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

Decision

Matter of: 9-1-1 Emergency Telephone Charge - State of Wisconsin
File: B-248907
Date: January 19, 1993

DIGEST

The federal government is constitutionally immune from paying the 9-1-1 emergency telephone charge imposed by the state of Wisconsin because the charge is a vendee tax, 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 charge assessed against federal agencies in the state of Wisconsin. For the reasons set forth below, we conclude that the charge is a vendee tax, 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 tax.

Under section 146.70(2) of the Wisconsin statutes, public agencies¹ in the state are authorized to establish and maintain a 9-1-1 emergency telephone system. To fund the 9-1-1 system, Wisconsin law authorizes counties in the state "by ordinance" to "levy a charge on all service users," provided certain conditions are met. Wis. Stat. Ann. § 146.70(3)(b). These conditions include (1) the county having adopted by ordinance a plan for the 9-1-1 system; (2) every service user in the county having access to the system; and (3) the county entering into a contract with each service supplier (i.e., telephone company) in the county for the establishment of the system. Id.

¹"Public agency" is defined in the statute to mean any municipality or state agency "which provides or is authorized by statute to provide fire fighting, law enforcement, ambulance, medical or other emergency services." Wis. Stat. Ann. § 146.70(1)(f).

The 9-1-1 charge is calculated by dividing the costs related to establishing a 9-1-1 emergency telephone system by the total number of exchange access lines in the county. Wis. Stat. Ann. § 146.70(3)(b)(4). The 9-1-1 charge may not exceed 25 cents per month for each exchange access line if the county has a population of 500,000 or more, and may not exceed 40 cents per month in any other county. Wis. Stat. Ann. § 146.70(3)(b)(8). The 9-1-1 charge is billed to service users in the county in the telephone companies' regular billings. Wis. Stat. Ann. § 146.70(3)(b)(5). The telephone companies collect the 9-1-1 charges and use the amount collected for the maintenance and operation of the emergency system. Wis. Stat. Ann. § 146.70(3)(b)(3).

It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments.² 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, 655-57 (1985).

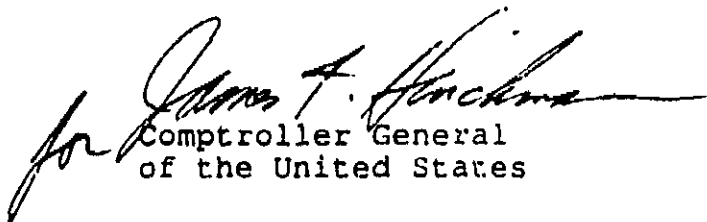
We recently examined 9-1-1 charges in Washington, B-248777, July 6, 1992; Kentucky, B-246517, Apr. 17, 1992; and Indiana, B-248363, Apr. 17, 1992.³ We concluded, in these cases, that the 9-1-1 charges at issue were vendee taxes not

²Although the Wisconsin statute labels the 9-1-1 fee a "charge," it is, nonetheless, a tax. In 55 Comp. Gen. 879, 881 (1986), we identified the characteristics of 9-1-1 charges which make them taxes. First, 9-1-1 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 charge assessed under the Wisconsin statute satisfies all these criteria. For further discussion of the characteristics of taxes, see e.g., Mich. Employment Security Comm'n v. Pratt, 144 N.W. 2d 663, 664-65 (Mich. App. 1966) and In re Mytiner, 31 F. Supp. 977 (N.D. Tex. 1940).

³See also 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-239608, Dec. 14, 1990 (Rhode Island); B-230691, May 12, 1988 (Tennessee).

payable by the federal government. Under these states' statutes, the legal incidence of the taxes fell on the users of telephone services and the telephone companies were merely collection agents for 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."

Under the Wisconsin statute, the telephone companies maintain and operate the 9-1-1 emergency system for the state under contracts whose terms are specified by law. Wis. Stat. Ann. § 146.70(3)(b)(3). Although the telephone companies do not remit the 9-1-1 charges to the state taxing authority, the charges are, nonetheless, taxes.⁴ (The taxes collected are used for the sole purpose of operating the emergency system.) Moreover, the Wisconsin statute makes clear that the legal incidence of the tax is on the users of telephone services in the state by providing that "[e]very service user subject to and billed for a charge . . . is liable for that charge until the service user pays the charge to the service supplier." Wis. Stat. Ann. § 146.70(3)(h). Wisconsin's 9-1-1 tax is, therefore, a vendee tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the state. Consequently, the United States is constitutionally immune and the tax is not payable by the federal government.


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⁴Wisconsin's 9-1-1 tax is distinguishable from the situation where a fee is imposed by a telephone company for its own services and duly permitted by a tariff. See 64 Comp. Gen. 655 (1985). As we stated in 66 Comp. Gen. 385, 387 (1987), "9-1-1 fees might be payable if a telephone company installed and operated a 9-1-1 system itself, and offered 9-1-1 emergency access, like directory assistance, as a component of its regular communications services." Under Wisconsin law, the telephone companies are operating the 9-1-1 emergency system under contract with the state's municipalities and agencies and the terms of the contracts are specified by law.