

DECISION



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

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JUL 16 1976

FILE:

B-172621

DATE:

MATTER OF:

Hotel-Motel Tax - Anchorage, Alaska

DIGEST:

1. When Bureau of Indian Affairs contracts with hotel or motel to provide housing and subsistence to Indian students in transit, the Federal agency and not the beneficiary, is the renter. The legal incidence of the hotel-motel rental tax imposed by Anchorage, Alaska, therefore, falls on the BIA which is constitutionally immune from State and local taxes. 53 Comp. Gen. 69 (1973) is modified accordingly.
2. Cost of hotel or motel room to Bureau of Indian Affairs employees on official business is sum of rental fee plus applicable taxes. Legal incidence of Anchorage, Alaska, hotel-motel rental tax is on the Federal employee when Government reimburses its employees via per diem or actual expenses allowance. Constitutional exemption from State and local taxes does not apply when Government is not itself contractually obligated to hotel-motel, even though it has voluntarily assumed economic burden thereof.

In a letter dated February 13, 1976, the Acting Area Finance Officer, United States Department of the Interior, Bureau of Indian Affairs (BIA), Juneau Area Office, requested our decision as to the legality of the application of a 5 percent Hotel-Motel Rental Tax charged to all transient guests renting hotel or motel facilities in the city of Anchorage, Alaska, to billings submitted to the BIA for Indian students staying overnight in Anchorage while traveling between BIA schools and their homes. The BIA has contracted with certain hotels and motels to pay housing and subsistence costs for such students. Specifically the question presented is whether the BIA is required to pay the 5 percent rental tax in view of the constitutional immunity of the Federal Government from State and local taxation. The question was also raised, in the enclosures to that letter, as to the applicability of the tax to Federal employees traveling on official business.

In order to exercise its constitutional immunity from State and local taxation, the Government must show that the legal incidence of

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the particular tax involved falls directly on the Government. Unless the Government or an agent on its behalf is purchasing the goods or services for the Government's benefit, the Government may not assert its constitutional exemption from paying State or local taxes. For example, it has been held that a State sales tax, the legal incidence of which falls on the buyer, does not infringe the constitutional immunity of the Government where it is determined that the Government is not in fact the "purchaser" within the meaning of the tax statute, even though the Government is obligated to reimburse the buyer for the total costs of the item. Alabama v. King and Boozer, 314 U.S. 1 (1941). Similarly, when an employee of the Government secures a hotel room or other lodging while traveling on official business, the Government is not ordinarily a party to the transaction. The fact that the Government is obligated to reimburse the employee for his travel expenses and thereby assumes the economic burden of the total costs, including the tax, does not thereby make it a tax upon the United States.

We have reviewed the provisions of Chapter 3.12 of the Anchorage Municipal Code. It is clear that the subject tax is imposed on all transient guests who occupy or rent for fewer than 30 days, and the hotel-motel operator is required to collect it from the transient guests. The ordinance provides that "The tax imposed shall be shown on the billing to the guest as a separate and distinct item." The term "guest" is defined as "an individual corporation, partnership or association paying monetary consideration for the use of a sleeping room or rooms in the hotel-motel."

The applicability of the tax depends on the identity of the transient guest. Ordinarily, a Federal employee on official duty rents a hotel or motel room directly from the proprietor. The Government is in no sense a party to this arrangement with the establishment. In the absence of a specific State or local statute exempting room rentals to Federal employees from this tax, that employee is liable to pay it. That the Government, via statute and regulations, may be obligated to reimburse that person for expenses incurred while away on official business does not affect that individual's liability for this tax. In this regard it is clear that the legal incidence of the tax is on the employee, and not on the Government, and that when the Government pays a per diem or actual expenses allowance, it is not paying the tax but reimbursing the employee for the employee's total expenses. That is, by statute and regulation the Government has agreed, in effect, to accept the economic burden of a tax imposed not on it but on its employees. We

therefore conclude that under such circumstances, Government employees may not assert the Government's exemption from the payment of State and local taxes levied upon motel and hotel rooms. B-172621, April 4, 1971.

The situation with regard to the Bureau of Indian Affairs students is quite different; as pointed out in an opinion by the Department's Field Solicitor, dated September 9, 1975, the BIA had a contract with hotels or motels to pay housing and other subsistence costs for Indian students traveling between home and BIA-sponsored boarding schools. The Field Solicitor concludes that the legal incidence of the tax falls on the transient students and not on the Government "because the transients are neither employees of the Government nor its agents; they are merely beneficiaries under the contracts." We disagree. The fact that the students are not Government employees or Government agents is immaterial. In fact, as explained above, in most instances a Government employee would be directly liable for the tax. The important factor is the existence of a direct contractual obligation by the Government to the hotels or motels to rent the rooms in question which makes the Government the "guest" under the Anchorage Ordinance. Under the agreement, the Government is solely liable for the charges incurred, and not the students who benefit from the Government's arrangements. Therefore, the Government is entitled to assert its immunity from imposition of the Anchorage rental tax, and the billings to the BIA should be adjusted accordingly.

The applicability of a room rental tax to the Federal Government under similar circumstance was considered in 53 Comp. Gen. 69 (1973). In our decision there was considered the Montgomery County (Maryland) Code which provides for the imposition of a hotel-motel room rental tax on all transients. The case involved a contract between the Government and a motel corporation under which the motel would provide, among other things, rooms for participants in the National Institutes of Health Leukemia Program and the Government would pay for the rooms. While the decision turned on the tax clause in the contract involved, the decision held, in effect, that the occupant of the room (i.e., the beneficiary of the contract between the Government and the motel), rather than the Government was the transient and, hence, the legal incidence of the tax was not on the Government. However, the County Code defines "transient" as a "person" who obtains sleeping accommodations and defines "person" as any "individual, corporation, company, association, firm," etc. Since the Government is the "person" who obtained and paid for these rooms under the County Code, the Government is the transient. Hence, our holding above as to the Anchorage motel tax would be equally applicable to the Montgomery County motel tax. Therefore, our holding in 53 Comp. Gen. 69 is modified to the extent it is inconsistent with the foregoing.

R. F. KELLER

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of the United States