



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

## **Decision**

**Matter of:** 9-1-1 Tax, State of Arizona

**File:** B-238410

**Date:** September 7, 1990

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### **DIGEST**

The telephone companies pass the burden of the 9-1-1 emergency service tax imposed by the State of Arizona on to their customers as a cost of providing telephone service. The 9-1-1 tax is a vendor tax, the legal incidence of which falls on the telephone companies. For that reason, the constitutional immunity of the United States does not apply, and that portion of the billings reflecting the amount of the tax may be paid by the federal government.

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### **DECISION**

By letter dated January 12, 1990, the Director, Office of the Sergeant at Arms, United States Senate, asked for our decision concerning the propriety of paying 9-1-1 emergency service charges included on telephone bills for the two Senators from Arizona. The Director questions whether the charges are covered by the constitutional immunity of the United States from state taxation.

The Arizona 9-1-1 statute, under which these charges are assessed, imposes a vendor tax on companies providing telephone services in Arizona. The companies pass the tax on to their customers as part of the cost of telephone service. Although the economic burden of the tax may ultimately fall on the federal government as a user of telephone service, the legal incidence of the tax does not. Therefore, the constitutional immunity does not apply, and the Arizona Senators may pay these charges.

### **BACKGROUND**

Under section 42-1472 (A) (1) of the Arizona Revised Statutes, the State of Arizona levies a tax for the purpose of financing emergency telecommunication (9-1-1) services. The law

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requires that telephone companies, or "providers",<sup>1/</sup> pay an amount not to exceed one and one-half percent of their gross proceeds of sales or gross income derived from the business of providing telephone exchange access services. Ariz. Rev. Stat. Ann. § 42-1472(A), as amended by 1990 Ariz. Legis. Serv., 3d Sp. Sess. 9 (West). Each provider must remit that amount monthly to the Arizona Department of Revenue for deposit in an emergency telecommunication services revolving fund. Ariz. Rev. Stat. Ann. § 42-1473(B).

#### DISCUSSION

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). 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). In these instances, the buyer of goods, consumer of services, and owner of property were obligated by law to pay the tax at issue. Such taxes are known as "vendee" taxes and are not payable by the federal government unless expressly authorized by the Congress. 64 Comp. Gen. 656, 656-57 (1985). If, however, the legal incidence of the tax falls directly on a business enterprise, i.e., the "vendor", which is supplying the federal government, the customer, with goods or services, the government may pay the tax. Id. at 657.

The issue here is whether the Arizona tax is the type of tax which the United States must pay; i.e., does the legal incidence of the tax fall on the provider ("vendor") or on the provider's customers ("vendees")? The determination of where the legal incidence of any particular tax falls can be extremely complex. "[T]here are very few definitive rules which show precisely where the legal incidence of a particular tax lies." United States v. Maryland, 471 F. Supp. 1030, 1036-1037 (D. Md. 1979). Courts have long recognized that the determination necessarily requires close analysis of the taxing statute "in the light of all relevant circumstances." Id. But, they have unanimously rejected the notion that legal incidence follows the economic burden of the tax. See, e.g., United States v. New Mexico, 455 U.S. 720, 734 (1982); Gurley

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<sup>1/</sup> Under Ariz. Rev. Stat. Ann. § 42-1471(4), "provider" means a public service corporation offering telephone or telecommunications services which provides exchange access services.

v. Rhoden, 421 U.S. 200 (1975); Maryland at 1036; United States v. City of Leavenworth, 443 F. Supp. 274, 281 (D. Kan. 1977). Thus, for example, the legal incidence of a vendor tax does not shift to the vendee when the vendor passes the tax on to his customers as a cost of doing business.

We conclude that the Arizona 9-1-1 statute establishes a vendor tax. While it is not disputed that Arizona's two United States Senators will shoulder, at least in part, the economic burden of the tax, the taxing statute itself and surrounding circumstances indicate that the legal incidence of the tax falls on the telephone company providers, not the Senators.

The statute clearly contemplates a tax on providers. The tax is calculated based on providers' gross receipts--"gross proceeds of sales or gross income from the business of providing exchange access services." Ariz. Rev. Stat. Ann. § 42-1472, as amended by 1990 Ariz. Legis. Serv., 3d Sp. Sess. 9 (West). The Arizona Attorney General has characterized the 9-1-1 tax as a tax on the provider of telephone services, and not as a tax on the companies' customers. Op. Atty. Gen. No. I85-075 (1985). And, under the Arizona tax code, the Arizona 9-1-1 tax is characterized as a "transaction privilege tax," which is an excise tax on the privilege or right to engage in an occupation or business in the state, or, in other words, a vendor tax. Ariz. Rev. Stat. Ann. § 42-1472(B); see Watkins Cigarette Service, Inc. v. Ariz. State Tax Comm'n, 526 P.2d 708 (Ariz. Sup. Ct. 1974).

In four recent cases, we held that the particular 9-1-1 service charges at issue were vendee taxes. 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-230691, May 12, 1988 (Tennessee). Under those states' statutes, however, unlike the Arizona statute, the telephone companies were simply collection agents, *i.e.*, required to collect the tax from their customers and then remit the amount collected to the state taxing authorities. The Texas statute, for example, made clear that the legal incidence of the tax fell on the customer by providing that "[e]very billed service user is liable for any fee imposed." 64 Comp. Gen. at 656.

We conclude that because the Arizona 9-1-1 charge is a vendor tax, the Office of the Sergeant at Arms may approve payment of the 9-1-1 service charges included on the bills of the Arizona Senators.

*for* *Wilton J. Auster*  
Comptroller General  
of the United States