



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Corrections to the Federal Highway Trust Fund

File: B-275490

Date: December 5, 1996

DIGEST

Because of a clerical error, the Financial Management Service, Department of the Treasury, failed to credit actual excise tax receipts to the Highway Trust Fund for the quarters ending June 30, September 30, and December 31, 1993, as required by law. 26 U.S.C. §§ 9601, 9503. The Secretary of the Treasury has the authority to correct the clerical accounting and reporting errors by restating the fiscal year 1994 and 1995 income statements for the Highway Trust Fund provided to the Department of Transportation. The Secretary of Transportation has no authority to administratively adjust, modify, or correct Highway Trust Fund income data provided by the Department of the Treasury and is bound to make apportionments to the States based on the data reported by the Treasury.

DECISION

The Department of the Treasury (Treasury) and the Department of Transportation (Transportation) ask whether they are authorized to correct certain clerical accounting and reporting errors relating to appropriations in the Highway Trust Fund (HT Fund). Treasury believes that it has the authority to, and should, correct errors made in recording collections and resulting appropriations attributable to the HT Fund by restating the fiscal years (FY) 1994 and 1995 income statements for the HT Fund provided Transportation. Transportation believes that it must apportion HT funds to the states based on the income statements provided by the Treasury. For the reasons explained below, we agree that Treasury may adjust the FY 1994 and 1995 HT Fund income statements and that Transportation must base its apportionment on the corrected income statements.

BACKGROUND

Federal Aid Highway Program

The Federal Aid Highway Program distributes billions of dollars of federal funding annually to the 50 states, the District of Columbia, and Puerto Rico for highway construction, repair, and related activities. To finance the highway program,

Congress established the HT Fund as a trust fund account in the Treasury of the United States, 26 U.S.C. § 9503(a) (1994), designating the Secretary of the Treasury as trustee, 26 U.S.C. § 9602(a). Congress has provided the HT Fund with a permanent indefinite appropriation of amounts received in the Treasury from certain gasoline, diesel fuel, and other excise taxes paid by highway users. 26 U.S.C. § 9503(b).

Statutory Responsibilities of Secretary of the Treasury

The Secretary of the Treasury (Secretary), as trustee of the HT Fund, must fulfill certain accounting and administrative functions.¹ Specifically, the Secretary is required to transfer at least monthly from the general fund of the Treasury amounts appropriated to the HT Fund based on Treasury estimates of the specified excise taxes for the month. 26 U.S.C. § 9601. The Secretary is further directed to make "proper adjustments . . . in the amounts subsequently transferred to the extent prior estimates were in excess of or less than the amount required to be transferred." *Id.*

To discharge its duties as trustee, Treasury uses estimates provided by the Treasury's Office of Tax Analysis (OTA). Each month OTA submits to the Treasury's Financial Management Service (FMS) an estimate of the specified excise taxes that will be covered into the general fund for the upcoming month. Upon receipt of the monthly OTA estimate, FMS records the amount of the estimate and on the 8th business day of the month transfers from the general fund 50 percent of the estimated amount to the HT Fund and the remaining 50 percent of the estimated amount to the Fund on the 18th business day of the month.

The statutory scheme recognizes that the actual amount of highway taxes covered into the general fund may be greater or less than the amounts previously estimated and transferred to the Fund. Pursuant to 26 U.S.C. § 9601, the Secretary is directed to adjust any differences between the transferred estimated amounts and the actual amounts collected. FMS makes these adjustments based on an Internal Revenue Service (IRS) quarterly certification of the actual amounts of taxes collected (IRS actuals). FMS receives the IRS actuals approximately 6 to 9 months after the end of each quarter and records the necessary upward or downward adjustment to the HT Fund income statement in the fiscal year in which it receives the IRS actuals. The Federal Highway Administration (FHWA) uses the HT Fund income statements

¹ The Secretary is responsible for maintaining an effective and coordinated system of accounting and financial reporting, 31 U.S.C. § 3513, managing the trust funds, and reporting to Congress on their financial conditions and operations. 26 U.S.C. §§ 9601 and 9602.

as the base figures for apportioning federal aid-highway "contract authority" to each state.²

FMS Clerical Accounting and Reporting Errors

The HT Fund consists of a Highway Account and a Mass Transit Account. 26 U.S.C. § 9503(a) and (e). According to Treasury, prior to the receipt of the IRS actuals for the quarter ended June 30, 1993, the form which IRS used to report actuals to FMS combined in a single column the amounts attributable to both the Highway Account and the Mass Transit Account. Starting with the IRS actuals for the quarter ended June 30, 1993, IRS separated the amounts attributable to the Highway and Mass Transit Accounts into two separate columns. IRS apparently did not notify FMS of the change in format nor did FMS notice the change. Consequently, when calculating its adjustments to the OTA estimates, FMS used the amounts listed in the Highway Account column, instead of using the sum of the Highway Account and the Mass Transit columns. Because of FMS failure to properly transcribe the IRS actuals in FY 1994 when the data was received,³ the FMS adjustments made in FY 1994 for the quarters ended June 30 (\$529,683,300), September 30 (\$547,256,400), and December 31, 1993 (\$513,533,200), understated the HT Fund income in the aggregate by approximately \$1.59 billion.

In November 1994, when the FMS forwarded to the FHWA the year-end FY 1994 HT Fund income statement, the FHWA discovered the FMS error. On November 30, 1994, the FHWA advised FMS of the error. The FHWA asked FMS to reflect the correction in the HT Fund income statement for FY 1994. Instead, on December 21, 1994, FMS adjusted upward the HT Fund account by \$1.59 billion, reporting the adjustment as income in FY 1995, the fiscal year in which FHWA advised FMS of the mistake. In contrast to Treasury's standard procedure, this had the effect of

²The Federal Aid Highway Program is essentially a "reimbursable" program, that is, the federal government reimburses states for costs actually incurred in building or repairing its highways. Congress, primarily in the highway authorization acts, authorizes Transportation, through the FHWA and its other agencies, to incur obligations (using contract authority) on behalf of the federal government. The FHWA apportions authorized amounts of contract authority to the states, in effect establishing lines of credit upon which the states may draw for a particular project. See Financing Federal Aid Highways, FHWA Publication No. FHWA-92-016 (1992).

³Treasury has advised that FMS received the IRS actuals as follows: for the quarter ended June 30, 1993, the FMS received the IRS actuals on May 26, 1994; for the quarter ended September 30, 1993, the FMS received the IRS actuals on July 5, 1994; for the quarter ended December 31, 1993, the FMS received the IRS actuals on September 15, 1994.

understating the FY 1994 HT Fund income by \$1.59 billion and overstating the FY 1995 HT Fund income by the same amount.

As previously noted, FMS has implemented the statutory scheme by crediting the HT Fund in the fiscal year in which they received the IRS actuals. The FMS' failure to follow their standard practice in this instance significantly affects the FHWA's allocations of HT Fund contract authority.⁴ Treasury and Transportation have informed us that due to the interactions between the 90 percent payment apportionments⁵ and the obligational limitation imposed by Congress for FY 1997,⁶ the FMS reporting error will result in approximately 24 states receiving lower distributions of obligational authority in FY 1997, with some of the adjustments ranging up to \$50 million.⁷

The Treasury has concluded that it should adjust the fiscal year 1994 income statements by crediting the HT Fund with the \$1.59 billion in the year in which IRS reported the actuals to FMS. If Treasury corrects the error by adjusting the FY

⁴Treasury officials have informally advised us that they could not recall any cases in which a clerical error was made that required corrective action.

⁵The 90 percent payments apportionment is one of a number of provisions Congress has built into the Federal Aid Highway Program to: (1) insure funding equity among the states, (2) address the concerns of states that contribute more highway user taxes than they would receive in federal aid highway funds, and (3) provide each state with the same relative share of overall funding that it had received in the past. Specifically, the 90 percent payments apportionment ensures that each qualifying state will receive an allocation in an amount that ensures its apportionments for the fiscal year and allocations for the previous fiscal year will be at least 90 percent of its contributions to the Highway Account of the HT Fund. Financing Federal Aid Highways, FHWA Publication No. FHWA-92-016 (1992).

⁶The obligation limitation for FY 1997 is \$18 billion. Pub. L. No. 104-205, 110 Stat. 2958 (1996).

⁷The law requires that Transportation base the 90 percent payment apportionments on the latest fiscal year in which data is available. Pub. L. No. 102-240, § 1015(b), 105 Stat. 1944 (1991). Generally, the latest fiscal year for which data is available lags by two years. For example, for fiscal year 1996, Transportation based the 90 percent payment apportionments of contract authority on data from the fiscal year 1994 HT Fund income statements. Similarly, Transportation will base the 90 percent payment apportionments of contract authority for FY 1997 on data from the FY 1995 HT Fund income statements. Thus, Treasury's correction of the FYs 1994 and 1995 HT Fund income statements will affect the allocations for FYs 1996 and 1997.

1994 and FY 1995 Fund income statements to credit the IRS actuals to the fiscal year in which they were originally reported to FMS, Transportation would ask the Office of Management and Budget for a reapportionment of FY 1996 contract authority. This would mean, according to FHWA, a redistribution of approximately \$300 million in contract authority among the States for FY 1996.

Transportation has concluded that it cannot administratively correct or modify HT Fund Treasury income statement by substituting data other than that reported by Treasury on the HT Fund income statement. Memorandum from Chief Counsel, FHWA, to General Counsel, Transportation, October 4, 1996. Transportation determined that in furtherance of its duty to administer the Federal Aid Highway Program, it must apportion funds authorized to be apportioned to the states under 23 U.S.C. § 104 and section 1015 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (23 U.S.C. § 104, note) on the basis of the data reported by Treasury. Based on its legal analysis of the Secretary's statutory responsibilities, Treasury has concluded, and Transportation agrees, that it has the authority to make the correction in FY 1994. We agree.

ANALYSIS

Authority of Treasury to Correct Errors

Consistent with the statutory scheme and his duties as trustee of the HT Fund, the Secretary of the Treasury credits on a monthly basis estimated amounts of specified excise taxes to the HT Fund and subsequently adjusts the estimated amounts to reflect the amount of the specified excise taxes actually collected. For three quarters in calendar year 1993, FMS misread the IRS form reporting the actual amount of excise taxes collected. As a result, FMS credited the HT Fund with \$1.59 billion less in income in FY 1994 than it otherwise would have had they properly read the IRS form. When notified of the mistake, FMS "corrected" the error by recording the \$1.59 billion as income to the HT Fund in FY 1995, apparently based on the view that they should make the correction effective when they learned of the error, as opposed to when they were initially advised of the amount of taxes collected. The issue is whether Treasury may credit the \$1.59 billion to FY 1994, the fiscal year that would have been credited had FMS not misread the IRS form. We think that the answer is clearly yes.

Our decisions in this area over the years stand for the proposition that an act of Congress is not required to correct clerical or administrative errors. 41 Comp. Gen. 16, 19 (1961). In B-251287, September 29, 1993, we concluded that when Treasury is presented with convincing evidence that a reporting error affecting the balance of an appropriation account has occurred as a result of an obvious clerical error, it may adjust the account balance to correct the mistake. In that particular case, had Treasury not been able to adjust the appropriation account balance to

correct the mistake, the erroneously reported amount would have been treated as canceled in accordance with the applicable account closing procedures contained in the National Defense Authorization Act of 1990, Pub. L. No. 101-510, 104 Stat. 1674 (1990). Id. Similarly, Treasury may adjust its accounting records to credit an appropriation account with the amount improperly credited to the general fund of the Treasury. 45 Comp. Gen. 724, 730 (1966); see also B-126738, April 11, 1956. Where the evidence of the error is unreliable or inconclusive, B-236940, October 17, 1989, we have objected to an administrative adjustment. In this case this limitation does not apply.

As explained above, had FMS officials properly understood the IRS form reporting the actual amount of excise taxes collected for the three quarters in question, they would have recorded the appropriate amounts in the FY 1994 HT Fund income statements. The fact that FMS officials recorded the amount, the \$1.59 billion, in the FY 1995 HT Fund income statement when FHWA advised them of their oversight is as much a deviation from their established practice of recording amounts collected in the fiscal year current when IRS reports the actual amounts collected as was the failure to properly read the IRS form in the first place. To now adjust the FY 1994 and FY 1995 income statements to reflect what FMS officials should have done had they followed their established procedures, consistently and regularly applied, does no more than restore the accounts to where they should have been. Apart from whatever responsibilities the Secretary may have to accurately state the accounts of the United States, the Secretary in his capacity as trustee of the HT Fund has the duty to accurately account for the amounts in the Fund consistent with the terms of the appropriation made thereto and the applicable administrative procedures adopted to effectuate his statutory responsibilities.⁸

The statutory scheme for apportioning contract authority among the states for the Federal Aid Highway Program makes it essential that the Secretary maintain an accounting of the HT Fund in the most accurate manner possible. The interplay between the HT Fund and the statutes providing federal aid to the states for highways reflects a complex congressional plan to equitably distribute the HT Fund

⁸Certainly, section 9601 contemplates that the Secretary will faithfully carry out his responsibilities as trustee of the HT Fund to credit the Fund with the amounts collected as reported by the IRS. Literally read, section 9601 only authorizes the Secretary to make "proper adjustments" necessary to reflect any differences between the estimated amounts provided by the OTA each month, and the amounts reported by the IRS several months later as actually collected. In our opinion, the Secretary's authority to correct the FMS clerical accounting and reporting errors in this case is not dependent on the authority in section 9601 to make "proper adjustments."

proceeds for the various highway programs among the states. This entire statutory scheme is dependent upon the Treasury accurately performing the ministerial duty of collecting, accounting for and reporting the revenues. For example, the 90 percent payment adjustment provided by section 1015(b) of ISTEA directs Transportation to base its computation on "the estimated tax payments attributable to highway users in the State paid into the Highway Trust Fund * * * in the latest fiscal year in which data is available." The failure to properly account for funds in the correct year can dramatically affect the amount of funds each state is entitled to receive from the HT Fund.

Thus, Treasury's accounting for the funds in the correct year is critical. Although section 9601 does not contain a specific time limit in which the Secretary must make the proper adjustments to reflect the actual amounts of the applicable excise taxes received in the Treasury, Treasury has implemented section 9601 by making the adjustment to the HT Fund income statement for the fiscal year current at the time of receipt of the IRS report on the actual amount collected. We understand that, with the exception of the adjustments at issue here, this has been the consistent practice of Treasury. Although this may not be the only way to implement this statutory scheme, it is entitled to deference unless clearly wrong. Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc., 467 U.S. 837, 844 (1984). As noted above, Treasury has advised us that it received all IRS actuals in fiscal year 1994. Accordingly, we have no objection to Treasury adjusting the FY 1994 and FY 1995 HT Fund income statements to conform to their established practice of accounting for these amounts.

Authority of Transportation to Adjust HT Fund Income Data

As mentioned above, Transportation has concluded that it cannot administratively correct erroneous HT Fund Treasury income statements.⁹ We agree. Transportation is statutorily charged with administering the Federal Aid Highway Program and it may only apportion funds authorized to be appropriated to the states under 23 U.S.C. §§ 101, et seq. As discussed above, as trustee of the HT Fund, Treasury is solely responsible for making transfers and adjustments to the HT Fund under 26 U.S.C. §§ 9601 and 9602. Transportation has no role in

⁹Earlier this year, Senator Baucus introduced an amendment to the Transportation appropriation for FY 1997 requiring Transportation to make appropriate adjustments to federal aid highway apportionments to correct Treasury's error. 142 Cong. Rec. S9266-9275 (daily ed. July 31, 1996). The amendment was agreed to by the Senate. 142 Cong. Rec. S9278 (daily ed. July 31, 1996). The Conference Committee on the differing House and Senate versions of the FY 1997 Transportation appropriation eliminated the Baucus amendment from the Conference bill. 142 Cong. Rec. S10778 (daily ed. September 18, 1996).

administratively adjusting, modifying, or correcting Highway Trust Fund income statements provided by the Department of the Treasury. Thus, Transportation is bound to make apportionments to the States based on the data reported by Treasury.¹⁰

CONCLUSION

Treasury may adjust the FY 1994 and 1995 HT Fund income statements to credit the HT Fund with the excise taxes originally not included in the HT Fund income statements' just as if Treasury had credited such amounts upon receipt of the reports from the IRS. Transportation has advised us that upon the adjustment of the FY 1994 and FY 1995 HT Fund income statements to reflect the actual receipt of revenue consistent with their standard practice, Transportation will seek a reapportionment of contract authority from the Office of Management and Budget for FY 1996. Once Treasury has issued its HT Fund income statement, Transportation's duty is to effectuate the statutory apportionment formula, including the 90 percent payment apportionment, based on the data provided by Treasury.

/s/Robert P. Murphy
for Comptroller General
of the United States

¹⁰See generally, 41 Comp. Gen. 16 (1961), holding that when an apportionment under the federal highway program results in some states receiving funds in excess of the amount they were entitled to receive and others receiving less than their entitlement, the failure to apportion properly must be regarded as an act in excess of statutory authority and the incorrect apportionments need to be appropriately adjusted.