



B-176967

AUG 2 1973

Mr. Samuel W. George ✓
Chief, Operations Accounting Branch
Office of Financial Management
National Institutes of Health
Department of Health, Education, and Welfare

Dear Mr. George:

This is in response to your letter of June 27, 1972, addressed to our Transportation and Claims Division, requesting a decision as to whether certifying officers at the National Institutes of Health (NIH) may certify for payment a room rental transient tax included in invoices submitted by the United Inn of America, Bethesda, Maryland.

On January 25, 1971, NIH awarded contract No. NIH 71-5644 CC, to the Chevy Chase Motor Lodge to provide housing and subsistence for outpatient participants in NIH's Leukemia Program and accompanying parents or guardians from January 1, 1971, through December 31, 1971. The contract was modified effective June 5, 1971, to incorporate the change of name agreement in which the corporate name of the contractor was changed from the Chevy Chase Motor Lodge to the United Inn of America. In addition, on January 13, 1972, the terms of the contract were modified to extend the period of the contract through February 29, 1972.

By contract No. NIH 72-C-466 CC, NIH awarded a subsequent contract on February 8, 1972, for the period of March 1, 1972, through December 31, 1972, to the United Inn of America, the terms of which are identical to those of the previous contract.

Section 84-33 of the Montgomery County [Maryland] Code 1965 provides in part as follows:

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PUBLISHED DECISION
53 Comp. Gen. 69

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a. There is hereby levied and imposed on each and every transient a tax at a rate of three percent of the total amount paid for room rental by or for any such transient to any hotel, motel or other similar place providing sleeping accommodations after July 1, 1971.

b. The following words and phrases when used herein shall, for the purposes of this tax, have the following meanings, except where the context clearly indicates a different meaning:

(1) Transient: An (sic) person who for any period of not more than seven consecutive days obtains sleeping accommodations, either at his own expense or at the expense of another, in any hotel, motel or other similar place providing sleeping accommodations for which a charge is made.

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c. Every person receiving any payment for room rental with respect to which a tax is levied shall collect the amount of tax hereby imposed from the transient on whom the same is levied or from the person paying for such room rental, at the time payment for such room rental is made. The taxes required to be collected hereunder shall be deemed to be held in trust by the person required to collect the same until remitted as hereinafter required.

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In their invoices submitted to NIH, United Inn of America included the room rental transient tax imposed by section 84-33 of the Montgomery County Code on those individuals furnished housing and subsistence after July 1, 1971.

First, it must be determined whether the imposition of the county tax infringes on the Government's constitutional immunity from state and local taxation. It has been the consistent position of our Office that the applicability of the doctrine of sovereign immunity rests upon a determination as to the identity of the taxpayer upon whom the legislature has placed the legal incidence of the tax. The Federal Government is exempt from the payment of

a state or local tax only if it is shown that the legal incidence of the tax falls directly on the Government or an instrumentality thereof. (See 51 Comp. Gen. 367, 368 (1971), modified for other reasons by 52 Comp. Gen. 83^v(1972)).

In the present situation, it is apparent from the above-cited provisions of the Montgomery County Code that the County Council has imposed the legal incidence of the transient tax directly upon the transient, and the responsibility for the collection of the tax upon the owner or operator of the motel. The transients are neither employees of the Government nor its agents; they are merely beneficiaries under the contracts. The relationship between the Government and the transients, as created by the contracts to provide for their housing and subsistence, is insufficient to effectuate a shift in the burden of the tax directly to the Government. Consequently, the transient tax is an indirect tax on the Federal Government and the Government would not be exempt from the payment of such a tax pursuant to the theory of sovereign immunity.

Notwithstanding the fact that the Government would not be immune from the tax in question, the determination of whether the United States must reimburse United Inn for the transient tax depends upon the provisions of the contracts awarded to United Inn. Both contracts contain the following provision:

Federal, State, and Local Taxes

Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and Local taxes and duties.

Since the contracts contain no clause providing for the payment of any taxes in excess of those stipulated in the contract price, the above-quoted provision, which limits payment to those taxes as included in the contract price, is controlling. Cf. 41 Comp. Gen. 719 (1962).

In addition, we have been informally advised by the Assistant County Attorney for Montgomery County that a room rental transient tax was imposed by resolution No. 6-503 effective July 1, 1967, and remained in effect until July 1, 1971. The tax imposed by resolution was identical in form to the 1971 codification except for the percentage rate. Since a transient tax had been in effect in Montgomery County from 1967 to the present time, there is no

basis to conclude that United Inn was unaware of the tax at the time it entered into either of the two contracts in question.

Accordingly, certifying officers are without authority to certify for payment to United Inn room rental transient tax as included in invoices submitted under the contracts.

However, our Office would have no objection to the inclusion of a provision in future contracts awarded by NIH to motels located in Montgomery County, Maryland, which would obligate the Government to pay the transient tax applicable to those individuals provided housing and subsistence as beneficiaries under future similar contracts.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States