

**DECISION**



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

**FILE:** B-211093

**DATE:** May 10, 1983

**MATTER OF:** Army Corps of Engineers--Payment of South  
Dakota Sales Tax on Furnishing of Electricity

**DIGEST:**

Army Corps of Engineers is not immune from paying South Dakota gross receipts tax on furnishing of electricity. Wording of statute that imposes the tax in question and a decision by the South Dakota Supreme Court make it clear that the legal incidence of the State tax is on the vendor, not the United States. The United States is not constitutionally immune from such a vendor tax.

A Finance and Accounting Officer for the United States Army Corps of Engineers, Omaha, Nebraska has requested an advance decision as to whether the Corps may pay a voucher for sales tax in the amount of \$11.56 applied against electricity charges by a public utility in South Dakota. For the reasons stated below, we hold that the voucher for sales tax may be paid.

The record indicates that Cam Wal Electric Cooperative, Inc., billed the Corps for \$289.08 for electricity furnished pursuant to a contract between the two parties. In addition, Cam Wal sent the Corps a voucher in the amount of \$11.56 for the sales tax applied against the electricity bill.

The tax in question is imposed under South Dakota Codified Laws section 10-45-6, which provides, in pertinent part:

"There is hereby imposed a tax of four percent upon the gross receipts from sales, furnishing, or service of \* \* \* electricity \* \* \* when sold at retail in the state of South Dakota to consumers or users."

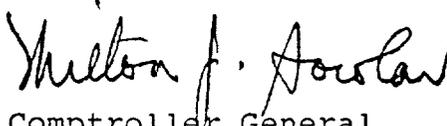
It is obvious from the above-quoted provision of South Dakota law that the legal incidence of the tax in question falls on the electric utility rather than the consumer of electricity. This view is supported by the decision of the

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South Dakota Supreme Court in Northwestern Public Service Co. v. Housing and Redevelopment Commission, 320 N.W. 2d 515 (S.D. 1982). In that decision the Court held that, since electricity is not "tangible personal property" within the meaning of the gross receipts tax exemption in section 10-45-10, those engaged in the sale, furnishing, or service of electricity are subject to the gross receipts tax of section 10-45-6. We have held that in determining whether the legal incidence of a particular tax is on the vendor or the vendee, we will follow the determination of the highest court of the State in question. See, e.g., B-172025, March 30, 1971; 21 Comp. Gen. 843 (1942).

We have repeatedly held that, when the legal incidence of a State tax falls on a vendor, the United States, as purchaser, is not immune under the Constitution from bearing the financial burden of that tax. See, e.g., 61 Comp. Gen. 257, 258 (1982). Therefore, since the unambiguous wording of section 10-45-6 and a decision of the South Dakota Supreme Court make clear that the tax in question is a tax on the vendor, the United States Government is subject to and can pay the South Dakota sales tax.

for   
Comptroller General  
of the United States