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United States General Accounting Office
Washington, DC 20548

B-288161

April 8, 2002

Mr. James M. Eagen, III
Chief Administrative Officer
Office of the Chief Administrative Officer
House of Representatives

Subject: 911 Emergency Surcharge and Right-of-Way Charge

Dear Mr. Eagen:

By letter dated June 18, 2001, you asked whether the United States House of Representatives and its respective offices are responsible for paying the 911 emergency surcharge and the right-of-way charge to local carriers within the District of Columbia. Both charges are itemized on the monthly statement from the local carrier, Verizon. As set forth more fully below, we find that the District of Columbia's 911 emergency surcharge is a tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the District of Columbia. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government. However, the right-of-way charge is a rental fee imposed upon the telecommunications companies and other utilities that use public property. Since it is not a tax that falls on the federal government as a vendee, the federal government may pay the right-of-way charge.

Background

The House of Representatives receives a monthly statement from Verizon, its local carrier for telephone services. Among the itemized charges are two specific fees which are the subject of your letter: a 911 emergency surcharge and a right-of-way charge. You note that the federal government is constitutionally immune from taxation by the states and where a state tax is imposed directly on the purchaser, and the purchaser is the United States, the United States is not required to pay the tax pursuant to principles of sovereign immunity. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). You asked us whether the House of Representatives and its

respective offices are responsible for paying the 911 emergency surcharge and right-of-way charge.

The two relevant statutes to the inquiry are the Emergency and Non-Emergency Number Telephone Calling Systems Act of 2000 for the 911 emergency surcharge (D.C. Code Ann. § 34-1801 (2001)) and the Fiscal Year 1997 Budget Support Act of 1996 (D.C. Law 11-198, April 9, 1997), which authorized the Mayor to issue permits and charge rent for use of public rights of way. D.C. Code Ann. § 7-1076 (2001). We will describe each in turn below.

Emergency and Non-Emergency Number Telephone Calling Systems Act of 2000

In 2000, the District of Columbia enacted the Emergency and Non-Emergency Number Telephone Calling Systems Fund Act of 2000 (fund) (D.C. Law 13-172, Oct. 19, 2000) which is to be used to defray the 911 emergency system costs incurred by the District of Columbia. Under this law, "[a]ll subscribers shall contribute to the Fund through a user fee to be collected by each local exchange carrier." D.C. Code Ann. § 34-1803(a) (2001). User fees collected under the statute are not "considered revenue of a local exchange carrier for any purpose." D.C. Code Ann. § 34-1803(c) (2001). These fees must be deposited in the fund and used solely to defray the costs incurred by the District of Columbia in providing a 911 emergency system. D.C. Code Ann. § 34-1802 (2001). The law explains that the 911 charges are "user fees imposed on [telephone] subscribers" and that the law "remove[s] the 911 system costs currently embedded in the base rates charged by the [telephone companies] for local telephone services." Emergency and Non-Emergency Number Telephone Calling Systems Fund Act of 2000, D.C. Law 13-172, Oct. 19, 2000.

Fiscal Year 1997 Budget Support Act of 1996

The Fiscal Year 1997 Budget Support Act of 1996 (D.C. Law 11-198, April 9, 1997) authorizes the Mayor to issue permits and charge rent for the occupation and use of public space, public rights of way and public structures. Part of the law deals with the area below the surface of any public street or sidewalk. D.C. Code Ann. § 10-1141.01 (2001). The Mayor is empowered to issue permits for use of the public rights of way, to issue regulations, and to provide for the payment of a nondiscriminatory, fair and equitable fee for use of the space. D.C. Code Ann. § 10-1141.03-.04 (2001).

By regulation, no person may use the below ground right of way without an occupancy permit and paying the rental fee. D.C. Mun. Regs. Tit. 24, § 3302.1 (2001). The rental fee for pipes below the surface is $.14 per linear foot of public right-of-way occupied. D.C. Mun. Regs. Tit. 24, § 3302.8 (2001). The law also requires each public utility company regulated by the Public Service Commission to recover from its utility customers all lease payments through a surcharge mechanism applied to each unit of sale, and separately state the surcharge amount on each customer's monthly billing statement. D.C. Code Ann. § 10-1141.06 (2001).

Discussion

The question of whether the United States and its instrumentalities must pay these charges turns on whether the 911 emergency surcharge and right-of-way charge are taxes imposed on the federal government. It is well established that the United States and its instrumentalities are immune from direct taxation by state and local governments. Direct taxation occurs where the legal incidence of a tax falls directly on the United States as the buyer of goods, Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), as the consumer of services, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. Allegheny County, 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).

Generally, when a statute states that the tax must be passed on to the purchaser, the legal incidence of the tax falls on the purchaser. See, e.g., 57 Comp. Gen. 59 (1977) (tax statute states that the tax must be passed on to the consumer and government therefore immune from payment). In these instances, the business enterprise (the "vendor") passing the tax on to vendees is really the collection agent for the state. On the other hand, if the legal incidence of the tax falls directly on a vendor, which is supplying the federal government as a customer with goods or services, immunity does not apply. 61 Comp. Gen. 257 (1982) (requirement that a utility tax be passed on to the user must be part of the taxing statute for the government to invoke the principles of sovereign immunity). Whether the federal government reimburses the vendor when it pays for the goods or services supplied by the vendor is determined by the government's contract or other agreement with the vendor. 61 Comp. Gen. 257, 258 (1982); B-211093, May 10, 1983.

A fee charged by a state or political subdivision for a service rendered or convenience provided, however, is not a tax. See Packet Co. v. Keokuk, 95 U.S. 80, 84 (1877) (wharf fee levied only on those using the wharf is not a tax); 49 Comp. Gen. 72 (1969) (a claim for an amount representing the fair and reasonable value of services provided in rehabilitation of a drainage ditch is payable, while an invoice assessing the government a fee for the drainage ditch calculated in the manner that taxes are assessed is a tax and may not be paid). Distinguishing a tax from a fee requires careful analysis because the line between "tax" and "fee" can be a blurry one. Collins Holding Corp. v. Jasper County, South Carolina, 123 F.3d 797, 800 (4th Cir. 1997). Taxation is a legislative function while a fee "is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974).

In determining whether a charge is a "tax" or "fee," the nomenclature is not determinative and the inquiry must focus on explicit factual circumstances. Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000). One court described a "classic" tax as one imposed by a legislature upon many, or all, citizens, raises

money, and is spent for the benefit of the entire community. San Juan Cellular Tel. Co. v. Public Service Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992). On the other hand, a classic "regulatory fee" is imposed by an agency upon those subject to its regulation, may serve regulatory purposes, and may raise money to be placed in a special fund to help defray the agency's regulation related expenses.[1] Id.

911 Emergency Surcharge Is a Vendee Tax and Government is Immune

The 911 emergency surcharge has attributes of a "classic" tax described in San Juan: it is levied by the D.C. Council on all citizens with telephone service, it raises money, and the money is spent to provide emergency service for the benefit of the entire community. Although the District of Columbia statute terms it a "user fee," it is clear that the service provider is not the telephone company but rather the District of Columbia government. The amount of the surcharge, $.56 per access line, $.07 per centrex line, and $.56 per wireless telephone service for each telephone number, is set by statute for all persons with local exchanges. D.C. Code Ann. § 34-1803(a)(2)(2001). The revenue raised is placed in a special fund to be used to defray the costs of the 911 emergency system. D.C. Code Ann. (2)(2001). The revenue raised is placed in a special fund to be used to defray the costs of the 911 emergency system. D.C. Code Ann. § 34-1802(a)(2001).

We have examined telephone charges in several states, including Utah, B-283464, February 28, 2000; Illinois, B-265776, November 29, 1995; and Alaska, B-259029, May 30, 1995. In each of these cases, we held that the state emergency telephone surcharges were vendee taxes not payable by the federal government because the telephone companies had merely collected surcharges for submission to the state taxing authorities. The District of Columbia statute is not materially different from the statutes of these states. Utah, for example, had many provisions similar to the D.C. statute: the local exchange carrier was required to collect the money and remit it to the public agency, the public agency must deposit the money in a special fund

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[1] This formulation for distinguishing taxes from fees in the context of the Tax Injunction Act (TIA) has found favor in a number of circuits. Cumberland Farms Inc. v. Tax Assessor, 116 F.3d 943, 946 (1st Cir. 1997); Collins Holding Corp. v. Jasper County, South Carolina, 123 F.3d 797, 800 (4th Cir. 1997); and Bidart Bros. v. California Apple Comm'n, 73 F.3d 925, 930 (9th Cir. 1996). Under the TIA, federal courts lack jurisdiction to enjoin, restrain, or suspend the assessment or collection of any state tax if the state courts have a speedy and efficient remedy. Thus the federal courts have had ample opportunity to analyze the differences between taxes and fees. See also Union Pacific R.R. Co. v. Public Util. Comm'n, 899 F.2d 854 (9th Cir. 1990), and Chicago and N.W. Transp. Co. v. Webster County Board of Supervisors, 880 F. Supp. 1290 (N.D. Iowa 1995), which use a similar formulation of the meaning of "tax" and "fee" in the context of the U.S. Constitution and the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

available only to pay the costs of the 911 emergency phone system, and the public agency, not the telephone company, administers the 911 telephone emergency system. Utah, B-283464, February 28, 2000.

In this instance, the District of Columbia statute clearly assesses the 911 charges directly against the users and specifically removes it from the telephone company's base rate. Like Alaska's statute, District of Columbia law states that the fees collected are not considered revenue to the telephone company. D.C. Code Ann. § 34-1803(c) (2001). The local exchange carrier is required to collect the fees and remit the proceeds to the Mayor on a quarterly basis. D.C. Code Ann. § 34-1802 (2001). As was true in Illinois, the local exchange carrier may deduct a fee (up to 2% in the District of Columbia) to cover administrative costs of the collection. D.C. Code Ann. § 34-1803(b)(2) (2001). The fact that the charge is called a "user fee" rather than a tax is legally irrelevant if, as is true here, the charge is really a vendee tax imposed by the District of Columbia government on a class of residents--telephone users--who receive certain emergency services which the District of Columbia government and its instrumentalities provide.[2]

It is our opinion that the District of Columbia's 911 emergency surcharge is a tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the District of Columbia. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government.

Right-of-Way Charge Is a Rental Fee Imposed on Vendors, not Vendees, and May Be Paid by the Government

The right-of-way charge presents a different situation. Here, the District of Columbia is imposing a rental fee on the telecommunications company (and other utilities) for the use of public space. The statute deals with the rental of public space, and the payments are based on the amount of underground space the company uses. The utility company proposing to use public space for company purposes is required to apply for a permit to occupy the public rights of way, and if the permit is granted, the company must pay a fee.

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[2] Compare the District of Columbia 911 statute with that of Arizona (B-238410, September 7, 1990). In Arizona, the statute requires that telephone companies, or vendors, pay an amount based on a percentage of sales or gross income derived from providing telephone exchange access service. Although the vendors pass the burden of the tax imposed on to their customers, the legal incident of the tax falls on the vendor. It is a "transaction privilege tax," which is an excise tax on the privilege of doing business in the state. We found that the Arizona 911 statute imposed a tax on the vendors and the amounts passed on to the customers were not taxes and were payable by the federal government.

It is clear from the statute that the fee is being imposed on the entity that wishes to occupy or otherwise use public rights of way. No permit is issued unless the party applying for the permit, that is, the company, pays the fee, D.C. Ann § 10-1141.04(1); the permit is held in the name of the company, see generally, D.C. Code Ann. §§ 10-1141.03 - .05; and, any failure to comply with the terms of the permit may result in costs charged to the company. D.C. Code Ann. § 10-1141.03(e). Unlike the 911 emergency surcharge statute, there is no language that indicates that the telecommunications company is collecting the fee from its subscribers for the benefit of the District of Columbia government. Nothing in the statute excludes any collection the telecommunications company may receive from its customers from being considered revenue to the company.

The fee is part of a regulatory framework that requires a permit and posting of a bond, and that regulates work done in public space and the rental of that public right of way. While a statute authorized a fee, it is the Mayor, through regulation, that sets the fee. The Mayor has issued regulations implementing the statute that sets the fee at $.14 per linear foot. The first $30 million of annual revenue derived from the collection of the public rights-of-way user fees, charges, and penalties "shall be dedicated to the Department of Public Works for expenditures related to street and alley repairs and maintenance that would otherwise be paid out of the General Fund." D.C. Code Ann. § 10-1141.04(5) (2001). Excess revenues are dedicated to the District of Columbia Highway Trust Fund. Id. The rental fee thus fulfills a purpose of helping to regulate work done in public rights of way, and establishes a funding stream for repairs and maintenance on roads and alleys that may be subject to excavation by the telecommunications companies and other utilities. Here, the rental fee is "incident to a voluntary act" as the Supreme Court in National Cable Television, 415 U.S. at 340, described a fee. Thus we find that the right-of-way fee is a rental fee that is part of a regulatory framework for use of public space and is not a tax.

Even if one were to conclude that the rental fee is a "tax," our result is the same, since the legal incidence of the fee falls on the telecommunications company, not on the end user. Your letter quotes the section of the statute that requires each "public utility company regulated by the Public Service Commission" to recover all lease payments it pays to the District of Columbia through a surcharge mechanism. D.C. Code Ann. § 10-1141.06 (2001). This provision does not shift the legal incidence of the payment from the telecommunications company to the company's customers but instead is part of the regulatory structure of a utility regulated by the Public Service Commission.

Some of our decisions have held that when a statute requires a vendor to pass on a tax to its customers, the legal incidence of the tax falls on the customer, and the United States, as a customer, is legally immune from paying the tax. See 57 Comp. Gen. 59, 61 (1977); 55 Comp. Gen. 1358, 1359 (1976). However, this is only one consideration in analyzing a statute to determine where the legal incidence of a tax falls. We have also explained that the fact that a utility may increase its rate to pass on the tax and itemizes it on the statement does not necessarily mean that the legal

incidence falls on the vendee. B-144504 (June 9, 1970); B-211093 (May 10, 1983). A utility, for example, may pass on the economic burden of a tax assessed against it to its customers as part of its rates. 61 Comp. Gen. 257, 260 (1982). Here, the language of the District of Columbia statute makes clear that payment of the right-of-way fee is the responsibility of the entity that applies for and receives the permit.

In summary, it is our opinion that the right-of-way charge is a rental fee imposed upon the telecommunications companies that use public property. Since it is not a tax that falls on the federal government as a vendee, the federal government may pay the right-of-way charge.

Conclusion

We find that the District of Columbia's 911 emergency surcharge is a tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the District of Columbia. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government. However, the right-of-way charge is a rental fee imposed upon the telecommunications companies and other utilities that use public property. Since it is not a tax that falls on the federal government as a vendee, the federal government may pay the right-of-way charge.

We trust this is responsive to your query. Copies of this opinion are being provided to the District of Columbia Corporation Counsel, the Office of the Secretary of the Senate, and interested Congressional committees. If you have any further questions, please contact Susan A. Poling, Associate General Counsel, at 202-512-2667.

Sincerely yours,

/signed/

Anthony Gamboa
General Counsel