



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Agricultural Research Service - Sewer Service Charges

File: B-250935

Date: October 12, 1993

DIGEST

1. The United States Department of Agriculture may pay sewer charges assessed by a local government entity since they are akin to service charges rather than taxes which cannot be paid by the government. However, the charges may be paid only if the amounts due are calculated so that they reflect the fair and reasonable value of the services received by the government.

2. Generally, statutes or other legislative enactments take effect at the time of their enactment. Thus, billing for previous 3 years of sewage service charges by a local government may not be paid unless local ordinance is made retroactive by express language or by necessary implication.

3. Sewer service charges established by a local government and required to be paid in advance, with a penalty if not paid when due, may be paid in advance, notwithstanding the advance payment prohibition in 31 U.S.C. § 3324, since danger of loss is minimized when State or an agency thereof is the contractor requiring the advance payment.

DECISION

This decision responds to a request for an advance decision from the Budget and Fiscal Officer, Agricultural Research Service, United States Department of Agriculture (USDA), in Albany, California. The Budget and Fiscal Officer questions the propriety of using appropriated funds to pay sewer service charges assessed by the City of Albany that he considers a tax. As explained below, we conclude that the sewer service charges may be paid so long as the amount paid reflects the fair and reasonable value of services received by the United States.

BACKGROUND

USDA owns approximately 17 acres of land located in the City of Albany (City), Alameda County, California. USDA acquired the land from the Regents of the University of California in 1939. USDA acquired the land subject to a right of way to

install and maintain a sewer line that the Regents had granted the City in 1930. In the deed granting the right of way, the Regents retained the right to "connect to or with or use for any purpose" the sewer pipes installed.

The USDA owned pipes connect the USDA Facility to the City sewer lines. The City sewer line connects (i.e., transfers the sewage) to an intergovernmental utility district, the East Bay Municipal Utility District (MUD), for processing. MUD provides water and sewage disposal to all Alameda County users. The distance from the point where the USDA lines connect to the city sewer system to the point where the City transfers the sewage to MUD is about 400 feet. Rates for MUD's services are established by a public utility commission and water charges are currently billed to USDA for the number of gallons consumed as measured by meters installed in the water lines. Other charges for transportation, treatment, and disposal of sewage are charged as a separate wastewater treatment charge on the monthly bill after a reduction is made for the percentage of water that does not go into the sewage system because of losses due to irrigation and similar uses.

On November 18, 1991, the City notified USDA that it had recently completed a city wide audit of its billings for sewer service. According to the notice, "the audit revealed that a significant number of properties have been receiving service without being previously billed for the service." The City calculated the current monthly service charge for the USDA facility to be \$4,410 per month using the water consumption rate for single family residence and equating USDA to 345 dwelling units. A resolution by the City Council amended the fee schedule for sewer service to incorporate this new USDA only rate of \$4,410 per month. The City then informed USDA that it would charge for sewer service for the past 3 years as a compromise for all the years of unpaid services. The retroactive charge is for \$124,320 from July 1988 to December 1991.

USDA argues that the sewer service fee is really a tax. Furthermore, USDA disputes the amount charged and its retroactive application, arguing that it does not represent the value of service provided and hence cannot be paid even on a quantum meruit basis. If payment is authorized USDA questions whether it may pay in advance of receipt of services in light of the prohibition contained in 31 U.S.C. § 3324.

ANALYSIS

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, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), cited in B-239608, Dec. 14, 1990. However, a charge made by a state or a political subdivision of a state for a service rendered or convenience provided is not a tax. 70 Comp. Gen. 687, 688 (1991). Thus, a federal agency may generally pay service charges such as those for municipal sewer service so long as the charges represent the fair and reasonable value received by the United States of the services rendered. Id. 66 Comp. Gen. 385, 386 (1987). Furthermore, we have held that in the context of utility services, where rates are established by a legislative body, such rates are controlling unless they are manifestly unjust, unreasonable or discriminatory. 70 Comp. Gen. at 688.

In our opinion, the purpose of sewer service charges is to recover the cost of services provided by the county. Here, the City of Albany reviewed its billings for sewer service and discovered that it had never billed several properties, including USDA. The City Council then amended the fee schedule for sewer service by adding monthly rates for the previously unbilled properties. By city ordinance, all revenues collected are deposited in a segregated account, not intermingled with tax receipts, and are dedicated for use only for the maintenance and operation of the sewer system. Albany Municipal Code (Code) § 15-1.7(f) (1988). USDA has and continues to receive a tangible benefit from its use of the city sewer. Thus, the sewer charges are akin to service charges rather than taxes and may be paid.¹

As we noted earlier, a federal agency may pay sewer service charges so long as they reflect the fair and reasonable value of services received by the United States. However, on the present record, we do not consider, for several reasons, the amount sought by the city as reasonable.

In establishing the amount charged USDA for sewer services, the city relied on a report prepared by its engineering

¹While it is true that USDA has a property right to connect to the City line, that does not mean it may discharge sewage through its connection and the 400 feet of City owned sewage pipes leading to the MUD facility without being charged for the service.

consultant.² The engineering report states that if the City decided to charge the USDA for sewer service, revenues "could be estimated" as follows:

"USDA uses approximately 2,660,000 gallons of water per month. This is 87,300 gallons per day. Assuming 70% of this water is discharged into the sewer an average of 61,100 gallons per day of sewage is discharged by the USDA. At an estimated 177 gallons per dwelling unit per day this translates into 345 equivalent dwelling units. At \$12.78 per dwelling unit this would result in \$4,410 revenue per month These potential sewer revenue increases are estimations only. More detailed assessments of each revenue source can be done upon direction from the City."

First, we note that the engineering report makes broad assumptions regarding the percentage of water discharged by "revenue sources," and specifically states that the projected sewer revenue increases were estimations only. Hence, we have no assurance that the water use assumptions conform to, or are consistent with, the assumptions used generally to establish billing rates for other categories of sewer users covered by the City ordinance.³

Second, the engineering report computed the USDA's sewer discharge rate as the equivalent of "345 . . . dwelling units" and then multiplies this number times \$12.78, to achieve the product \$4,410. The Albany Municipal Code supplied to USDA, however, does not contain a \$12.78 per dwelling unit rate. In this regard, section 15-1-8(a) of the Municipal Code establishes a "[b]asic fee" for "[s]ingle family residences and users not listed in paragraph (b)" of \$6.75. Paragraph (b) reads as follows:

"b. The following user categories shall be billed as set forth below:

²The staff report to City Council members in support of amending the Municipal Code to bill USA for sewer services restates and relies on the engineering report. Staff Report To City Council Members From Ron Lefler, D.P.W., dated November 18, 1991.

³Section 15-1-7(a) of the Municipal Code explains that the City shall charge a fee "based upon the amount of sewage flow generated. Single Family residences are assumed to have an average or 'base' flow. Other user rates are based on water consumption by user classification."

Fee	User Group
\$13.50	Residence (Duplex, Triplex, Fourplex), Medical Office, Rest Home, Laboratory.
\$20.25	Forging, Machine Shop, Communications.
\$27.00	Restaurant, Mortuary.
\$33.75	Apartment Building (5 to 10 Units).
\$40.50	Foundry, Laundry, Laundromat.
\$54.00	Hospital.
\$81.00	Car Wash."

As USDA points out, the \$12.78 figure per dwelling unit relied on by the City does not rationally relate to any of the basic fees contained in section 15-1-8 of the Municipal Code.

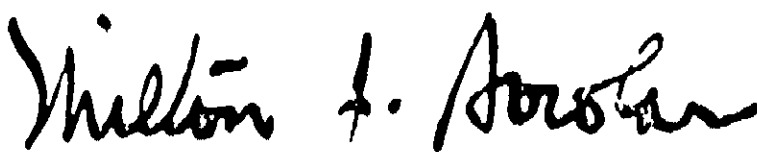
Our final concern relates to the discounts built into the City's fee structure which were not similarly afforded USDA. For example, the Residence User Group is charged a monthly user fee twice the basic rate even though a "Triplex, Fourplex" contains 3 and 4 dwelling units. Similarly the monthly user fee for "Apartment Buildings (5 to 10 units)" is 5 times, not 6 to 10 times, the basic fee, a 50 percent discount. Neither the engineers nor the staffs report to the City Council adjusted the calculation of the appropriate USDA fee to reflect the discount afforded other users apparent on the face of the Municipal Code.

Thus, we conclude that the sewer charges may be paid only to the extent the City makes and documents a non-discriminatory assessment for the reasonable value of the sewer services received by the government.

USDA also asked whether sewage fees may be imposed retroactively for the past 3 years, as the City has proposed, as a compromise for all the years of unpaid service. We conclude that the City resolution amending the fee schedule does not impose a retroactive liability for the sewage fees. Our Office has followed the general rule that statutes or other legislative enactments take effect at the time of their passage, are to be applied prospectively, and are not retroactive unless made so by express language or by necessary implication. 39 Comp. Gen. 286, 290 (1959). The California courts have also followed this general rule. Melton v. City of San Pablo, 61 Cal. Rptr. 29, 36 (Cal. Ct.

App. 1st 1967); see also Edison Co. v. Public Utilities Commission, 144 Cal. Rptr. 905 (S.Ct. Cal. 1978) (relating to prohibition against retroactive rate making by public utility commissions). The staff report advising the City Council of its billing options set out three scenarios. The city could: bill for unbilled service since 1985, bill partially for unbilled service since 1985, or not bill at all for unbilled service. The City Council resolution amending the fee schedule, however, is silent regarding past unbilled service. Thus, since the Council did not expressly make the sewer service charges retroactive, we conclude that the City Council did not intend the resolution to have retroactive effect. Hence, USDA is not liable retroactive to the city in the amount stated.⁴

Lastly, you asked whether sewer service charges can be paid in advance. We have held that sewer service charges established by a local government and required to be paid in advance, with a penalty if not paid when due, may be paid in advance, notwithstanding the advance payment prohibition in 31 U.S.C. § 3324. 39 Comp. Gen. 285 (1959); cf. 58 Comp. Gen. 29 (1978) (distinguishing 39 Comp. Gen. 285 from situation where the United States contracts with a state to provide services generally and commercially available). In 39 Comp. Gen. 285, we explained that the primary purpose of the prohibition is to preclude the possibility of a loss in the event a contractor, after receipt of payment, should fail to perform the contract and refuse or fail to refund the money to the government. 39 Comp. Gen. at 286. Consequently, where a state government, or an agency thereof, is the provider of public utility services and requires advance payment thereof, the danger of a loss is generally minimal. Accordingly, we have authorized advance payments to local government for such public utilities as sewage, water, and electric charges. Given the minimal risk of loss and the savings realized by avoiding otherwise applicable late payment charges, the advance payments described in this case are authorized.

for 
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⁴Under 31 U.S.C. § 3702(b), a claim against the United States must be made within 6 years of the date the claim accrues. Since, under section 15-1-8 of the Municipal Code, the USDA property is "not listed in paragraph b", the basic monthly rate of \$6.75 applies per the express terms of the ordinance. Hence, we view USDA liability as limited presently to \$6.75 x 12 months x 6 years.