



Comptroller General
of the United States
Washington, D.C. 20548

25344

Decision

Matter of: Emergency Telephone Charges - State of Michigan

File: B-254628

Date: April 7, 1994

DIGEST

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone charges imposed by the state of Michigan because the charges are vendee taxes, 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 charges assessed against federal agencies in the state of Michigan. For the reasons set forth below, we conclude that the 9-1-1 emergency telephone charges included in the Michigan 9-1-1 statute are vendee taxes, 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 taxes.

BACKGROUND

Under section 22.1467(301) of the Michigan Statutes, the board of commissioners of a county in Michigan may establish an emergency telephone district and cause 9-1-1 emergency telephone service to be implemented by service suppliers¹ in the county. As soon as feasible after installation and commencement of operation of a 9-1-1 system, the service supplier shall provide a billing and collection service for the emergency telephone charges. Mich. Stat. Ann. § 22.1467(401)(1). The charges shall include an emergency

¹"Service supplier" is defined to mean any person providing telephone services to a "service user," *i.e.*, a telephone company. "Service user" is defined to mean any exchange access facility customer of a service supplier within a 9-1-1 system. Mich. Stat. Ann. § 22.1467(102)(q) and (r).

telephone technical charge² and an emergency telephone operational charge.³ The portion of the emergency telephone technical charge that represents start-up costs, nonrecurring billing, installation, service, and equipment charges of the service supplier, including the costs of updating equipment necessary for conversion to 9-1-1 service, shall be amortized over a period not to exceed 10 years, as approved by the public service commission, and shall be billed and collected from all service users only until those amounts are fully recouped by the service supplier. Recurring costs and charges shall continue to be billed to the service users. *Id.* The amount collected for the emergency telephone operational charge shall be paid by the service supplier to the county that authorized the collection. Mich. Stat. Ann. § 22.1467(401)(4).

The statute includes a maximum rate for the calculation of the charges based on the highest monthly flat rate charged by the service supplier for an access line within the 9-1-1 service district. Mich. Stat. Ann. § 22.1467(401)(3). The difference between the maximum rate and the costs associated with the 9-1-1 system is paid by the county. Mich. Stat. Ann. § 22.1467(401)(3). The charges must be uniform per each exchange access facility within the 9-1-1 service district. Mich. Stat. Ann. § 22.1467(401)(1). The emergency telephone charges are to be collected by the service supplier in accordance with the regular billings of the service supplier. Any amounts collected by the service supplier for the emergency telephone technical charge and emergency telephone operational charge shall be used only for costs and charges directly attributable to providing the 9-1-1 service. Mich. Stat. Ann. § 22.1467(401)(3).

ANALYSIS

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from

²"Emergency telephone technical charge" means a charge for the network start-up costs, customer notification costs, billing costs including an allowance for uncollectibles, and network nonrecurring and recurring installation, maintenance, service, and equipment network charges of a service supplier. Mich. Stat. Ann. § 22.1467(102)(f).

³"Emergency telephone operational charge" means a charge for nonnetwork technical equipment and other costs directly related to the operation of a 9-1-1 system including, but not limited to, dispatch personnel. Mich. Stat. Ann. § 22.1467(102)(e).

direct taxation by state and local governments.⁴ 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). If, however, the legal incidence of the tax falls directly on a business enterprise, *i.e.*, the "vendor," which is supplying the federal government, the customer, with goods or services, the government may pay the tax provided it is included in an approved tariff. Id. at 657.

We recently examined 9-1-1 charges in North Carolina, B-254712, Feb. 14, 1994; Wyoming, B-255092, Feb. 14, 1994; Pennsylvania, B-253695, July 28, 1993; and Nebraska, B-249007, Jan. 19, 1993.⁵ 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." B-248363, Apr. 17, 1992.

⁴Although the Michigan statute labels the 9-1-1 emergency telephone charges as "charges," they are, nonetheless, taxes. 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 charges assessed under the Michigan statute satisfy all these criteria. For further discussion of the characteristics of taxes, see, e.g., In re Myttinger, 31 F. Supp. 977 (N.D. Tex. 1940); Mich. Employment Security Comm'n v. Pratt, 144 N.W.2d 663, 664-65 (Mich. App. 1966).

⁵See also 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-248907, Jan. 19, 1993 (Wisconsin); B-248777, July 6, 1992 (Washington); B-246517, Apr. 17, 1992 (Kentucky); and B-248363, Apr. 17, 1992 (Indiana).

After an analysis of Michigan's 9-1-1 statute, we conclude that Michigan's 9-1-1 emergency telephone charges are vendee taxes. First, the Michigan statute states that "each billed service user shall be liable" for the 9-1-1 taxes "imposed on the service user," and that the taxes "payable by service users . . . shall be added to and shall be stated separately in the billings to service users." Mich. Stat. Ann. §§ 22.1467(402), 22.1467(401)(4). Second, the telephone companies are made responsible for the collection of the taxes and "may take any legal action to collect" them. Mich. Stat. Ann. § 22.1467(403). They are not required to pay the taxes if the service users fail to pay; each service user is liable for payment of the tax. Mich. Stat. Ann. § 22.1467(402). One hallmark of a vendor tax is that the seller is required to pay it even if he is unwilling or unable to collect it from the purchaser. 63 Comp. Gen. 49 (1983); B-239608, Dec. 14, 1990.

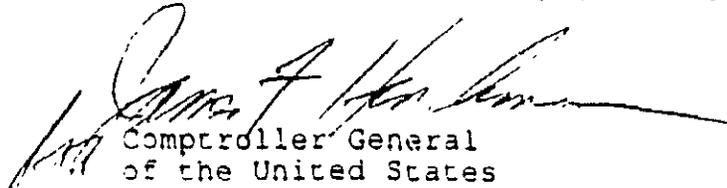
Third, the telephone companies are characterized merely as providing a "billing and collection service" for the telephone charges, acting in this regard as collection agents for the state. Mich. Stat. Ann. § 22.1467(401). See B-247501, May 4, 1992. With respect to the emergency telephone operational charge, the telephone companies collect the charge and remit the amount collected to the county that authorized the collection. Mich. Stat. Ann. § 22.1467(401)(4). Although amounts collected for the emergency telephone technical charge are retained by the telephone companies to cover their costs, Mich. Stat. Ann. § 22.1467(401), this alone does not mean that this charge is a vendor tax. An analysis of the taxing scheme as a whole suggests that the telephone companies are collecting this charge on behalf of the state as well; these amounts appear available only to defray the costs incurred by the telephone company, on behalf of the county, for implementing the 9-1-1 system. See Mich. Stat. Ann. § 22.1467(401)(1), which authorizes the telephone company to amortize the nonrecurring costs included in the technical charge over a period of time "until those amounts are fully recouped." Moreover, the telephone company is authorized to retain their billing and collection costs. Mich. Stat. Ann. §§ 22.1467(102)(f), 22.1467(405)(2).

Michigan's 9-1-1 charges are, therefore, vendee taxes, the legal incidence of which falls directly on the federal government as a user of telephone services in the state.⁶

⁶Senate Bill No. 849, a bill to amend Michigan's 9-1-1 statute, was introduced in the state legislature in early 1993 but no further action has been taken on this bill. The amendments, if enacted, may affect our conclusion as to

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Consequently, the United States is constitutionally immune and the taxes are not payable by the federal government.



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⁶(...continued)
whether Michigan's 9-1-1 telephone charges retain their character as vendee taxes.