

Office of the General Counsel

B-239608

December 14, 1990

Colonel Ernest E. Ricci
Executive Director,
E 9-1-1 Uniform Emergency
Telephone System
State of Rhode Island
One Communications Place
Providence, Rhode Island 02903

Dear Colonel Ricci:

By letter dated April 16, 1990, Senator John H. Chaffee asked that we provide you an explanation of the legal bases of our recent decisions which hold that the federal government is constitutionally immune from paying certain 9-1-1 emergency service charges. You have expressed some concern at the refusal of federal agencies located in Rhode Island to pay the Rhode Island 9-1-1 charge.

We have held that the 9-1-1 service charges imposed by the states of Florida, Maryland, Texas, and Tennessee are not payable by the federal government. 66 Comp. Gen. 385 (1987); 65 Comp. Gen. 879 (1986); 64 Comp. Gen. 655 (1985); B-230691, May 12, 1988. But, we recently held, in B-238410, Sept. 7, 1990, that the federal government may pay the 9-1-1 service charge imposed by the state of Arizona. The differing result in these cases is grounded in constitutional law and the state statutes at issue in the cited cases.

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. One hallmark of a vendor tax is that the seller is required to pay it even if he is unable or unwilling to collect it from the purchaser. B-225123, May 1, 1987, citing 63 Comp. Gen. 49 (1983).

We most recently held that Arizona's 9-1-1 service charge is a vendor tax payable by the federal government. B-238410, Sept. 7, 1990. We found that under Arizona's 9-1-1 statute, the legal incidence of the tax falls on the telephone companies operating in Arizona, and not on the users of telephone services. The Arizona law provides that the amount of the tax is based on the telephone companies' gross receipts. The Arizona tax code characterizes the tax 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. And, the Arizona Attorney General has characterized the 9-1-1 tax as a tax on the providers of telephone services, not as a tax on the companies' customers.

In four other cases, however, we held that the particular 9-1-1 service charges at issue were vendee taxes not payable by the federal government. 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 the state statutes at issue in those cases, 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, makes clear that the legal incidence of the tax falls on the customer by providing that "[e]very billed service user is liable for any fee imposed." 64 Comp. Gen. at 656.

The Rhode Island 9-1-1 statute appears similar to the Texas statute. The Rhode Island law provides that "[t]he 911 authority shall determine the rate of a surcharge to be levied upon each residence and business main telephone exchange line . . . in the state." R.I. Gen. Laws § 39-21.1-14(a) (emphasis added). It specifically holds 9-1-1 service users liable for payment of the surcharge:1/

1/ Although the Rhode Island statute labels the 9-1-1 fee a "surcharge," it is, nonetheless, a tax. In a 1986 decision, we iterated the characteristics of 9-1-1 service charges which make them taxes. 65 Comp. Gen. at 881. First, 9-1-1 service is provided by a local government or by a quasi-governmental unit. Second, public funding of the service requires legal authority, e.g., an ordinance or referendum. Third, the

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"Every billed service user shall be liable for any surcharge imposed under this section until it has been paid to the common carrier."

Id. § 39-21.1-14(e).

Moreover, the law appears to contemplate that Rhode Island's telephone common carriers will serve strictly as collection agents for the state. Each telephone common carrier operating in Rhode Island is required to bill the surcharge to its customers and transfer the amount collected to the state's general treasury. Id. § 39-21.1-14(d). It appears, therefore, that Rhode Island's 9-1-1 tax is a vendee tax, the legal incidence of which falls on the federal government as a user of telephone services. Consequently, the constitutional immunity of the United States applies and the tax is not payable by the federal government.

I trust that you will find this discussion useful. Should you have further questions, please call me or Thomas Armstrong of my staff at 202-275-5644.

Sincerely yours,



Gary L. Kepplinger
Associate General Counsel

Enclosure

APPROPRIATIONS/FINANCIAL MANAGEMENT

Appropriation Availability

Purpose availability

Specific purpose restrictions

Utility services

Use taxes

1/(...continued)

Service charge is actually based on a flat rate per telephone line and is unrelated to levels of service.