DECISION

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

FILE: B-208522 DATE: March 17, 1983

MATTER OF: Customs Service Charging User Fees To Recover Cost of Instructing Travel Agents

DIGEST: When employees of the Customs Service participate as instructors in programs to train travel agents in Customs requirements and procedures so that the travel agents will, in turn, provide this information to travelers, the Customs Service must charge a fee to recover the full cost of the special benefit conferred. Any receipts may be deposited to the credit of the appropriation of the Customs Service pursuant to 19 U.S.C. § 1524.

The Commissioner of Customs asks whether the Customs Service (Customs) may receive free or reduced-rate transportation and accommodations or reimbursements for such costs in connection with the participation of its employees in seminars or training programs at the request of private parties. Subject to the conditions set forth below, we answer this question in the affirmative.

The Customs employees would serve as instructors explaining Customs regulations and procedures, describing how to fill out forms and answering any questions the participants may have on these matters. While participation by Customs employees as instructors in programs of this nature is not an express statutory function of the Customs Service, we have been informally advised by an official of the Customs Service that answering inquiries as to requirements of the Customs laws and procedures is considered an authorized agency activity. However, participating in training as described above is not the normal procedure for accomplishing this activity.

We note that the Customs Service does not possess any general statutory authority to accept and use gifts or donations for agency purposes. Thus if we consider the offered items as donations, acceptance and use by Customs

would be precluded as an unauthorized augmentation of their appropriations. See 16 Comp. Gen. 911 (1937). Furthermore, the airlines, schools and travel agents participating in the seminars and providing the offer of the free ticket do not appear to be eleemosynary institutions so that acceptance by the employee of the cost of transportation and accommodation would be authorized by 5 U.S.C. § 4111. Consequently, Customs has proposed that acceptance be considered proper under 31 U.S.C. § 9701 1/ authorizing agencies to charge user fees to recipients of special benefits or services.

31 U.S.C. § 9701 provides in pertinent part that:

> "(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.
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> "(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--
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> (1) fair and
> (2) based on--
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> (A) the costs to the Government;
> (B) the value of the service or thing to to the recipient;
> (C) public policy or interest served; and
> (D) other relevant facts. * * *" (Emphasis supplied.)

The Supreme Court has held that whole industries are not in the category of those who may be assessed under the law but instead its thrust reaches only specific charges

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1/ Codified by Pub. L. No. 97-258, September 13, 1982, 96 Stat. 1051 (formerly called the User Charge Statute, 31 U.S.C. § 483a (1976)).

for specific services to specific individuals or companies. 2/ Furthermore, the Court held that OMB Circular A-25 which sets forth the policy to be followed by executive agencies in applying the law, properly construed the law where it states that chargeable services:

> "include agency action which 'provides special benefits . . . above and beyond those which accrue to the public at large . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:
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> * * * * *
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> '(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).'3/"

Finally, it has been the position of this Office and the Courts that while expenses incurred to serve the public generally must be excluded from a fee assessed under the law, a fee may be charged for the full cost of an activity even though the general public secondarily or incidentally benefits from it. 4/

While 31 U.S.C. § 9701 authorizes agencies to charge for services provided to the public, it does not in and of itself provide the authority for agencies to provide the services. Independent authority, either express or implied, must be relied upon to provide the legal basis for an agency

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2/ Federal Power Commission v. New England Power Co., 415 U.S. 349 (1975).

3/ See id. at 349-351 (particularly f. 3 on 350).

4/ See our decision in the matter of the Customs Service Recovery of Preclearance (Including TECS) Cost Under User Charge Statute, 31 U.S.C. § 483a, 59 Comp. Gen. 389 (1980) and Mississippi Power and Light Co. v. United States Nuclear Regulatory Commission, 601 F. 2d 230-231 (5th Cir., 1979).

undertaking the activity in the first place.[5]/ Otherwise, the law would provide a facile means for agencies to circumvent congressional or judicial oversight and control over the limits of authorized agency activity.

Here, the Customs Service has informally advised that providing information to the public about procedures and requirements affecting travelers is within the scope of its authorized agency activities. Customs further states that the normal procedure for responding to inquiries is not through seminars but by use of pamphlets or response to questions from travelers at Customs clearance stations. However, here Customs intends to participate at the request of the program sponsors, and it is the sponsors and the travel agents who will primarily benefit from this activity by having the Customs representatives present to provide responses to any inquiries that may arise following their discussions of Customs clearance procedures and requirements for travelers.

In such a situation, we would have no objection to Customs charging a fee for this service even though some incidental public benefit is also served by their conduct of this activity. [6]/ However, the fee recovered should be reflective of the full cost of providing the special benefit in question, i.e., the full travel costs of employees who provide the special benefit. We note in this regard, that no recovery is proposed to be made for all costs incurred while the employee is in travel status. For example, subsistence or per diem costs (with the possible exception of accommodations) do not appear to have been included in the proposal made by Customs.

Finally, since any cash payments received by Customs under this authority would be for deposit to the credit of the appropriation available to Customs for collecting

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5/ 28 Comp. Gen. 38 (1948).

6/ See 48 Comp. Gen 24, 27-28 (1968) and OMB Circular A-25, par. 3a(1).

Customs revenue under authority of 19 U.S.C. § 1524 7/ (if that appropriation bore the cost of providing the services), we would have no objection in similar circumstances to Customs accepting a ticket rather than cash as a payment in kind. However, any limitations on agency payment of expenses for employee travel would still apply and must be complied with in order to prevent the employee's receipt of an unauthorized payment. See 18 U.S.C § 209.

for Shelton J. Jordan
Comptroller General
of the United States

7/ 48 Comp. Gen. 24 (1968).