DECISION

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

60147

FILE: B-114898 DATE: NOV 13 1975

MATTER OF: User charges for administrative costs of special and overtime customs services.

DIGEST: Customs Service has authority under User Charges Statute, 31 U.S.C. § 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. § 483a.

In a recent report to the Secretary of the Treasury entitled "Services For Special Beneficiaries: Costs Not Being Recovered," B-114898, March 10, 1975 (GGD 75-72), our General Government Division noted that the United States Customs Service (Customs) currently provides a number of services--representing both special services provided during normal working hours and overtime services--for which it is reimbursed by the party-in-interest for the salary and/or expenses of the officer performing the service pursuant to various statutory provisions. With one exception, discussed infra, Customs does not collect administrative overhead associated with these reimbursable services.

The following provisions are illustrative of Treasury's statutory authority to charge for the furnishing of special services:

19 U.S.C. § 1447 (1970) - reimbursement of the compensation and expenses of customs officers supervising the unloading of cargo at a location other than a port of entry.

19 U.S.C. § 1456 (1970) - reimbursement of the compensation of customs officers stationed on a vessel or vehicle proceeding between ports of entry (as well as payment or provision of subsistence).

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19 U.S.C. § 1457 (1970) - reimbursement of the compensation and subsistence expenses of customs officers remaining on board a vessel or vehicle to protect revenues under specified circumstances.

19 U.S.C. § 1458 (1970) - reimbursement of the compensation of customs officers supervising the unloading of bulk cargo under an extension of time.

19 U.S.C. § 1555 (1970) - reimbursement of the compensation of customs officers appointed to supervise the receipt of merchandise into, and delivery from, bonded warehouses.

With respect to overtime services, 19 U.S.C. § 267 (1970) provides that the Secretary of the Treasury shall fix reasonable rates of extra compensation for various overtime activities of customs officers. Such extra compensation is payable by the party-in-interest under a special license or permit to an appropriate customs official who in turn shall pay it over to the customs officers and employees entitled thereto. Similarly, with certain exceptions discussed hereinafter, 19 U.S.C. § 1451 (1970) requires parties-in-interest, as a prerequisite to obtaining a special license to unload on Sundays, holidays or at night, to make a deposit or post bond for payment of the compensation and expenses of customs officers and employees in accordance with 19 U.S.C. § 267.

Our March 10, 1975, report noted that under section 501 of the Independent Offices Appropriation Act, 1952, 31 U.S.C. § 483a (1970), the so-called "User Charges Statute,"

> —Government activities resulting in special benefits or privileges for individuals or organizations are to be as financially self-sustaining as possible; and
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> —fees are to be fair and equitable, considering direct and indirect costs to the Government, value to the recipient,

public policy or interest served, and other pertinent facts. (Emphasis supplied.) 1/

The Office of Management and Budget (OMB) (actually the predecessor Bureau of the Budget) has issued policy guidelines implementing the User Charges Statute. Circular No. A-25 (September 29, 1959).

1/ 31 U.S.C. § 483a provides in full:

"It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: Provided, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: Provided further, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price."

Our report identified 23 services (listed in Appendix III thereto) performed during normal working hours for which reimbursement is provided by statute. The Customs Service presently bills parties-in-interest for the full compensation and/or travel and subsistence of the officer performing the service, including both base salary and indirect labor cost but, as stated before, except for reimbursement for preclearing aircraft, Customs does not collect administrative overhead associated with these reimbursable services. The report also indicated that amounts assessed for certain services outside normal working hours, such as overtime inspection services at United States ports of entry, do not include charges for overhead.

In view of the User Charges Statute, supra, our report recommended, among other things, that the Secretary of the Treasury direct the Commissioner of Customs to include in the charges for reimbursable services a fair and equitable amount for administrative overhead. The report stated in this regard, pages 7-8:

> "An OMB official responsible for administering Circular A-25 said the Circular prescribes the collection of all administrative overhead associated with reimbursable services. Customs officials said they recognize that recovery of full costs would include administrative overhead but that statutes governing the reimbursable services do not authorize Customs to collect administrative overhead (except for reimbursement for preclearing aircraft).
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> "Although the statutes governing reimbursable services require parties-in-interest to reimburse Customs for the compensation and expenses of officers performing these services, these statutes do not specify that the required reimbursement be the sole charge for such services or prohibit the collection of a fee for overhead expense. Therefore, we believe that 31 U.S.C. 483a (see p. 1) authorizes Customs to include administrative overhead in the billings of parties-in-interest for all reimbursable services performed during normal working hours.
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> "The Office of Budget and Finance has recommended since 1963 that, in the absence of a formal accounting system for determining administrative overhead (as is the case with Customs), Department bureaus use a figure

of 15 percent of the identified costs of providing the service. As of February 1, 1975, Customs had taken no action to include the 15-percent overhead in its charges for reimbursable services.

"Customs collected about $3.1 million in fiscal year 1974 for reimbursable services performed during normal working hours. By not collecting for administrative overhead at the recommended rate of 15 percent, Customs absorbed about $460,000 that should have been passed on to parties-in-interest.

"In fiscal year 1974, Customs collected $26.9 million in overtime payments for services rendered outside normal working hours. Statutes governing reimbursement for overtime vary somewhat from those governing reimbursement for services provided during regular duty hours. However, nothing in these statutes specifies that the required reimbursement be the sole charge for such services or prohibits the collection of administrative overhead. Therefore, we believe 31 U.S.C. 483a authorizes Customs to include administrative overhead in the billings of parties-in-interest for services performed outside normal working hours. Customs could have collected $4 million more in fiscal year 1974 had administrative overhead been charged at the recommended rate of 15 percent."

By letters dated May 9, 1975, to the Chairmen of the Senate and House Committees on Government Operations, the Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs) responded to our recommendations, pursuant to section 236(1) of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176(1) (1970). 2/ In his letter, the Assistant Secretary expressed doubt concerning the Customs Service's legal authority to implement our recommendation for

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2/ This provision requires that whenever the General Accounting Office makes a report which contains recommendations to the head of a Federal agency, the agency shall, within 60 days, submit a written statement of the action taken with respect to such recommendation.

inclusion of administrative overhead under the user charges here involved, and suggested that we reconsider this issue. His letter stated in part:

> "* * * The so-called User Charge statute, 31 U.S.C. 483a, which states the Congressional policy that services furnished to private parties shall be self-sustaining as far as possible, contains the proviso that 'nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge, or price: provided further, that nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fees, charge or price.' This language indicates that where a statute provides reimbursement by the public of a particular amount or type of expense, Customs has no authority to include other expenses. Laws which direct Customs to collect the compensation paid to a Customs officer may not be changed to include administrative expenses without a specific determination stating that the word 'compensation' includes such administrative costs. The report from the General Accounting Office, in our opinion, does not constitute a binding determination to this effect, as would a decision by the Comptroller General. We are not aware of any opinion that defines the word compensation to have this meaning."

The Assistant Secretary maintained that statutory directives to collect "compensation" and/or "expenses" are not sufficient to include administrative overhead. He also expressed the view that our decision at 3 Comp. Gen. 960 (1924), holding that 19 U.S.C. § 1451, supra, does not authorize the collection of travel expenses as part of "compensation and expenses" thereunder, is inconsistent with the recommendation in the March 1975 report.

This decision responds to the Assistant Secretary's suggestion, in effect, that we reconsider our recommendation concerning the collection of administrative overhead and issue a formal determination on the matter.

As noted, athe Assistant Secretary contends (1) that the statutes referred to, supra, and similar provisions requiring payments by parties-in-interest for compensation and/or expenses constitute the exclusive source of charges; and (2) that the payments specified in these statutes do not include administrative overhead. We agree that the statutory provisions in question do not expressly include administrative overhead but neither do they prohibit the charging of such costs. Moreover, we do not agree that the statutes relating to payment of specified compensation and expenses of Customs officers preempt the authority to collect additional charges under 31 U.S.C. § 483a; nor do we perceive any inconsistency between our report's recommendation to collect administrative overhead and our prior decisions.

Our decision at 3 Comp. Gen. 960, referred to by the Assistant Secretary and reaffirmed in 43 Comp. Gen. 101 (1963), held that 19 U.S.C. §§ 1451 and 267 very specifically delimit rates for "compensation and expenses" to the exclusion of travel expenses. But such decisions are clearly limited to the language and express effect of those two sections. Thus, for example, we concluded in 48 Comp. Gen. 622 (1969) that Customs regulations properly included travel expenses as an item of "compensation and expenses" payable under 19 U.S.C. § 1447, supra, in connection with unloading cargo outside a port of entry. We pointed out that:

> "Our decisions [3 Comp. Gen. 960; 43 id. 101] held only that the statutory provisions cited [19 U.S.C. §§ 267, 1451] did not in and of themselves authorize reimbursement of the travel and subsistence expenses of customs employees incident to services performed during the times specified therein." (Emphasis supplied.)

More fundamentally, it has consistently been our view that the provisos set forth in 31 U.S.C. § 483a preclude the imposition of additional user charges under that section only to the extent that another statute expressly or by clear design constitutes the only source of assessments for a service. Our decision at 48 Comp. Gen. 24 (1968) is especially relevant to the present matter. In that decision, we approved a proposal by the Assistant Secretary of the Treasury to require reimbursement from the airlines for costs relating to the performance of preclearance services in Canada over and above reimbursement for extra compensation under the Customs overtime laws. We stated in part, 48 Comp. Gen. at 26-28:

"The Assistant Secretary expresses the view that in the language of 31 U.S.C. 483a, the services provided in Canada are embraced fairly within the terms 'work,' 'service,' 'benefit,' 'privilege,' and 'use,' 'or similar thing of value,' 'performed,' 'furnished,' 'provided,' or 'granted.' He states that the head of the Federal agency is authorized by regulation 'to prescribe therefor such fee, charge, or fine, if any, as he shall determine, in case none exists * * *;' and that in doing so he shall make the charge 'fair and equitable taking into consideration direct and indirect cost to the Government value to the recipient, public policy or interest served and other pertinent facts.' This, he feels, indicates that the charge should cover the special benefit conferred; and he points out that although the authority contained in 31 U.S.C. 483a is subject to the proviso that its provisions do not 'repeal or modify existing statutes prohibiting the collection * * * of any fee, charge, or price,' there is no statute which in terms prohibits the collection of a charge for the services involved.

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"The legislative history of section 501 [31 U.S.C. § 483a] discloses that the purpose thereof is to provide authority for Government agencies to make charges for services in cases where no charge was made at the time of its enactment, and to revise charges where charges then in effect were too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made (page 3, H.Rept. No. 384, 82d Cong., 1st Sess.).

"We agree with the Assistant Secretary that the language of 31 U.S.C. 483a is very broad, and that the section contemplates that those who receive the benefit of services rendered by the Government especially for for them should pay the costs thereof, at least to the extent that it appears that a special benefit is conferred. In the instant case the Assistant Secretary's letter discloses that the costs (including related costs) of stationing men and performing services in Canada are considerably greater than total costs to

> Customs would be if all of the Customs operations were performed in the United States. Also, as indicated above, the preclearance operation in Canada is essentially of advantage to the airline rather than the Bureau of Customs. Accordingly, it is our view that to the extent the costs (including employees' compensation) of the requested preclearance services in Canada are in excess of the costs that Customs would incur if all of the Customs operations involved were performed in the United States, a charge covering such excess costs would be authorized by 31 U.S.C. 483a, if fixed in accordance with the provisions of such section." (Emphasis supplied.)

We believe that the foregoing observations apply generally to the extra compensation and expenses statutes here involved. With certain exceptions referred to below, the reimbursements required by these statutes are not in terms exclusive. Moreover, it is clear that most of these statutes were enacted essentially for the benefit of Customs officers and employees, rather than to reimburse the Customs Service as such for its expenses (over and above the salary and related amounts passed on to employees) incident to the furnishing of special benefits. Cf., United States v. Myers, 320 U.S. 561, 567 (1944) (addressing 19 U.S.C. § 1451). Thus we do not view such statutes, in terms of their purpose, as inconsistent with the imposition of additional charges under 31 U.S.C. § 483a which are designed to make whole the Customs service.

As noted previously, there are certain exemptions from or limitations upon, payment by parties-in-interest of extra compensation or expenses. 49 U.S.C. § 1741(a) (1970) places a $25 maximum upon the amount payable under 19 U.S.C. § 1451 by the owner of a private vessel or aircraft in connection with arrival in or departure from the United States. 46 U.S.C. § 331 (1970) prohibits the collection of fees by customs officers for certain services. Also, 19 U.S.C. § 1451a (1970) and the proviso to 19 U.S.C. § 1451 require the United States to absorb the extra compensation payable to customs officers in specified circumstances. See with respect to the latter, 48 Comp. Gen. 262 (1968). We would construe the statutory exemptions and limitations described as precluding the imposition of additional user charges under 31 U.S.C. § 483a in the situations to which they apply. At the same time, the existence of these exceptions and limitations tends to support the conclusion that the compensation and expenses statutes are not otherwise exclusive.

For the reasons set forth above, it is our opinion that the Customs Service generally has authority to impose user charges under 31 U.S.C. § 483a, in addition to amounts payable for compensation and expenses of customs officers pursuant to the statutes discussed previously. Accordingly, we affirm the position taken in our March 1975 report that the Secretary of the Treasury has authority to direct the Customs Service to include a fair and equitable amount for administrative overhead in charges for such services, consistent, of course, with 19 U.S.C. §§ 1451 (proviso), 1451a, 46 U.S.C. § 331, and 49 U.S.C. § 1741.

Copies of this decision are being provided to the Chairmen of the Senate and House Committees on Government Operations and Appropriations.

R.F. KELLER

Deputy Comptroller General
of the United States