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Washington, DC 20548

B-302230

December 30, 2003

Mr. Robert J. Spagnoletti
Corporation Counsel
Government of the District of Columbia

Subject: Reconsideration of District of Columbia 9-1-1 Emergency Telephone System Surcharge and Effect of New Amendments

Dear Mr. Spagnoletti:

This responds to two requests of your office with regard to the District of Columbia 9-1-1 Emergency Telephone System considered in B-288161, Apr. 8, 2002, to James M. Eagen III, Chief Administrative Officer of the House of Representatives.[1] You asked us to reconsider our decision that the U.S. House of Representatives is not required to pay the District 9-1-1 emergency telephone system surcharge as originally enacted in 2000. You also asked whether recent amendments to District law that made fundamental changes to the nature and applicability of the surcharge cured the problem identified in our 2002 decision that made the surcharge an impermissible tax on the federal government.

For the reasons given below, we find no basis to change our previous determination that the House of Representatives was not required to pay the District's 9-1-1 emergency telephone system surcharges, as originally enacted. However, the recent amendments to the District 9-1-1 emergency telephone system surcharge changed the nature of the tax. As now imposed, the legal incidence of the tax is not on the federal government, but on the provider of services. Therefore, federal agencies may pay service provider bills that include itemization of the amended District 9-1-1 surcharge.

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[1] Letter from Interim Corporation Counsel Arabella Teal to GAO General Counsel Anthony Gamboa, Oct. 10, 2002, and Letter from Corporation Counsel Robert J. Spagnoletti to GAO General Counsel Anthony Gamboa, Oct. 27, 2003.

BACKGROUND

Your office disagrees with our conclusion in B-288161 that the District 9-1-1 emergency telephone system surcharge, as originally enacted, was an impermissible tax on the federal government. In our 2002 decision, we considered whether the United States and its instrumentalities must pay the District 9-1-1 surcharge, or whether the surcharge amounted to a tax impermissibly imposed on the federal government. Citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), our decision noted that the United States and its instrumentalities are constitutionally immune from direct taxation by state and local governments. We concluded that, despite its use of the term "user fee," the District's 9-1-1 emergency telephone system surcharge constituted a tax, the legal incidence of which fell directly upon the federal government as user of telephone services in the District of Columbia. Accordingly, we held that the federal government, including the House of Representatives, was constitutionally immune from, and need not pay, the District's 9-1-1 emergency telephone system surcharge. B-288161, supra.[2]

After we issued B-288161, your office requested that we reconsider our conclusion. You said that your research had not revealed any case in which a court had invoked the tax immunity doctrine to set aside a district tax levied upon the United States or one of its instrumentalities. You believe that the constitutional considerations underpinning the McCulloch tax immunity doctrine do not apply to the District, given its unique status as a federal district and a "'partially independent' governmental unit." You also believe that the District's power to impose a tax or fee on federal government entities is controlled exclusively by federal statute, and you said that you can find no federal statute prohibiting the District from imposing the surcharge on the federal government. Moreover, you argue that, if Congress wishes to preclude the District from taxing other federal entities, it may easily do so by disapproving or amending the relevant District acts through established processes and statutory provisions. Letter from Interim Corporation Counsel Arabella Teal to GAO General Counsel Anthony Gamboa, Oct. 31, 2002.

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[2] In the same decision, we held that the House of Representatives could pay another District fee: The right-of-way surcharge authorized by the Fiscal Year 1997 Budget Support Act of 1996 (D.C. Law 11-198, April 9, 1997). D.C. Code § 10-1141.01-10-1141-.06 (2001). That surcharge is imposed on telecommunications and other utility companies for their use of public space below the surface of District streets and sidewalks. We found it to be a rental fee, the legal incidence of which fell on the telecommunications and utility companies, not on the federal government as an end user. B-288161, supra.

Recently, the District amended the statute creating its 9-1-1 surcharge. See Budget Support Congressional Review Emergency Act of 2003, D.C. Law 15-149, §§ 501, 502 (Sept. 22, 2003).[3] The 2003 amendments eliminated provisions of the original law characterizing the surcharge as a "user fee" and explicitly imposed it upon telephone subscribers. The amendments also repealed the provisions stating that the surcharge was not to be considered revenue of the telephone companies, as well as those allowing the telephone companies to retain up to 2 percent of the surcharge to cover their administrative costs in collecting the surcharge for the District. See D.C. Law 15-149, § 502, to be codified at D.C. Code §§ 34-1801-1804.

Now, as amended, the District 9-1-1 surcharge is described in District law as a "tax," and it is "imposed on all local exchange carriers . . . calculated [as a flat rate] on the basis of each individual telephone line sold or leased in the District of Columbia." Emergency and Non-Emergency Number Telephone Calling Systems Fund Emergency Amendment Act of 2003, D.C. Law 15-149, tit. V, § 502, to be codified at D.C. Code § 34-1803. Telephone service providers are required to "submit the tax . . . to the Mayor on a quarterly basis." Id. The amendments took effect on October 1, 2003. D.C. Law 15-149, § 504.

DISCUSSION

First, we will address your request that we reconsider our 2002 decision holding that the federal government is immune from paying the District 9-1-1 surcharge, as originally enacted. Second, we will consider whether, under the 2003 amendments, the federal government may pay the District 9-1-1 surcharge.

1. The District 9-1-1 Surcharge, as Originally Enacted, is an Impermissible Tax

Our 2002 decision was predicated upon federal supremacy and sovereignty, as upheld in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). You argue that McCulloch has no application to a tax enacted by the District of Columbia because the District is part of the federal government and the rule in McCulloch is limited to protecting the federal government from taxation by the states. We disagree. We see McCulloch as protecting the supremacy and sovereignty of the federal government from interference by any subordinate jurisdiction, including the government of the District of Columbia.

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[3] Because this was an "emergency act," an identical "permanent law" has also been enacted: D.C. Law 15-106. Your letter states that the law took effect Nov. 11, 2003. Letter from Corporation Counsel, Robert J. Spagnoletti to GAO General Counsel, Anthony Gamboa, Oct. 10, 2003.

The Supremacy Clause Bars Interference by Any Subordinate Government

McCulloch concerned an attempt by the state of Maryland to impose a tax upon the Bank of the United States, a federal instrumentality. To resolve the resulting controversy, the Supreme Court turned to the Supremacy Clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States which are made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. The Supreme Court found that the Supremacy Clause rendered the federal government and its instrumentalities immune from state taxes like the one imposed by Maryland. McCulloch, 17 U.S. at 436. McCulloch is often cited for the proposition "that States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." United States v. County of Fresno, 429 U.S. 452, 459 (1977). Quoting United States v. New Mexico, 455 U.S. 720, 735 (1982) (itself quoting McCulloch at 430), you argue that "the principal purpose of the [McCulloch] immunity doctrine [is] that of forestalling 'clashing sovereignty' . . . by preventing the States from laying demands directly on the Federal Government." Letter from Interim Corporation Counsel Arabella Teal to GAO General Counsel Anthony Gamboa, Oct. 10, 2002. It is true that most of the court cases that have applied McCulloch involved attempts by units of state and local government to tax the federal government, but the language of Chief Justice Marshall's opinion in McCulloch shows that the Court had more in mind.

While McCulloch factually concerns the propriety of a state tax, it is apparent from Chief Justice Marshall's opinion that, for the Court, larger issues were at stake, including protecting and preserving the sovereignty and supremacy of the federal government. His opinion emphasizes that the elevation of the federal government's authority over the rest of the nation "so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds." McCulloch, 17 U.S. at 426. Chief Justice Marshall stated that

> "no principle, not declared [in the Constitution], can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain."

Id. at 427 (emphasis added). Because the Court understood that "the power to tax involves the power to . . . control," id. at 431, the Court found the federal government exempt from the influence and power of "subordinate governments," as a necessary

and essential implication of the Supremacy Clause.[4] Chief Justice Marshall sought to establish a rule that allowed subordinate governments within the American federal system sovereignty over the private persons and property situated within their borders, but not sovereignty over the federal government and its instrumentalities.[5] It was intended to serve as a rule under which "[w]e are relieved, as we ought to be, from clashing sovereignty; from interfering powers."[6] Id. at 430 (emphasis added).

As we already observed, the rule in McCulloch has been applied mostly to attempts by states and their local governments to tax the federal government, even though its language clearly evinces a broader purpose. Attempts by territories and possessions of the United States to tax the federal government have faced a similar rule. Federal cases have uniformly held that territories and possessions of the United States may not tax the federal government or its instrumentalities without the consent of Congress. Often cited for this proposition is Domenech v. National City Bank of New York, 294 U.S. 199 (1935). Congress statutorily granted Puerto Rico a general power of taxation. Puerto Rico attempted to use that authority to tax a branch of a bank organized under the laws of the United States. Id. at 200-202. Domenech held that a territory or island possession is "an agency of the federal government." Id. at 204. As such, territories and possessions have no independent sovereignty comparable to that of a state; all of their authority, including their authority to impose taxes, must be derived from the federal government. Cf. id. at 204-205. "[L]ike a state, though for a different reason, such an agency may not tax a federal instrumentality." Id. at 205. The Court explained:

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[4] Cf. James A. Poore, III, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen,* 60 Mont. L. Rev. 17, 19, 23 (1999) (regarding the proposition that "the power of Indian tribal government is limited by the Constitution of the United States," "[i]n McCulloch v. Maryland, the Chief Justice made it clear that the Constitution applied to all subordinate governments").

[5] McCulloch, 17 U.S. at 430 ("a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers [of] the government of the Union").

[6] See also, e.g., Hancock v. Train, 426 U.S. 167, 179 (1976) ("this immunity means that . . . 'the federal function must be left free' of regulation . . . where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign") (footnotes omitted and emphasis added).

> "A state, though a sovereign, is precluded from [taxing the federal government] because the Constitution requires that there be no interference by a state with the powers granted to the federal government. A territory or a possession may not do so because the dependency may not tax its sovereign."

Id. at 205 (footnote omitted).[7]

We recognize that, just as it is not a state, the District is also not a territory or a possession. The District is "a unique entity." E.g., Firemen's Ins. Co. v. Washington, 483 F.2d 1323, 1328 (D.C. Cir. 1973). However, it is clear to us that the rule in McCulloch has a broader purpose than your office argues. These precedents demonstrate that the Constitution does not contemplate, and the Supreme Court will not allow, "subordinate governments" of any stripe within the American federal system to tax the federal government without the consent of Congress.

The Federal Government Must Clearly Consent to be Taxed or Regulated

The Supremacy Clause does not bar all efforts by subordinate governments to regulate or tax the federal government but rather only those efforts to which the federal government has not clearly and expressly consented. The decision in Hancock v. Train, 426 U.S. 167, 178-79 (1976), illustrates and emphasizes this point. In Hancock, the Supreme Court rejected an attempt by the state of Kentucky to compel federal installations to obtain state permits before operating facilities that might contaminate the air. The Court quoted McCulloch and the Supremacy Clause. 426 U.S. at 178. Then, the Court added:

> "Taken with the 'old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign' 'without a clear expression or implication to that effect,' this immunity [i.e., McCulloch] means that where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free' of regulation. Particular deference should be accorded that 'old and well-known rule' where, as here, the rights and privileges of the Federal

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[7] See also United States v. Wheeler, 435 U.S. 313, 321 (1978); Gumataotao v. Director of Department of Revenue and Taxation, 236 F.3d 1077, 1081-82 (9th Cir. 2001) (Guam would not be allowed to exercise congressional delegation of general taxing authority to tax federal bonds); District of Columbia National Bank v. District of Columbia, 348 F.2d 808, 812 (D.C. Cir. 1965) ("a territory or possession may not tax the instrumentality of its sovereign without the latter's consent"); Yerian v. Territory of Hawaii, 130 F.2d 786, 789 (9th Cir. 1942) ("[a] Territory cannot, any more than a State can, tax an instrumentality of the United States without the consent of Congress").

> Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign."

Id. at 179 (footnotes omitted and emphasis added). This passage from Hancock is often cited by the federal courts.[8]

In a relatively recent case, this requirement for express federal consent to regulation or taxation was applied to a law enacted by the District of Columbia. In District of Columbia Financial Responsibility and Management Authority v. Concerned Senior Citizens of the Roosevelt Tenant Ass'n, 129 F. Supp. 2d 13 (D.D.C. 2000), a tenant association claimed that a District law gave it "the right of first refusal" to buy a building before the District sold it to the District of Columbia Financial Responsibility and Management Assistance Authority (commonly referred to as the "Control Board"). 129 F. Supp. 2d at 14-15. Congress created the Control Board in a federal law and specified a very short list of those District laws that would apply to the Control Board. Id. at 16. The court had no doubt whatsoever that a District law not on that list could have no application to the Control Board. The list (only three laws) represented the sole extent to which Congress had consented to District regulation of the Control Board. Id. at 16-18.

The requirement for express consent has also been applied to attempts by territories and possessions of the United States to tax the federal government or its instrumentalities. For example, in Domenech (discussed in greater detail above), the Court said, "[T]he Congress may consent to such taxation; but the grant to [a territory or possession] of a general power to tax should not be construed as a consent. Nothing less than an act of Congress clearly and explicitly conferring the privilege will suffice." 294 U.S. at 205 (footnote omitted).[9]

The District of Columbia is Subordinate to the Federal Government

The District of Columbia is clearly subordinate to the federal government. The Constitution itself makes this clear when it describes it as "such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States," over which Congress shall "exercise exclusive Legislation in all Cases whatsoever." U.S. Const., Art. I, § 8, cl. 17. Your office notes

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[8] See, e.g., Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180, 187-88 (1988) (both the majority and the dissent); United States v. City of St. Paul, 258 F.3d 750, 752 (8th Cir. 2001), Blackburn v. United States, 100 F.3d 1426, 1435 (9th Cir. 1996); State of Minnesota v. Hoffman, 543 F.2d 1198, 1206 (8th Cir. 1976).

[9] See also 53 Comp. Gen. 173, 176 (1973) ("[i]t is clear that a United States territory may not impose a tax upon its sovereign in the absence of express statutory permission"). For additional examples, see the cases cited in note 7, supra.

that the power Congress exercises over the District has been described by the Supreme Court as "plenary," Palmore v. United States, 411 U.S. 389, 397-98 (1973), and that, although Congress has delegated to the District some of that authority, that delegation is "neither complete nor irrevocable." Clarke v. United States, 886 F.2d 404, 407 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (1990) (en banc). Within the District of Columbia, your office argues, there can be no opportunity for "clashing sovereignty" because the District of Columbia is but a part of the federal government. Letter from Interim Corporation Counsel Arabella Teal to GAO General Counsel Anthony Gamboa, Oct. 10, 2002. Consequently, within the District of Columbia there is only one sovereign, the Congress of the United States. See Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1, 9 (1889); United States v. Cohen, 733 F.2d 128, 132 n.10 (D.C. Cir. 1984). Thus, you argue McCulloch has no application to District taxes because the District is a "'unique entity' that is neither a state nor the municipality of a state [and is not] sufficiently independent" from the Federal government to "warrant application of the tax immunity doctrine." Letter from Interim Corporation Counsel Arabella Teal to GAO General Counsel Anthony Gamboa, Oct. 10, 2002, quoting Firemen's Ins. Co. v. Washington, 483 F.2d 1323, 1328 (D.C. Cir. 1973). This argument overlooks the larger issues of McCulloch.

The issue is not whether the District is a state, or a part of the federal government, or even some unique other thing, but whether the District, as a subordinate government, is exercising or attempting to exercise some degree of sovereignty that has the effect of interfering in the operations of the federal government without the consent of Congress. Whatever it is and however unique it may be, the District is constitutionally subordinate to the federal government. Before it may tax the federal government, the District must be able to demonstrate that the federal government has explicitly consented to be taxed by it. Cf., e.g., Hancock, 426 U.S. at 179; Domenech, 294 U.S. at 204-205; Roosevelt Tenant, 129 F. Supp. 2d at 17.

Your office supports its position, in part, by pointing out that no federal court has ever struck down a District tax on the basis of the McCulloch immunity. Our research suggests this is true. Equally true, however, is the fact that no federal court has ever upheld a District tax in the face of a challenge under McCulloch. For the most part, in those cases where a District tax has faced a challenge based on application of the tax to a federal instrumentality, the tax survived because Congress—not the District—enacted it, or because the court avoided the question when it noticed that the tax explicitly precluded its application to the federal government.[10]

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[10] Cf., e.g., United States v. District of Columbia, 669 F.2d 738, 740 n.1 (D.C. Cir. 1981) (District sales tax, enacted by federal statute, did not fall directly on federal government; but "[e]ven if the 'legal incidence' of the tax fell on the United States, constitutionally grounded federal tax immunity from state taxation [i.e., McCulloch] would not bar the tax in question [because the District] sales tax was enacted by

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Congress Has Not Consented to Taxation by the District

The District Home Rule Act explicitly shields the federal government from taxation by the District. The United States Constitution vests in Congress exclusive legislative authority for the District. U.S. Const., art. I, § 8, cl. 17. As your office noted in its submissions to us, congressional authority over the District is "plenary." Palmore v. United States, 411 U.S. 389, 397-98 (1973). Since Congress has exclusive legislative authority over the District, all legislative authority that the District government may legitimately assert, including the authority to lay and collect taxes must have been given to it by Congress.[11] Thus, the proper analysis is not, as you suggest, to determine whether any federal law precludes the District from taxing other elements of the federal government, but rather whether any federal law authorizes it to do so.

In 1973, Congress granted the District a measure of "home rule" by delegating to the District government "certain legislative powers" and other specified authorities—"subject to the retention by Congress of the ultimate legislative authority" over the District. District of Columbia Self-Government and Governmental Reorganization Act (known also as the "Home Rule Act"), Pub. L. No. 93-198, § 102(a), 87 Stat. 774, 777 (1973) ("Statement of Purposes"), codified at D.C. Code § 1-201.02. See also, e.g., Home Rule Act, §§ 1-206.01 (congressional "Retention of Constitutional Authority" as District legislature); 1-206.02 ("Limitations on the Council"). It was clearly a limited grant of authority. District of Columbia v. Greater Washington Central Labor Council, 442 A.2d 110, 113 (D.C. 1982), cert. denied, 460 U.S. 1016 (1983).

The Home Rule Act's grants of taxing authority vis-à-vis the federal government are specifically limited in scope. For example, for each kind of tax that might conceivably be applied against the federal government, Congress also enacted a

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Congress, not by [District or] a state"); United States v. District of Columbia, 558 F. Supp. 213, 217-18 (D. D.C. 1982) (United States Capitol Historical Society, a federal instrumentality, was exempt from District sales tax requirements, because the federal statute "limits the District of Columbia's taxing power to the same extent that the states are limited by the federal constitution"), vacated as moot, United States v. District of Columbia, 70 F.2d 1521 (D.C. Cir. 1983) (during the appeal, Congress enacted an express exemption for the Society); ITEL Corp. v. District of Columbia, 448 A.2d 261, 263 (D.C. 1982) (tax at issue "was enacted not by an independent sovereign, or even a partially-independent governmental unit such as the District of Columbia government, but by the Congress itself").

[11] Cf. Domenech, 294 U.S. at 204-05 ("Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States.").

specific exemption for the federal government. Your office noted several of those taxes and exemptions, including the District property, sales, and cigarette taxes. D.C. Code §§ 1-206.02(a)(1), 47-2005(1), 47-2403. Your office infers from these exemptions that Congress must have understood the District to have general authority to tax the federal government; otherwise, it would not have felt the need to create these exemptions.

There are two problems with this inference. First, if Congress intended to exempt the federal government from District taxation in only a few specific situations, one would expect to find at least a few instances where Congress did not exclude the federal government from the District's authority to levy a tax that might reasonably have application to the federal government. Your office has not cited such a tax, however, and we have identified none. Second, as we noted above, the federal government must explicitly give its consent clearly and unambiguously before a subordinate government may impose taxes upon it; the drawing of such an inference or an implication is not sufficient. E.g., Hancock, 426 U.S. at 179. As the Supreme Court said in Domenech, 294 U.S. at 205, with respect to the authority of other subordinate governments, the grant by Congress of the general power to tax is not sufficient. There must be clear and explicit statutory authority.

The Home Rule Act did not give the District authority to tax the federal government. In fact, two provisions of the Home Rule Act clearly limit the District in this area. First, section 602(a)(3) specifies that the District may not "enact any act . . .which concerns the functions or property of the United States." Second, section 602(b) specifies, "Nothing in this Act shall be construed as vesting in the District government any greater authority . . . except as otherwise specifically provided in this Act, over any Federal agency, than was vested in the Commissioner."[12] Home Rule Act, 87 Stat. at 813-14, codified respectively in D.C. Code §§ 1-206.02(a)(3), 1-206.02(b) (formerly codified in § 1-233). Taken together, these provisions preclude the District from imposing any direct taxes or other forms of interference upon the federal government.

The Court of Appeals for the District of Columbia considered these two provisions in District of Columbia v. Greater Washington Central Labor Council, 442 A.2d 110 (D.C. 1982), cert. denied, 460 U.S. 1016 (1983). Although the factual situation in that case was different from the one with which we are presently concerned, the court's conclusions speak directly to the purposes Congress had in mind when it created these limitations. Specifically, the court found these provisions were intended to

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[12] You have not cited and we are not aware of any statute or any precedent holding that the Commissioner of the District was legally authorized to tax the federal government.

"safeguard the operations of the federal government on the national level." 442 A.2d at 116. The Act's legislative history showed "[t]he functions reserved to the federal level would be those related to federal operations in the District and to property held and used by the Federal Government for conduct of its administrative, judicial, and legislative operations." 442 A.2d at 116, quoting House Comm. on the District of Columbia, 93d Cong., 2d Sess., District Executive Branch Proposal for Home Rule Organic Act 182 (Comm. Print 1973). "What Congress sought to protect [in sections 602(a)(3) and 602(b)] was the integrity of the federal domain as it relates to administration of federal legislation having national implications." 442 A.2d at 116.[13]

The limitations of sections 602(a)(3) and 602(b) take on additional meaning when they are considered in the context of applying a District tax to other federal entities. Inasmuch as "the power to tax involves . . . a power to control," McCulloch, 17 U.S. at 431, any attempt by the District to tax another federal entity without the benefit of express authority from Congress necessarily places the District in the position of attempting to exercise "greater authority over"[14] a federal agency, intruding upon the "conduct of [federal] administrative, judicial, and legislative operations,"[15] and compromising "the integrity of the federal domain"[16] by violation of sections 602(a)(3) and 602(b).

The Absence of Congressional Disapproval Does Not Constitute Consent

Before it may tax the federal government, the District must have explicit authorization. E.g., Hancock, 426 U.S. at 179. The submission of your office implies that Congress must have consented: In failing to disapprove the District law creating the original surcharge, your office suggests, Congress has effectively approved it and consented to its provisions. Letter from Interim Corporation Counsel Arabella Teal to GAO General Counsel Anthony Gamboa, Oct. 31, 2002. We disagree with this position.

As we already noted, Congress delegated to the District only certain specific powers, expressly conditioning their exercise upon compliance with certain specific limitations and restrictions, and expressly retaining to itself the "ultimate legislative power" for the District. In attempting to tax the federal government, the District exceeded its authority under the Home Rule Act. It is well accepted in the law that

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[13] See also Techworld Development Corp. v. D.C. Preservation League, 648 F. Supp. 106, 115 (D. D.C. 1986) ("the limitation of [section 602(a)(3)] is included to ensure that the local government does not encroach on matters of national concern").

[14] D.C. Code § 1-206.02(b).

[15] 442 A.2d at 116.

[16] Id.

ultra vires behavior is, ab initio, legally ineffective.[17] For example, in McConnell v. United States, 537 A.2d 211, 215 (D.C. 1988), the court considered a District of Columbia voter initiative that would have required different sentencing and treatment guidelines for addicts convicted in the District, as compared with those prescribed by federal law for the nation. The court found the initiative violated the Home Rule Act provision prohibiting the District from attempting to amend or repeal any act of Congress having national application (as opposed to congressional laws with purely local impact). Id. See District Code § 1-206.02(3). "It follows, therefore," the Court concluded, "that the amendments [which were the subject of the voter initiative] could not—and did not—work an effective repeal of any of the provisions of [the federal law]." 537 A.2d at 215. There was no requirement for Congress to disapprove the initiative; it simply had no effect.

A similar holding can be seen in McMillan Park Committee v. National Capital Planning Commission, 759 F. Supp. 908 (D.D.C. 1991), rev'd on other grounds, 968 F.2d 1283 (D.C. Cir. 1992). In McMillan, the District government had enacted an amendment to the comprehensive land use plan covering the District of Columbia. The amendment changed the permitted land uses for McMillan Park—from "parks, open space and recreation" to "mixed use," allowing for medium density residential and moderate density commercial development. The enacted amendment was submitted to Congress under the Home Rule Act. Congress did not disapprove it. Subsequently, private activists brought suit, complaining that applicable federal procedural requirements had not been followed. Id. at 911-13. The court agreed that the applicable procedures had not been followed. In response, the District argued that the court was without power to order relief: Since Congress had not disapproved the District law, it had the force of a congressional enactment. Id. at 916. The court held the District's position "lacks merit entirely. Clearly Congress could not have intended that its silence could permit an invalid law to withstand legal challenge." Id. at 917. Congressional approval under the Home Rule Act is based on the assumption that the District law was validly enacted, the court said. "[H]ad Congress been aware that the [amendment enacted by the District] was the

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[17] Cf., e.g., 15 C.J.S. *Commerce* § 8 (2003) citing, e.g., Target Sportswear, Inc. v. United States, 875 F. Supp. 835, 841 (Ct. Int'l Trade 1995) (exercise of congressionally delegated authority must be within scope of authority granted and comply with any procedures prescribed by Congress; regulatory action taken by the President, ostensibly pursuant to statutory delegation, but actually beyond the scope of the delegated authority, or not in compliance with prescribed procedures, is ultra vires and void); 56 Am. Jur. 2d *Municipal Corporations and Other Subdivisions* § 180 (2003) ("[a]ll the powers of a municipal corporation are derived from law and its charter . . . [a]cts beyond the scope of the powers conferred on a municipality are "ultra vires" and are void").

product of regulatory violations, . . . it would have exercised its veto authority." Id. Having determined that the amendment was improperly approved, the court found the District act was "therefore invalid." Id.

When the District levies a tax on the federal government without explicit statutory authority from Congress, the District exceeds its authority and the tax is invalid and has no legal effect. There is no requirement for Congress to disapprove the District act. Here, the District attempted to impose a tax on the federal government, contrary to the restrictions and limitations of federal sovereignty and the Home Rule Act. Thus, to the extent that it appeared to apply to the federal government, the original District 9-1-1 surcharge was invalid and had no legal effect.

2. The District 9-1-1 Surcharge, as Amended, Qualifies as a Permissible Vendor Tax

You also asked whether the 2003 amendments to the law creating the District 9-1-1 surcharge cured the problems identified in B-288161, Apr. 8, 2002. We conclude that the legal incidence of the tax imposed by the 2003 law falls on providers of telephone services, not the federal government as a user of telephone services. Consequently, the federal government may pay bills that include itemizations of the amended District 9-1-1 surcharge.

The United States and its instrumentalities are immune from direct taxation (sometimes referred to as a "vendee" tax). However, when the legal incidence of a tax falls directly on a vendor supplying the federal government as a customer with goods or services, a "vendor" tax results and the immunity does not apply. E.g., 61 Comp. Gen. 257 (1982). See also 63 Comp. Gen. 49 (1983). Determining where the legal incidence of any particular tax falls can be extremely complex. E.g., Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000). Here, the nature of the amended District 9-1-1 surcharge seems clear to us.

Under the 2003 amendments, the District explicitly imposes a "tax" upon telephone service vendors, rather than telephone service customers. The tax is calculated as a flat rate per line charge specified in the District law and telephone service providers are required by the amended law to "submit the tax . . . to the Mayor on a quarterly basis." The amendments allow telephone companies to itemize the surcharge on customer phone bills. The itemization appears to serve only the purpose of informing the customer of the charge now incurred by the vendor as a cost of doing business in the District of Columbia. The 2003 amendments repealed the provisions stating that the surcharge was not to be considered revenue of the telephone companies, as well as those which allowed the telephone companies to retain up to 2 percent of the surcharge to cover their administrative costs in collecting the surcharge. See D.C. Law 15-149, § 502, to be codified at D.C. §§ 34-1801–34-1804. Nothing in the District law as amended makes telephone customers liable to the District if the customer does not pay the surcharge.

We have examined 9-1-1 charges imposed by nearly two dozen states, most of which we found were impermissible "vendee" taxes. See, e.g., B-301126, Oct. 22, 2003. However, in B-238410, Sept. 7, 1990, we considered Arizona's 9-1-1 surcharge and concluded that it constituted a "vendor" tax that could be reimbursed by the federal government. The Arizona statute differed in significant ways from those of the other states. Most importantly, Arizona explicitly imposed its "tax" on telephone vendors (rather than directly on telephone subscribers, as in the other states) and allowed the telephone companies to pass the Arizona tax on to their customers as part of their costs of doing business. Because the companies were allowed to pass the tax on to their customers, it was clear that the economic burden of the Arizona tax would fall on the shoulders of the telephone companies' customers, but this did not alter the outcome.[18] If the tax went unpaid, it was the telephone company, not the customers, to whom the state would look for payment. In other words, the legal incidence of Arizona's tax fell not on the government as a telephone subscriber, but on the telephone service vendors.

In our view, the amended District surcharge resembles more closely the Arizona vendor tax considered in B-238410 than the impermissible vendee taxes of the other states that we have previously considered.[19] The 2003 amendments clearly and

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[18] The courts have unanimously rejected the notion that legal incidence necessarily follows the economic burden of the tax. E.g., United States v. New Mexico, 455 U.S. 720, 734 (1982); Gurley v. Rhoden, 421 U.S. 200 (1975); United States v. Maryland, 471 F. Supp. 1030, 1037 (D. MD. 1979); United States v. City of Leavenworth, 443 F. Supp. 274, 281 (D. Kan.1977). Thus, the legal incidence of a vendor tax does not shift to the vendee when the vendor passes the tax on to his customers as a cost of doing business. Cf. B-238410, supra ("the legal incidence of a vendor tax does not shift to the vendee when the vendor passes the tax on to his customers as a cost of doing business").

[19] There is one difference that concerned your office: The Arizona tax was calculated based on the providers' gross sales receipts, while the amended District surcharge uses a flat rate assessment. In a number of previous 9-1-1 decisions, we have contrasted so-called "fees," calculated at flat, per customer rates, with "taxes," calculated as percentages of the vendor's gross receipts. Those were all cases in which the terminology and form of the statutory surcharge at issue cast doubt upon whether the surcharge was more in the nature of a tax imposed on the customers or a fee for services imposed on the vendor. Because a flat rate charge usually bears little if any relationship to the cost or value of services provided, we found in those cases that the state's resort to a flat rate assessment was generally more indicative of a vendee tax than a vendor tax. See, e.g., 66 Comp. Gen. 385, 387 (1987); B-301126, supra. There is no rule that vendor taxes may not be calculated on a flat, per customer rate and the distinction made in those cases is inapposite to the District surcharge since there is no question of whether the District surcharge charge constitutes a "tax" or a "fee," nor where its legal incidence falls.

fundamentally changed the nature of the surcharge, as originally enacted, and cured the problems noted in our previous decision. Now, the legal incidence of the tax falls on the telephone service vendors, not on the federal government.

CONCLUSIONS

As discussed above, we find no basis to change our previous determination that the House of Representatives was not required to pay the District's 9-1-1 emergency telephone system surcharges, as originally enacted. In the absence of an express statutory consent by the federal government, the Supremacy Clause of the United States Constitution precludes the District from taxing the federal government or its instrumentalities. The District Home Rule Act, rather than providing the requisite consent, clearly evidences a congressional desire to insulate the federal government from District taxes and other forms of interference. For this reason, the District's original 9-1-1 statute exceeded the District's authority under the Home Rule Act, and rendered the original 9-1-1 surcharge invalid and legally ineffective.

On the other hand, we are satisfied that the recent amendments to the District 9-1-1 emergency telephone system surcharge have cured the defects noted in our previous decision. As amended, the District 9-1-1 surcharge is clearly a tax on the providers of telephone services in the District of Columbia. Accordingly, federal agencies may pay bills that itemize an appropriate portion of the amended District 9-1-1 surcharge because the tax is, for the telephone companies, a cost of doing business within the District of Columbia.

Should you have any questions regarding this decision, please feel free to contact Ms. Susan A. Poling of my staff at 202-512-5644.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel

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

B-302230

Digests

1. GAO finds no basis to change its previous determination in B-288161, Apr. 8, 2002, that the House of Representatives was not required to pay the District of Columbia's 9-1-1 emergency telephone system surcharges as originally enacted by the District in 2000. In the absence of an express statutory consent by the federal government, the Supremacy Clause of the United States Constitution precludes "subordinate governments," including the District, from taxing the federal government or its instrumentalities. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Hancock v. Train, 426 U.S. 167, 178-79 (1976).

2. The Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), does not authorize the District of Columbia to tax the federal government. That act clearly evinces a congressional desire to preclude the District from taxing or otherwise interfering with the federal government by enacting express exemptions to each kind of District tax authorized by Congress that might conceivably be applied against the federal government, by barring the District from enacting any law "which concerns functions or property of the United States," and by disavowing any intent to vest in the District "any greater authority [not] specifically provided in this Act, over any Federal agency" than was previously vested in the District. See D.C. Code §§ 1-206.02(a)(1), 1-206.02(a)(3), 1-206.02(b), 47-2005(1), 47-2403.

3. When the District of Columbia levies a tax on the federal government without explicit statutory authority from Congress, the District exceeds its authority and the tax is invalid and has no legal effect. There is no requirement for Congress to disapprove the District act.

4. Amendments enacted by the District of Columbia in 2003 to its 9-1-1 emergency telephone system surcharge have cured the defects noted in B-288161, Apr. 8, 2002. As amended, the District 9-1-1 surcharge is clearly a tax on the providers of telephone services in the District of Columbia, and federal agencies may pay bills that itemize an appropriate portion of the amended District 9-1-1 surcharge because the tax is, for the telephone companies, a cost of doing business in the District of Columbia.