



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Telephone Surcharge - State of North Carolina

File: B-254712

Date: February 14, 1994

DIGEST

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone charge imposed by the state of North Carolina because the charge is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services.

DECISION

An authorized certifying officer of the Department of Agriculture's National Finance Center has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying the 9-1-1 emergency telephone charge assessed against federal agencies in the state of North Carolina. For the reasons set forth below, we conclude that the charge is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from the tax.

BACKGROUND

Under sections 62A-4 and 62A-8 of the General Statutes of North Carolina, governing authorities of any local government in the state are authorized to impose a monthly 9-1-1 emergency charge on each exchange access facility¹ to pay for the costs of operating a 9-1-1 system. The charge must be uniform and may not vary according to the type of exchange access facility used. The service supplier, i.e., the telephone company, is required, on behalf of the local government, to bill the telephone subscriber for the charge and to remit the amount collected to the local government each month. N.C. Gen. Stat. §§ 62A-5(a), 62A-6. Funds collected from the imposition of the charge "shall be used only to pay for . . . the lease, purchase, or maintenance of emergency telephone equipment, including necessary computer

¹"Exchange access facility" is defined as "the access from a particular subscriber's premises to the telephone system of a service supplier." N.C. Gen. Stat. § 62A-3(4).

hardware, software and data base provisioning, addressing, and non-recurring costs of establishing a 911 system, and . . . other service supplier recurring charges." N.C. Gen. Stat. § 62A-8(a).

ANALYSIS

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments.² Direct taxation occurs where the legal incidence of the tax falls directly on the United States as the buyer of goods, Kern - Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), or as the consumer of services, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. County of Allegheny, 322 U.S. 174 (1944). These direct taxes, known as "vendee" taxes, are not payable by the federal government unless expressly authorized by Congress. 64 Comp. Gen. 655, 656-57 (1985).

We recently examined 9-1-1 charges in Pennsylvania, B-253695, July 28, 1993; Nebraska, B-249007, Jan. 19, 1993; Wisconsin, B-248907, Jan. 19, 1993; and Washington, B-248777, July 6, 1992.³ We held, in these cases, that the 9-1-1 service charges at issue were vendee taxes not payable by the federal government. Under these states' statutes, the telephone companies were merely collection agents, i.e., required to collect the 9-1-1 charges from their customers and then remit the amount collected to the state taxing authorities. Cf. B-238410, Sept. 7, 1990. The Indiana statute, for example, makes clear that the legal incidence of the tax falls on the customer by providing that "[t]he

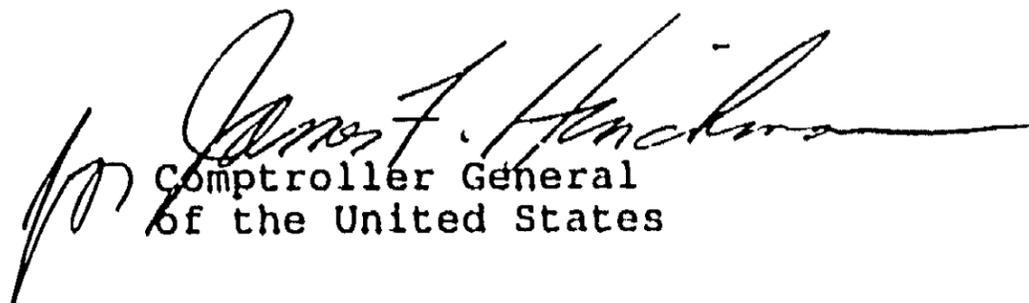
²Although the North Carolina statute labels the 9-1-1 emergency telephone charge as a "charge," it is, nonetheless, a tax. In 65 Comp. Gen. 879, 881 (1986), we identified the characteristics of telephone charges which make them taxes. First, the telephone service is provided by a local government or by a quasi-governmental unit. Second, public funding of the service requires legal authority, e.g., an ordinance or referendum. Third, the service charge is actually based on a flat rate per telephone line and is unrelated to levels of service. The 9-1-1 charge assessed under the North Carolina statute satisfies all these criteria. For further discussion of the characteristics of taxes, see, e.g., In re Mytinger, 31 F. Supp. 977 (N.D. Tex. 1940). Mich. Employment Sec. Comm'n v. Pratt, 144 N.W. 2d 663, 664-65 (Mich. App. 1966).

³See also 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-246517, Apr. 17, 1992 (Kentucky).

person who uses an exchange access facility is liable for the monthly . . . fees."

The North Carolina statute is not materially different from these state statutes. Under North Carolina's statute, the telephone company acts as a collection agent for the governing authorities in the state; the telephone company collects the 9-1-1 charge from telephone subscribers and remits the amount collected to the state. The North Carolina law provides that the "subscriber of an exchange access facility will be billed for the monthly 911 charges" and that the telephone company "shall, on behalf of the local government, collect the charges." N.C. Gen. Stat. § 62A-5(a). North Carolina's law makes clear that there is no obligation on the telephone company to take legal action to enforce collection of the charge. N.C. Gen. Stat. § 62A-5(b). Moreover, any taxes due on 9-1-1 service "will be billed to the local government subscribing to that service." N.C. Gen. Stat. § 62A-5(d). Also, the telephone company is allowed to retain one percent of the charge as an administrative fee to compensate for collecting the charge.

North Carolina's 9-1-1 charge is, therefore, a vendee tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the state. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government. Federal agencies who are threatened with discontinuation of service for non-payment of this tax should consult with the Department of Justice.


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