



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

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September 14, 1973

Captain J. A. Treinen, USAF
Chief, Accounting and Finance Branch
Through the Director, Directorate of
Accounting Operations
Headquarters Air Force Accounting and
Finance Center
3800 York Street
Denver, Colorado 80205

Dear Captain Treinen:

Reference is made to your letter of December 10, 1971 (attention ACF) forwarded here by letter dated January 5, 1972, from Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of payment by the United States Air Force to the Government of Guam for overtime services provided by Guam customs and quarantine officers at Andersen Air Force Base, Guam.

Public Law 9-47, enacted March 15, 1967, by the Territory of Guam, and codified as section 47136 of the Government Code of Guam (1970), imposes a charge on "all air and sea carriers and other persons" for the services of customs and quarantine officers when required beyond regular working hours. The basic charge is equivalent to the hourly wage rate of the officer performing the service; and this amount is paid over to such officer. Public Law 9-47 further imposes a surcharge of 25 percent of the wage rate, which the Government of Guam claims is reimbursement for administrative overhead occasioned by the use of its customs and quarantine officials outside of regular hours.

The request for our advance decision reads in part:

"Guam customs and quarantine officers are charged with the duty of enforcing federal customs, quarantine, gun control and vehicle safety laws (49 USCA 789 and federal agency directives unavailable to us), as well as customs and quarantine laws of Guam (sections 47100-47136, Government Code of Guam). Because the federal and territorial laws are enforced simultaneously, the overtime services on which charges are based are not divisible into 'federal time' and 'territorial time.' From the standpoint of time allocation, Guam customs officials have no responsibilities with regard to federal customs duties since Guam is a 'free port' (19 USCA 1202, footnote 2). Consequently,

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their only function as customs officers is to assure compliance with federal and territorial laws concerning illegal entry of persons and property. It is significant to note, however, that another major function of these officers in behalf of the Government of Guam is to assist in the enforcement of a Guam use tax, by reporting all property imported by terminating passengers to the Guam Director of Revenue and Taxation.

* * * * *

"Andersen Air Force Base has long been a major military air traffic center. As such, it is subject to incoming traffic from foreign countries at all hours seven days weekly. Guam customs officials, working in shifts, are on duty 24 hours daily at the Base Terminal. In 1960 the Government of Guam was charging 'carriers and similar agencies' (including the Air Force) for overtime services rendered by Port Security personnel. The practice was voluntarily terminated in June 1960 because the authority to so charge was questionable (see Attachment 2). The practice was reinstated in July 1971, pursuant to the 1967 enabling statute cited above * * *. To date, payments totaling \$551.89 have been disbursed with the understanding that further payments would be withheld pending receipt of your decision in the matter. Should that decision be favorable, refund will be requested.

"It is understood that the Air Force pays for services of federal customs officials at other installations where the services are requested at irregular hours. The present case is distinguishable in that a non federal agency is involved, and the services involve three indivisible and significantly self-serving functions -- enforcement of federal and Guam customs and quarantine laws, and enforcement of Guam use tax laws. Additionally, the services are not requested as in those cases at other installations. It is unknown to what extent, if any, the Government of Guam may be compensated by other federal agencies for these same 'services' in enforcing federal laws as delegated."

Finally, the submission questions whether the Air Force may be considered an "air carrier" or "other person" within the application of the charges imposed by Guam Public Law 9-47.

On April 7, 1972, we requested the opinion of the Attorney General of Guam concerning the issues raised in the submission. At the same time, we also requested the view of the Deputy Assistant Secretary for Territorial

Affairs, Department of the Interior. By letter dated March 13, 1973, we were advised by the Acting Attorney General of Guam that Public Law 9-47 is construed to include the Federal Government as a carrier subject to charges for overtime customs and quarantine services. The Acting Attorney General also states that in addition to enforcement of certain territorial laws and regulations, the Guam customs and quarantine officers enforce a number of Federal laws and regulations, listed in his letter. Such Federal enforcement is undertaken either pursuant to formal delegation by the Federal Government or on a de facto basis, sustained by the courts, resulting from the absence of cognizant Federal officials within the Territory. Enforcement of certain of these Federal laws and regulations has been delegated by the Federal Government specifically with respect to military flights at Andersen Air Force Base. The Acting Attorney General concludes:

"I do not regard the 25% administrative overhead and overtime charge as a tax upon the United States Government. It will be noted that the fee upon which the 25% administrative charge is based is paid directly to the officers who are on the scene and who are performing the inspection. The 25% administrative charge relates to charges borne by the Government of Guam other than the actual salaries of the inspecting officers. Therefore, those charges are not a tax, but rather a rough estimate of additional government cost occasioned by the use of these customs officers outside of regular hours.

"Since the time spent on 'Federal Enforcement' cannot be differentiated from the time spent on 'Guam Enforcement', and since Guam and Federal Enforcement tend to overlap in the subjects covered, I see no means of differentiating charges on the basis of the duties performed by the customs officers at any given time. These inspection duties must be performed by these officers, whether under Federal Law or under Guam law, and it is upon the fact that the duties are necessary that the charges are based. Therefore, I am of the opinion that the charges imposed upon air and sea carriers and other persons, including the United States Air Force, are justified by local law and are not prohibited by the Organic Act. * * *

By letter dated June 14, 1973, the Director of Territorial Affairs, Department of the Interior, forwarded to us a memorandum by the Department's Associate Solicitor, General Legal Services, which comments upon our letter from the Acting Attorney General of Guam. This memorandum expresses the opinion that the Air Force is chargeable only for overtime services rendered by Guam officers which are attributable to enforcement of Federal laws and regulations, as opposed to those of the Territory. The memorandum also notes that no basis has been provided for differentiating between Federal enforcement of laws and regulations of the Territory. It states that there is no basis for charging a 25 percent surcharge to Guam's actual administrative costs in providing overtime services.

The question raised is whether the service charges and surcharges as assessed by the Territory of Guam pursuant to Guam Public Law 9-47 are in the nature of an unconstitutional tax as applied to the Federal Government or its department and agencies. It is clear that a United States Territory may not impose a tax upon its sovereign in the absence of express statutory permission. Domeneck v. National City Bank of New York, 294 U.S. 199 (1935). However, the United States is not exempt from payment of reasonable compensation for services rendered or convenience provided to it. See, e.g., 50 Comp. Gen. 343; 344 (1970) and authorities cited therein.

Applying the foregoing principles to the instant matter, it is necessary at the outset to determine what service or convenience, if any, the Air Force derives in return for the charges imposed by Guam Public Law 9-47. The materials submitted to us, discussed above, appear to approach this question by reference to the nature and source--i.e., Federal versus territorial--of the laws and regulations enforced by the Guam officers. However, this approach is not, in our opinion, dispositive. The Air Force is not responsible for the enforcement of territorial laws; nor is it the agency which would have had original responsibility for the Federal enforcement functions performed by the Guam officers. Moreover, there is no indication that Guam seeks reimbursement from the Air Force for performance of any of its territorial or Federal enforcement activities on a regular basis, i.e., during normal working hours. On the contrary, it is evident that the service or convenience for which Public Law 9-47 imposes charges is the availability of the Guam officers to perform their enforcement functions--whatever the nature and source of such functions--on an overtime basis. Thus Guam Public Law 9-47 is similar to a Federal statute which provides that carriers be assessed charges equivalent to the compensation of Federal customs inspectors for inspections conducted outside of normal working hours, and that such amounts be paid over to the customs inspectors. See 19 U.S.C. 267.

The submission indicates that Andersen Air Force Base is subject to incoming traffic from foreign countries at all hours, seven days a week; and that the Guam customs and quarantine officers are on duty at the Base Terminal at all times. While the submission does not specifically so state, we assume that such incoming traffic cannot clear the base Terminal without processing through the Guam officers and, accordingly, that the availability of these officers for only 40 hours a week would seriously impede operations at Andersen.

For the foregoing reasons, it appears to us that the availability of the Guam officers at Andersen on a 24-hour basis provides a substantial service to the Air Force, irrespective of the laws and regulations which they enforce. We also believe that the Air Force may properly pay for this service. Our Office has held that Federal agencies are subject as other carriers to the charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, similar to the charges paid to customs inspectors for overtime to customs inspections generally. 6 Comp. Gen. 257, 4-41643, May 25, 1949. We have also authorized payment of such charges by Federal agencies where

customs inspections were performed by employees of the Panama Canal, 11 Comp. Gen. 10, 13; A-22614, April 21, 1928. The latter decisions relied upon the utility in terms of Federal transportation operations of having available such overtime services.

It remains to consider whether the specific charges imposed by Guam Public Law 9-47 represent reasonable costs for the provision of overtime services. As stated previously, these charges consist of two elements: the wages of the customs and quarantine officers performing overtime services, and a 25 percent surcharge thereon. The wage element represents an actual cost to Guam and is, therefore, clearly a proper charge. The 25 percent surcharge represents by the terms of the statute "reimbursement for administrative overhead and overtime * * *." The Acting Attorney General of Guam describes the 25 percent amount as a "rough estimate" of additional costs to Guam occasioned by the use of the officers outside of regular hours. We recognize that it would be difficult to delineate fully and precisely the actual components of such administrative cost. In view of this, as well as the representations contained in the statute and the Acting Attorney General's letter, we would not object to payment of the 25 percent surcharge unless it is administratively determined that the 25 percent figure is so unreasonable--in relation to the services rendered--as to constitute a tax on the United States.

For the reasons stated herein, it is our opinion that the Air Force is authorized to pay the charges imposed by Guam Public Law 9-47 unless the charges are determined to be unreasonable. The voucher presented with the request for our advance decision is returned herewith and payment thereon is authorized, subject to the foregoing, if otherwise correct.

Sincerely yours,

E. H. Morse, Jr.

For the Comptroller General
of the United States