment contract. At the request of GSA, the Department of Justice instituted litigation seeking declaratory and injunctive relief against the imposition of the taxes under the amended state statute. This litigation is still pending although a motion for dismissal by the defendants was ruled on in favor of the Federal Government on May 16, 1989. United States v. Hynes, Civil Action No. 88 C 3732, U.S. District Court, Northern District of Illinois, Eastern Division (1989 U.S. Dist. LEXIS 5638).

In an internal GSA memorandum dated October 18, 1989, Regional Counsel Harry Gerdy asserted that despite a preliminary decision favorable to the United States, the outcome of the litigation is still in doubt.

With respect to the accrual of funds, if there is a final decision adverse to the Government, Jefferson County where Mount Vernon is located could back tax the Federal Government pursuant to Ill. Rev. Stat., Ch. 120, Para.(s) 701 et seq. These taxes would be a charge against the property from the date of the adverse decision. . . . Thus, it is recommended that funds be accrued until this matter is settled.

GSA accrued then current FY 1989 funds and expired FY 1988 funds, apparently as loss contingencies, for the potential tax liability of the Mount Vernon building that could result if a court ruled against the government in the litigation mentioned above.

Your concerns arose because GSA accrued the potential tax liability even though Jefferson County never submitted a tax bill to GSA or made known any claim that the building in Jefferson County under GSA's control was taxable. You also point to 31 U.S.C. Sec. 1502(a) which precludes the obligation of appropriated funds beyond their legal availability.

Because the underlying legal liability of the Government has yet to be established, the potential tax liability of the Mt. Vernon building is not sufficiently definite to be recorded as an obligation. However, GSA has not actually obligated funds for this purpose, and thus the proscription in 31 U.S.C. Sec. 1502(a) is not applicable here. Instead, in terms of fiscal operations, it is possible for GSA officials to have recorded the potential liability as a commitment through the budgetary account "Commitments Available for Obligation" in the Standard General Ledger. This accounting procedure reflects allotments or other available funds which are earmarked in anticipation of a potential obligation and is used for purposes of effective financial planning. See GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, Sec. 3.4.E. (Feb. 1990).

Even though Jefferson County has not submitted any claim for taxes against the Mt. Vernon building, under current Illinois law, the building could still be back taxed. From a proprietary accounting perspective, it appears that GSA officials considered the likelihood of this happening to be either "probable" for recognizing that an actual loss may occur /2/ or "reasonably possible" for disclosure of loss contingencies in the agency's financial statements, as set out in title 2, appendix I (TS No. 2-24, Oct. 31, 1984) of our Policy and Procedures Manual for Guidance of Federal Agencies. Since this office is not familiar with the merits of the litigation in this case, we are not prepared to question GSA's treatment of the potential tax liability of the Mt. Vernon building as a contingent liability. We are, however, sending GSA officials a copy of this letter with reference to the accounting standards for recording accrual of loss or disclosure of loss contingencies.

Sincerely,

Gary L. Kepp;inger Associate General Counsel

1. On October 3, 1990, an attorney on my staff discussed the issues you raised with Gabriel Steinburg, GSA/Chicago Deputy Regional Counsel, and Karen Locklear of GSA's Budget Division in Washington.

2. Another requirement for an accrual of loss is that the amount of the potential loss be reasonably estimated. GAO, Policy and Procedures Manual for

Guidance of Federal Agencies, title 2, appendix I (TS No. 2-24, Oct. 31, 1984). The Oct. 18, 1988 memorandum from J. David Hood, Director, Planning Staff, to Edward D. Suda, Director, Finance Division, estimating the potential tax liability of the Mt. Vernon building appears to meet this requirement.