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Federal Security Administrator, Federal Security Agency.

My dear Mr. Miller:

Reference is made to your letter of June 16, 1947, as follows:

"Section 702(A) of the Federal Food, Drug, and Cosmetic Act as amended (49 Stat. 871, U.S.S., Sup. V, 372a) provides:

"'The Federal Security Administrator, upon application of any packer of any sea food for shipment or sale within the jurisdiction of this Act, may, at his discretion, designate inspectors to examine and inspect such food and the production, packing, and labeling thereof. If on such examination and inspection compliance is found with the provisions of this Act and regulations promulgated thereunder, the applicant shall be authorized or required to mark the food as provided by regulation to show such compliance. Services under this section shall be rendered only upon payment by the applicant of fees fixed by regulation in such amounts as may be necessary to provide, equip, and maintain an adequate and efficient inspection service. Receipts from such fees shall be covered into the Treasury and shall be available to the Federal Security Administrator for expenditures incurred in carrying out the purposes of this section, including expenditures for salaries of additional inspectors when necessary to supplement the number of inspectors for whose salaries Congress has appropriated.

The Administrator is hereby authorized to promulgate regulations governing the sanitary and other conditions under which the service herein provided shall be granted and maintained and for otherwise carrying out the purposes of this section. Any person who forges, counterfeits, simulates, or falsely represents, or without proper authority uses any mark, stamp, tag, label, or other identification devices authorized or required by the provisions of this section or regulations thereuder, shall be guilty of a misdemeanor, and shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not less than $1,000 nor more than $5,000 or both such imprisonment and fine.' (Underscoring supplied.)

"You will note that subscription to this service is voluntary.

"Since the fiscal year 1937 and continuing through 1947, Congress has appropriated $40,000 annually to help defray the expense of this service. This appropriation item in the labor-Federal Security Appropriation Act for 1947 (P.L. 549-79th Congress) appears as follows:

"'Salaries, sea food inspectors: For salaries of sea food inspectors designated in accordance with the provisions of section 702(A) of the Federal Food, Drug, nad Cosmetic Act, $40,000.'

"This annual appropriation is sufficient to pay the salaries of the inspectors assigned to the sea food plants for approximately the first four and one-helf months of the fiscal year and is used for this purpose. Miscellaneous expenses, and salaries for the remaining seven and one-half months are met first, from case fees collected from the individual packers on the basis of the number of cases packed and, second, from advance deposits made by the packers at periodic intervals during the fiscal year. The amounts of case fees and advance deposits are governed by regulations published in the Federal Register by the Administrator. These regulations furhter provide that, in applying the advance deposits toward the liquidation of the cost of the service, the deposits by each packer shall be charged in the same ration to the total deposits as the number of months service rendered in such packer's establishment bears to the total number of months of inspection service rendered in all establishments, and that the balances of deposits remaining after such charges shall be returned to the packers.

(Federal Register July 2, 1942 (7 F.R. 4945), as amended in Federal Register of June 10, 1943 (8 F.R. 7751), June 15, 1944 (9 F.R. 6583), June 30, 1945 (10 F.R. 7971), October 13, 1945 (10 F.R. 12800), and June 1, 1946 (11 F.R. 5904) re shrimp; and Federal Register January 4, 1944 (9 F.R. 56), as amended in Federal Register of February 2, 1944 (9 F.R. 1203), June 15, 1944 (9 F.R. 6534), October 21, 1944 (9 F.R. 12675), June 30, 1945 (10 F.R. 7971), October 13, 1945 (10 F.R. 12800), and October 23, 1946 (11 F.R. 12379) re oysters.) After applying all of the 1947 appropriation above referred to for salaries of inspectors and liquidating the remaining cost of the service from case fees and deposits it is estimated that for the current fiscal year a substantial balance of deposits will remain for return to the packers.

"For the proper maintenance of this service a number of automobiles are needed. These are used by supervising personnel in visiting the plants to which inspectors are assigned, in transporting samples of sea food suspected of being contaminated from the plants to the laboratory for examination; and for other transportation requirements which arise in connection with the sea food inspection service. At present three cars are assigned to this service, which were purchased during the fiscal years 1938 and 1940 from deposits made by the subscribing packers during those fiscal years. Each of these cars has traveled approximately 100,000 miles. It has been administratively determined that replacement of each is in the interest of the service and an additional one is needed for adequate service.

"It should be noted that the cost of these automobiles will not be paid from the appropriation inasmuch as this has been used exclusively for the payment of salaries and was exhausted after about four and one-half months of operation in the fiscal year. On the contrary, the cost will be paid from the advance deposits made by the packers. Purchase of this needed automotive equipment would merely result in reducing the balance of deposits which will be available for refund to the packers when the fiscal year ends. It would appear that the purchase of automobiles may be considered within the scope of that part of the basic legislation which reads, 'Service under this section shall be rendered only upon payment by the applicant of fees fixed by regulation in such amounts as may be necessary to provde, equip, and maintain an adequate and efficient

inspection service.' Hoever, no authority for such purchase appears in the appropriation act, nor is there any other explicit satutory authority for the same other than the above quoted sentence.

"For the fiscal year 1948 the $40,000 appropriation for sea food inspection has been deleted by the Congress. This means that the packers subscribing to the service must bear the entire cost, and the amounts of case fees and advance deposits have been revised upward and published in the Federal Register to meet this situation. (Federal Register May 23, 1947; 12 F.R. 3318)

"In view of the foregoing we request answers to the following questions:

"(a) May funds now in possession of the United States Treasury arising from advance deposits made by the packers during this fiscal year, in excess of the ultimate computed cost of the service for the year for salaries and ordinary operating expenses, be used by the Food and Drug Administration to purchase four automobiles for the sea food inspection service?

"(b) If the appropriation made by Congress in prior years, but deleted for the fiscal year 1948, is resoted in some subsequent fiscal year, may the deposits made by packers during such fiscal years be used by the Food and Drug Administration for the purchase of automobiles for the sea food inspection service?

"(c) May the deposits made by packers during the fiscal year 1948, and any other fiscal years wherein no appropriation is made for the sea food inspection service, be used by the Food and Drug Administration for the purchase of automobiles for the sea food inspection service?

The Federal Security Agency Appropriation Act, 1947, 60 Stat. 687, 688, appropriated funds to the Food and Drug Administration for all necessary expenses of performing the functions required to carry into effect provisions of the Federal Food, Drug, and Cosmetc Act, as amended, 21 U.S.C. 301-392, under individual headings for (1) endorcement operations, (2) salaies of sea food inspectors, (3) certification services, and (4) general administration. The needs of those branches of the Administration, incluing the sea food inspection service, were submitted to the Congress separately, as shown by the estimates contained in the 1947 budget, and, consequently, individual and complete appropriations were made in each case. Thus, authority was granted therein for the purchase of passenger automobiles in connection with "Enforcement operations" and "Certification services." However, in the case of "Salaries, sea food inspectors," while the budget included estimates, in addition to those for personal services, for travel, supplies and materials, etc., it apparently did not include any estimate for the purchase of passenger automobiles. In any event, no authority to purchase passenger motor vehicles was granted in the appropriation made for the sea food inspection service.

However, it is noted that an allowance was made in the budget for the amount of anticipated receipts from fees as a reduction of the total expenses. Therefore, it is clear that, in appropriating $40,000 "For salaries of sea food inspectors designated in accordance with the provisions of section 702(A) of the Federal Food, Drug, and Cosmectic Act," 21 U.S.C. 372a, the Congress, in effect, passed upon the availability of all receipts from fees during 1947 without making any provision for the purchase of passenger automobiles.

Section 5 of the act of July 16, 1914, 5 U.S.C. 78, as amended by section 16(a) of the "Administrative Expenses Act" of August 2, 1946, 60 Stat. 806, 810, 811, provides, in part, as follows:

"(a) Unless specifically authorized by the appropriation concerned or other law, no appropriation shall be expended to purchase or hire passenger motor vehicles for any branch of the Government other than those for the use of the President of the United States, the secretaries of the President, or the heads of the executive deartments enumerated in 5 U.S.C. 1.

* * * *

"(d) In the budgets for the fiscal year 1943 and subsequent fiscal years there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase or hire of passenger motor vehicles or for purchase, maintenance, or operation of aircraft, specifying the sums required, the public purposes for which said conveyances are intended, the number of currently owned conveyances to be continued in use, and the officials or employees by whom all of such conveyances are to be used."

Subsection (a) thereof plainly prohibits the expenditure of any "appropriation" to purchase passenger motor vehices unless specifically authorized by the appropriation concerned or other law. The funds derived from inspection fees must be regarded as appropriations since the effect of the language employed in the basic legislation relating to the sea food inspection service, quoted in your letter, in to continuously appropriate them for expenditure after they have been deposited into the Treasury. In other words, the quoted section 702(A) of the Federal Food, Drug, and Cosmectic Act, as amended, provides that the receipts from fees shall be covered into the Treasury and then authorized the use of such funds for expenditures incurred in carrying out the purposes of the sea food inspection service provided for therein. In such connection it was stated in Campagna v. United States, 26 C. C1s. (Ct.Cl) 316, 317, that "An appropriation is par se nothing more than the legislative authorization prescribed by the Constitution that money may be paid out at the Treasury."

In fact, unless such language be regarded as making an appropriation of the receipts derived from fees, there would be no authority to use such receipts for expenditures incurred in carrying out the purposes of the section of the act here involved in view of the provisions of Article 1, section 9, Clause 7, of the Constitution which provides that "No Money shall be withdrawn from the Treasury, but in Consequence of Appropriations made by Law." See Stitzel-Waller Distillery v. Wickard, 118 F. 2d 19; and Cf. Varney, et al. v. Warehime, et al, 147 F. 2d 238, 245, certionari denied 325 U.S. 882.

Hence, as to the first question presented by your letter you are advised that, since neither the Federal Security Appropriation Act, 1947, nor section 702(A) of the Federal Food, Drug, and Cosmetic Act, as amended, authorizes specifically the purchase of passenger motor vehicles, the funds now in possession of the U.S. Treasury--arising from deposits made by the packers during the fiscal year 1947 in excess of the amount necessary for salaries and operating expenses--may not be used to purchase automobiles for the sea food inspection service. As to the second and third questions presented in your letter, you are advised that, in the absence of specific authorization by the Congress in an appropriation for the sea food service or other laws, the deposits made by the packers during the fiscal year 1948, and subsequent fiscal years, may not be used by the Food and

Drug Administration for the purchase of automobiles for the sea food inspection service. In view of the negative answers to the first three questions presented, no reply is necessary to the fourth question.

Respectfully,

(Signed) Frank L. Yates Acting Comptroller General of the United States