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

FILE: B-215735 **DATE:** July 1, 1985

MATTER OF: 9-1-1 Emergency Number Fee

DIGEST:

1. Texas 9-1-1 Emergency Number Act authorizes establishment of communication districts to process calls to public safety agencies from residents of each district in large metropolitan areas for emergency aid, accessed by dialing 911. Each district is governmental entity performing a municipal service and is permitted by Texas law to assess service fees to recoup operating costs. The fee assessed by the districts amounts to a tax from which Federal entities are constitutionally immune.

2. While 9-1-1 service fee appears as a separately stated item on monthly telephone bills of district customers, telephone company is only collection agent for district and is not itself the service provider. Legal incidence of the tax is directly on telephone service customers, or "vendees," including GSA. Direct taxes on U.S. as vendee are unconstitutional; therefore 9-1-1 fee must be withheld from payment.

An authorized certifying officer of the General Services Administration (GSA), requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying a 9-1-1 emergency number service fee, itemized on the telephone bills of Houston, Texas, customers (including GSA) of the Southwestern Bell Telephone Company. If this were a fee imposed by the telephone company for its own services and duly permitted by the tariff to which all utility customers are subject, we would find that the charges are properly due and payable by the United States as a utility customer. However, for the reasons explained below, we conclude that this particular charge is a tax, the legal burden of which falls directly on the Federal Government as the service consumer (vendee), and that the Government is constitutionally immune from paying it. (A June 11, 1984 legal

opinion provided by GSA's Regional Counsel on this matter comes to the same conclusion.) GSA should continue its present policy of deducting the 9-1-1 service fee from its payments to Southwestern Bell.

I. CHARACTERISTICS OF THE HOUSTON 9-1-1 SERVICE CHARGE.

In 1983, Texas enacted the 9-1-1 Emergency Number Act, Tex. Stat. Ann., art. 1432c (Vernon 1983) (hereafter cited by section number in art. 1432c). Under the Act, areas with more than 2 million population (§ 4(a)) can, by referendum (§ 10 (e)), establish a special purpose district (called a "communication district") (§ 5(a)) to provide answering, referral and dispatch service for emergency calls to all area public safety agencies, using the emergency service telephone number, "9-1-1" (§ 8).

Each communication district's powers are enumerated in the law as follows:

> "The district, when created and confirmed, constitutes a public body corporate and politic, exercising public and essential governmental functions, having all the powers necessary or convenient to effect the purposes and provisions of this Act, including the capacity to sue or be sued. * * *" § 11(a).

Funding for the district is also specified in the Act. The district is permitted to accept "federal, state, county, or municipal funds as well as private funds * * *." (§ 11(b).) The district is also empowered to raise funds. At its option, the district may incur bonded indebtedness to finance its start-up costs (§ 16). It may also "levy and collect [a] 9-1-1 emergency service fee" (§ 11(a)), and use the fee either to retire its bonds or to fund day-to-day operations, or both.

The amount of the 9-1-1 fee is determined by the district (§ 12), but it may not exceed 2 percent of the base rate charged by the local telephone company for each local exchange access or trunk line (§ 10(b)). A telephone customer will be assessed the service fee on each of its lines up to 100 lines per entity per location (§ 13(a)). Coin-operated telephones are exempt from the fee (§ 13(a)).

The 9-1-1 Emergency Number Act also provides that "[e]very billed service user is liable for any fee imposed * * *." (§ 13(a)). The local telephone company has a "duty * * * to

collect the fee" (§ 13(a)) and to remit all collections quarterly to the governing board of the communication district (§ 13(c)). In the event of nonpayment by a service user, the telephone company is required to notify the district. (§ 13 (b)). The district will then "commence legal proceedings to collect fees" from the user (§ 13(b)).

The Act requires that the 9-1-1 fee be added to and separately stated on the telephone company's regularly issued bills. § 13(a) and (b). The telephone company is required to maintain records of its fee collections for 2 years and make them available for audit at the district's expense. § 13(c). In return for its services, the telephone company is allowed an administrative fee of 2 percent of the collected 9-1-1 fees. § 13(c).

This statutory description of the local telephone company's responsibility with regard to the service fee, in our view, clearly limits the utility's role to that of collection agent for services provided by each district. This means that the legal burden of the tax is not on the utility as vendor but on the consumer of utility services--the vendee.

II. DISCUSSION

The United States and its instrumentalities are constitutionally immune from direct taxation. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Where the legal incidence of the tax falls directly on the United States as the buyer of goods, Kern Limmerick, 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. Allegheny County, 322 U.S. 174 (1944), it may not be taxed by states and their inferior governmental units. Such taxes may be grouped together and called "vendee" taxes. Only the Congress can waive the Government's constitutional immunity to a direct tax by expressly authorizing its payment. See, e.g., 5 U.S.C. §§ 5516-20; 31 U.S.C. §§ 6901-06 (1982).

On the other hand, if the legal incidence of the tax falls directly on a business enterprise (the "vendor") which is supplying the Federal Government as a customer with goods or services, it is the contract or other agreement which determines what the Government must pay for the items supplied. For example, contract language stating that the "price includes all applicable taxes" will authorize full payment of the contract price, even though some of the cost of the item is attributable to taxes paid by the vendor. 45 Comp. Gen. 192 (1965); 23 Comp. Gen. 957 (1944); B-160129, Dec. 7, 1966.

The same principle applies to taxes on public utilities. A utility's vendor taxes which are passed along to customers can be paid (i.e. reimbursed) by the United States if they are included in an approved tariff. 32 Comp. Gen. 577 (1953). The State Public Utility Commission could approve the vendor tax either as an undifferentiated element of cost subsumed in the basic rate (B-144504, June 9, 1967) or as a separately stated component of the approved rate. 61 Comp. Gen. 257 (1982); B-144504, June 30, 1970. The Government's obligation to pay is contractual: if a valid vendor tax appears on a utility bill, but has not been approved by the Public Utility Commission as a part of the tariff, there is no basis for the United States to pay. See 45 Comp. Gen. 192 (1965); B-134602, Dec. 26, 1957.

If approved by the Public Utility Commission, the exact type of vendor tax is unimportant. Compare 32 Comp. Gen. 577 (1953) (franchise tax); B-123206, June 30, 1956 (sales tax); B-148667, May 15, 1962 (business privilege tax); and B-171756, Feb. 22, 1971 (tax surcharge).

In the above-cited cases, payment was allowed because the taxes were vendor taxes and approved by the Public Utility Commission as a part of the tariff. In the present case, as pointed out earlier, the 9-1-1 Act imposed a fee for a governmental service not on the vendor utility, but directly on a class of district residents (vendees) who use the telephone services of Southwestern Bell. Although termed a "service fee," it is clear that the service provider is not the telephone company but rather each governmental communication district, which utilizes the telephone company as an agent to collect the district's service fee.

It must be noted that the fact that the charge is called a "service fee" is legally irrelevant if, as we think is the case here, the charge was really a vendee tax imposed by a local governmental unit under state law on a class of residents--telephone users--who receive certain emergency services which the governmental unit is obligated by state law to provide. See Van Brocklin v. Tennessee, 117 U.S. 151 (1886); Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933).

VII. CONCLUSION

It is our opinion that the Houston 9-1-1 emergency service fee is a vendee tax, the incidence of which falls directly on the United States as the user of telephone services. Unlike vendor taxes which often appear on public utility bills as part of the vendor utility's cost of doing business and which must be paid if authorized by a Public Utility Commission approved

tariff, there is a constitutional immunity from a direct (vendee) tax imposed by a governmental unit to defray the costs of government services it is required by law to provide. Accordingly, payment of the 9-1-1 fee would be improper, and GSA should continue its present policy of withholding the fee portion of the basic rate charges from its payments to Southwestern Bell for telephone service.

Milton J. Socolar

Acting Comptroller General
of the United States