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

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B-168024

December 13, 1973

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

Reference is made to letter of June 22, 1973, from Hugh Witt, Special Assistant to the Assistant Secretary of the Navy (I and L), requesting our decision as to the propriety of payment of a Fire Service Fee assessed against the Naval Reserve Center in the city of Huntington, West Virginia, by the municipality.

Chapter 8, Article 13, Section 13 of the Code of West Virginia provides in pertinent part that—

> "* * * every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection * * * shall have plenary power and authority * * * to impose by ordinance upon the users of such service * * * reasonable rates, fees and charges to be collected in the manner specified in the ordinance. * * *"

As explained in your letter, pursuant to the above authority the city of Huntington has passed several ordinances which provide for the assessment of a fee for fire protection services against all users, including tax exempt users. The fee is calculated at a given percentage of the assessed value (as fixed for tax purposes), of buildings and personal property. Since June 30, 1972, that percentage has been equal to six-tenths of one percent. The Naval Reserve Center has been assessed a total of $548 in Fire Service Fees for 1971-1973.

You ask our opinion whether this fee constitutes a tax on the United States or a reasonable charge for services rendered. If the fee is in effect a tax, the United States is exempt from payment. See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819), Van Brocklin v. Tennessee, 117 U.S. 151 (1886), United States v. City of Detroit, 355 U.S. 466, 469 (1958). Also, see Chapter 11, Article 3, Section 9 of the Code of West Virginia, which exempts the United States from taxation. However, if the fee is a service charge, the United States may pay it. See 24 Comp. Gen. 599 (1945), and 50 Comp. Gen. 343 (1970).

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In determining whether the fee being charged is a tax or a service charge, we are required to look beyond the characterization given to the fee in the ordinance, to its real nature. See Carpenter v. Shaw, 280 U.S. 363, 367-8 (1930), United States v. County of Allegheny, 322 U.S. 174, 184 (1943), United States v. City of Detroit, 355 U.S. 466, 469. Guidelines for making this determination were set forth in 50 Comp. Gen. 343, 345 (1970), as follows:

> "* * * A reasonable charge by a political subdivision based on the quantum of direct services actually furnished and applied equally to all property tax-exempt entities need not be considered a tax against the United States, even though the services in question are provided to the taxpayers of the political subdivision without a direct charge, provided the political subdivision is not required by law to furnish the service involved--without a direct charge--to all located within its boundaries--such as fire and police protection."

The first question that must be answered is whether the city of Huntington is under an obligation to provide fire protection services to its citizens. We have consistently held that municipalities are required by law to provide this service as well as police protection. See, for example, 24 Comp. Gen. 599, 26 Comp. Gen. 382 (1946), and 49 Comp. Gen. 284 (1969). In the decision appearing at 24 Comp. Gen. 599 this conclusion was reached as a result of an interpretation of the Michigan statute giving fire protection powers to municipalities. Our interpretation was based, in part upon the Supreme Court holding in Mason v. Pearson, 50 U.S. 248, 259 (1850), that a statute which confers a power upon a governmental body or official which is exercised for the benefit of third persons should be construed as imposing a duty. However, it may be noted that in United States v. Thoman, 156 U.S. 353, 359 (1894), the court stated that:

> "It is a familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty rather than conferring a discretion. Mason v. Pearson, 9 How. 248 * * *. This rule of construction is, however, by no means invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty. * * *"

The applicable statute is set out in Chapter 8, Article 15, Section 1 of the West Virginia Code which provides in pertinent part as follows:

> "The governing body of every municipality shall have plenary powers and authority to provide for the prevention and extinguishment of fires. * * *"

This wording is similar to the wording of § 8-14-1 of the Code which gives municipalities police powers. It stands in contrast to the permissive wording of other parts of the Code giving municipalities such powers as the power to improve streets, § 8-18-1, and the power to acquire and operate waterworks, § 8-19-1. Thus, the wording of § 8-15-1 leads us to conclude that the West Virginia legislature did, in fact, intend to give municipalities a mandate to provide fire protection to its citizens and all property within its boundaries.

However, the Code explicitly permits more than one way of financing such firefighting activities, including the option of charging a fee for such services. See § 8-13-13, quoted above. Thus while the city of Huntington is required to provide fire protection to its inhabitants, it is not required to finance it through its general tax funds. Therefore, if the charge for firefighting services bears a reasonable relationship to the quantum of services provided and is charged proportionately against all inhabitants who use those services, it need not be considered a tax against the United States, but a fee for services rendered which may be paid.

It may be reasonable to charge the owners of buildings and personal property as users with a Fire Service Fee. See McCoy v. City of Sistersville, 199 S.E. 260 (1938). However the method of assessing the fee involved here is not analogous to any of the methods of assessment which our decisions have held to be reasonable charges based on the amount of services provided, such as a water charge based on the amount of water supplied or a sewerage charged based a monthly rental fee. See 31 Comp. Gen. 405 (1952) and 29 Comp. Gen. 120 (1949). We find no correlation between the quantum of use of fire protection services and the value of a person's property. An owner of valuable property is no more likely to use fire protection services than an owner of less valuable property; similarly, he is not likely to use a greater proportion of those services.

On the other hand, the instant Fire Service Fee resembles a common type of tax--the ad valorem tax--which has been defined as a tax or duty calculated at a certain percentage of the value of the object being taxed. See Thomas v. City of Elizabethtown, 403 S.W. 2d 269, 272 (1965), United States v. County of Allegheny, 322 U.S. 174, 184, Powell v. Gleason, 74 P. 2d 47, 50 (1937). In the McCoy case, supra, the Supreme Court of Appeals of West Virginia indicated that a similarly calculated fire protection fee was not a tax because it was not based on the assessed value (on which tax levies are laid) of the buildings and personal property. As indicated above Huntington ordinance bases the fee upon the assessed value (as fixed for tax purposes) of the property. In any event in our opinion an assessment (fee) based on the value of property (whether it be based on the assessed value for tax purposes, other assessed value or actual value) is in the nature of a tax for which the United States would not be liable.

In light of the foregoing, we must conclude that the city of Huntington Fire Service Fee is in effect a tax upon the United States and, hence, may not be paid by your Department.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States