



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Telephone Surcharge - State of Wyoming

File: B-255092

Date: February 14, 1994

DIGEST

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone surcharge imposed by the state of Wyoming because the surcharge 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 surcharge assessed against federal agencies in the state of Wyoming. For the reasons set forth, we conclude that the surcharge 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 section 16-9-103 of the Wyoming Statutes, governing bodies in the state are authorized to impose a monthly 9-1-1 emergency surcharge on each local exchange access line to pay for the costs of operating a 9-1-1 system. The surcharge is defined as "a charge set by the governing body and assessed on each local exchange access line."¹ Wyo. Stat. § 16-9-102(v). The charge must be uniform and may not exceed fifty cents per month for each access line. Wyo. Stat. § 16-9-103(b). The local exchange access company, i.e., the telephone company, is required to bill the service

¹"Local exchange access line" is defined as "any telephone line that connects a telephone subscriber to the local switching office." Wyo. Stat. § 16-9-102(iii).

user² for the surcharge and must remit the amount collected to the governing body on a quarterly basis. Wyo. Stat. §§ 16-9-103(d), 16-9-104(a). Funds collected from the imposition of the surcharge "shall be spent solely to pay for the equipment and service costs, installation costs, maintenance costs, monthly recurring charges and other costs directly related to the continued operation of a 911 system." Wyo. Stat. § 16-9-105(b).

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.³ 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,

²"Service user" is defined to mean "any person who is provided local access exchange telephone service in the state," and thus would include federal agencies. Wyo. Stat. § 16-9-102(a)(ix).

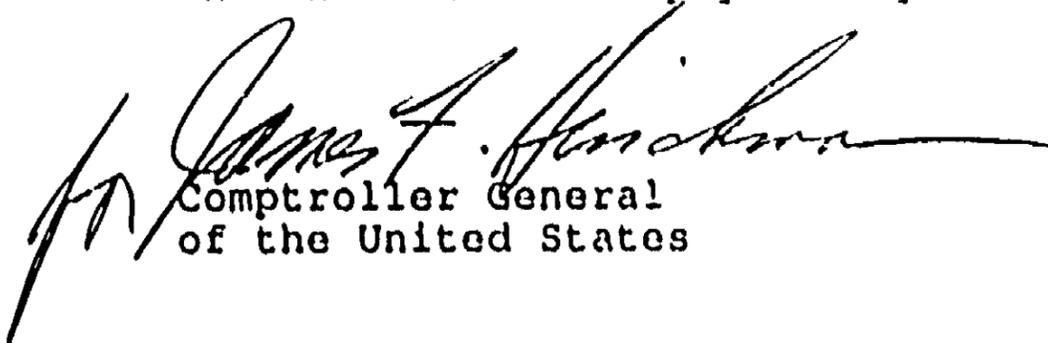
³Although the Wyoming statute labels the 9-1-1 emergency telephone charge as a "surcharge," it is, nonetheless, a tax. In 65 Comp. Gen. 879, 881 (1986), we identified the characteristics of telephone charges which make them taxes. First, the telephone service is provided by a local government or by a 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 surcharge assessed under the Wyoming 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).

B-248777, July 6, 1992.⁴ 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 person who uses an exchange access facility is liable for the monthly . . . fees."

The Wyoming statute is not materially different from these state statutes. Under Wyoming's statute, the telephone company acts as a collection agent for the governing bodies in the state; the telephone company collects the 9-1-1 surcharge from service users and remits the amount collected to the state. The Wyoming law provides that "[e]very billed service user shall be liable for any charge imposed under this chapter until it has been paid to the local exchange access company or governing body." Wyo. Stat. § 16-9-103(e). Wyoming's law makes clear that there is no obligation on the telephone company to take legal action to enforce collection of the surcharge, and states that the telephone company "is not liable for uncollected amounts." Wyo. Stat. § 16-9-103(f). Also, the telephone company is allowed to retain one percent of the charge as a cost of administration for collecting the surcharge. Wyo. Stat. § 16-9-104(b).

CONCLUSION

Wyoming's 9-1-1 surcharge 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.


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⁴See 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); B-248363, Apr. 17, 1992 (Indiana); B-239608, Dec. 14, 1990 (Rhode Island); B-230691, May 12, 1988 (Tennessee).