Mr. Crystal

15559

DECISION

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

FILE: B-197439 DATE: November 26, 1980

MATTER OF: Reconsideration of authority of SBA to leverage Minority Business Resource Center investments in minority enterprise small business investment companies.

DIGEST: Decision of July 29, 1980, B-197439, which held that SBA did not have authority to leverage (match) investments of the Minority Business Resource Center in minority enterprise small business investment companies is affirmed.

This is in response to a letter of October 20, 1980, from the General Counsel of the Small Business Administration (SBA) requesting reconsideration of our decision B-197439, July 29, 1980. That decision held that SBA did not have authority to leverage (match) investments of ~~the Department of Transportation's~~ DOT Minority Business Resource Center in minority enterprise small business investment companies (MESBICs). The decision was based on our conclusion that section 303(c)(2)(iii) of the Small Business Investment Act, 15 U.S.C. §683(c)(2)(iii), limits leveraging to private money. Since the Minority Business Resource Center uses Federal money and since no other statute authorizes SBA to leverage the Center's money, we held that SBA had no authority to leverage in that case. We have considered the arguments set forth in SBA's reconsideration letter and find nothing that would justify a change in our decision. D4055 98

SBA points out, and we agree, that SBA may leverage Federal money where there is statutory language similar to that in the Community Services Act, Pub. L. No. 93-644, 88 Stat. 2291 (1975). The Community Services Act expressly provides that money invested under it in MESBICs is to be considered "private" for leveraging purposes. See 42 U.S.C. §2985a(a)(1). SBA argues that the Community Services Act contained this express statutory language only because SBA's regulation had not been promulgated when Congress was considering the bill (H.R. 14449, 93d Cong., 2d sess. (1974)) that became the Community Services Act. Since SBA's regulation had been in effect for several years when Congress authorized the Minority Business Resource Center within the

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Department of Transportation, SBA reasons, there was no need for similar statutory language in the Center's charter. Rather, SBA contends that Congress was satisfied to indicate its intent through legislative history. SBA cites a Senate Appropriations Committee report concerning the Department of Transportation, S. Rep. No. 95-268, 26 (1977), as a clear example of such congressional intent. This report observed that money the Minority Business Resource Center invested in MESBICs would be leveraged by SBA.

SBA's position relies on the timing of the SBA regulation in relation to the passage of the Community Services Act and the Minority Business Resource Center legislation (Pub. L. No. 94-210, 90 Stat. 31 (1976)). It asserts that when Congress was considering the bill (H.R. 14449) that ultimately became the Community Services Act, the SBA regulation had not been promulgated. With this "fact" SBA goes on to infer the evolution of a legislative "intent" that "private" funds may include Federal funds. (In point of fact, H.R. 14449 was introduced on April 29, 1974, well after SBA had published its final regulation on July 5, 1973.) */

There is no Congressional intent that Minority Business Resource Center funds be eligible for leveraging. The legislative history of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210), which authorized the Minority Business Resource Center, is silent on the issue. SBA relies on the following statement in a report by the Senate Appropriations Committee on a Department of Transportation appropriations bill..

> "The Committee has included an additional $5 million for venture capital funding under the Minority Business Resource Center (MBRC), which, when

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*/ Although the statutory provision dates back to Pub. L. No. 92-424 (1972), before SBA's regulation, Congress had ample time to consider the effect of SBA's regulation when it was considering the Community Services Act.

> combined with the $1 million provided by the House can be used, through SBA leveraging, to generate $30 million in venture capital * * *" S. Rep. No. 95-268, 26 (1977).

The quoted statement appears to have its origin in testimony given by the Deputy Secretary of Transportation. See Hearings on H.R. 7557 before the Subcommittee on Transportation and Related Agencies of the Senate Committee on Appropriations, 95th Cong., 1st Sess., 2132 (1977), where the Deputy Secretary said:

> "With the contribution of $1 million expected from the railroads and other private sources and the $5 million already appropriated for fiscal year 1977, the investment company, through Small Business Administration (SBA) leveraging, will be able to supply approximately $30 million in venture capital * * *."

The interpretation the Deputy Secretary of DOT placed on the Small Business Investment Act is accorded no special significance, since it is an interpretation of another agency's legislation, and the record provides no rationale for the Deputy Secretary's having reached a conclusion at odds with the language of the Small Business Investment Act.

The record also provides no information, other than that set forth above, on the reasons for the Senate Committee's adoption of that interpretation. Indeed, even assuming the Senate Committee knew of the SBA regulation, which is at the heart of SBA's present argument, no evidence suggests it knew how SBA was applying that regulation. The regulation is ambiguous. It references only the Community Services Act, which is a specific instance where a statute expressly authorizes certain Federal funds to be considered private for leveraging purposes. However, the SBA applies the regulation not only to Community Services Act funds, but to all Federal funds, apparently disregarding the clear language of the Small Business Investment Act. Also, SBA has itself asserted to Senate Appropriations Committees at other times that only private

money could be leveraged. See, e.g., Part 3 of the Hearings on Fiscal 1978 Appropriations Before the Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies of the Senate Committee on Appropriations, 95th Cong., 1st Sess., 985 (1977); and Part 3 of the Hearings on Fiscal 1979 Appropriations Before the Subcommittee on State, Justice, Commerce, the Judiciary and Related Agencies of the Senate Committee on Appropriations, 95th Cong., 2d Sess., 1241 (1978), where SBA stated that the amount of leveraging depended on "the amount of combined private paid-in surplus" (emphasis added). And see pp. 917 and 1178, respectively, of the above cited Senate hearings, where the permitted amount of leveraging is described as a ratio of four Federal dollars "for each $1 private capital" (emphasis added).

Whatever significance attaches to the appropriations background described above, one may not reasonably conclude that it overcomes the clear meaning of the Small Business Investment Act. Congress is not required to act each time a statute is interpreted erroneously. Kay v. Federal Communications Commission, 443 F.2d 638, 646 (D.C. Cir. 1970). Congressional silence alone is not sufficient to adopt a controlling rule of law, or change the clear meaning of a statute. There must be persuasive circumstances showing a clear design that congressional inaction be taken as acceptance of an interpretation of a law. Boys Market v. Clerks Union, 398 U.S. 235, 241-2 (1970). We see no persuasive circumstances showing such a clear design in this case.

The doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. Jones v. Liberty Glass Co., 332 U.S. 524, 533-34 (1947). Here it is far from clear whether a Senate Committee, one without substantive authorizing jurisdiction over the subject matter, much less the Congress itself, acquiesced to anything. And without doubt the clear language of the statute takes precedence over an erroneous administrative interpretation. Where no ambiguity exists, there is no room for agency construction. See United States v. Missouri Pacific Railroad Co., 278 U.S. 269, 277 (1928), wherein the Court stated:

> "* * * The language of that provision is so clear and its meaning so plain that

> no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. * * * Construction may not be substituted for legislation."

We do not think congressional inaction constitutes approval of SBA's practice of treating Federal funds as "private" funds for leveraging purposes. More specifically, we see no authority for SBA to leverage Minority Business Resource Center funds. Therefore, we decline to withdraw our decision of July 29, 1980. Whether or not there is sufficient expression of legislative intent in other cases to allow leveraging of Federal funds would depend on the circumstances of each case. In any event, the circumstances would have to be more persuasive than in the case of the Minority Business Resource Center legislation.

Milton J. Socolar

For The Comptroller General
of the United States

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

B-197439

November 26, 1980

The Honorable Charles B. Rangel
House of Representatives

Dear Mr. Rangel:

This is to inform you of recent developments involving SBA's leveraging practices in minority enterprise small business investment companies (MESBICs). By letter of August 21, 1980, you expressed concern that SBA, relying on a Comptroller General decision, had abruptly ceased leveraging certain Government investments in MESBICs, reneging on previous commitments. In our reply letter of September 18, 1980, we promised to keep you apprised of our dealings with SBA regarding its leveraging policy, particularly with respect to existing SBA commitments. While we have not received any inquiry from SBA about how to treat existing commitments, SBA has asked us to reconsider our opinion. We considered the new arguments raised by SBA and found nothing that would justify a change in our decision of July 29, 1980. Enclosed is a copy of our decision regarding the reconsideration.

Sincerely yours,

Milton J. Socolar

For The Comptroller General
of the United States

Enclosure

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

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO: B-197439

November 26, 1980

Edward W. Norton, Esq.
General Counsel
Small Business Administration
1441 L Street, N. W.
Washington, D. C. 20416

Dear Mr. Norton:

This is in response to your letter of October 20, 1980, requesting reconsideration of Comptroller General decision B-197439, July 29, 1980. That decision held that the SBA did not have authority to leverage (match) investments of the Department of Transportation's Minority Business Resource Center in minority enterprise small business investment companies (MESBICs). Having read your letter and considered your arguments, we find nothing that would justify a change in our decision.

Enclosed is a copy of our decision in this matter and the reasons therefor.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Deputy General Counsel

Enclosure

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-197439

November 26, 1980

Ms. Karen Williams, Administrator
Office of Federal Procurement Policy
Room 9001
New Executive Office Bldg.
726 Jackson Place, N.W.
Washington, D.C. 20503

Dear Ms. Williams:

Enclosed for your information is a copy of our response to the Small Business Administration's recent request that we reconsider our decision B-197439, July 29, 1980. That decision held that the Small Business Administration did not have authority to leverage (match) investments of the Department of Transportation's Minority Business Resource Center in minority enterprise small business investment companies. We considered the arguments raised by the Small Business Administration, but found no compelling reasons for changing our decision.

If we can be of further help to you in regard to this matter, please let me know.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Deputy General Counsel

Enclosure