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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Administrative Office of the U.S. Courts—California E-Waste Recycling Fee

File: B-320998

Date: May 4, 2011

DIGEST

Appropriated funds are not available to pay the e-waste recycling fee assessed by the State of California against the Administrative Office of the United States Courts because the fee constitutes a tax, the legal incidence of which falls on the federal government as a vendee. While section 6001(a) of the Resource Recovery and Conservation Act of 1976 (RCRA), 42 U.S.C. § 6961(a), waives sovereign immunity from state and local requirements respecting hazardous waste disposal and management, including reasonable service charges such as permit fees, it does not waive immunity from taxation. Such a waiver must clearly and expressly confer the privilege of taxing the federal government. *Domenech v. National City Bank of New York*, 294 U.S. 199, 205 (1935). The e-waste recycling fee is not a regulatory fee constituting a "reasonable service charge" within the scope of section 6001(a) of RCRA, but is, instead, a vendee tax. Other states that have enacted e-waste recycling legislation impose the financial burden of e-waste recycling on manufacturers (vendors) of electronic products who then pass on this business cost to consumers through an increased purchase price for the products.

DECISION

The Associate Director and General Counsel of the Administrative Office of the United States Courts (AOUSC) has requested an advance decision under 31 U.S.C. § 3529 on the propriety of using appropriated funds to pay electronic waste (e-waste) recycling fees assessed by the State of California in connection with AOUSC's purchase of computer monitors. Letter from Associate Director and General Counsel, AOUSC, to Acting General Counsel, GAO (Oct. 5, 2011) (Request Letter). Specifically, AOUSC has asked whether the e-waste recycling fee is a tax and, if so, whether the United States has waived its sovereign immunity with respect to its payment. Request Letter, at 3. As we explain below, we conclude that, under the

Supremacy Clause of the U.S. Constitution, the e-waste recycling fee is a tax and that Congress has not legislated a waiver of sovereign immunity permitting federal agencies to pay the tax. Therefore, appropriated funds are not available to pay the assessment. Although section 6001 of the Resource Recovery and Conservation Act of 1976 (RCRA),[1] 42 U.S.C. § 6961, frequently referred to as the federal facilities provision, requires federal agencies to comply with state and local requirements respecting the control and abatement of solid waste or hazardous waste disposal and management, including the payment of reasonable service charges, that provision does not waive the federal government's sovereign immunity from a vendee tax on the purchase of computer monitors. A waiver of sovereign immunity must clearly and expressly confer the privilege of taxing the federal government. *Domenech v. National City Bank of New York*, 294 U.S. 199, 205 (1935). Unlike California, other states impose an e-waste recycling tax on manufacturers (vendors) rather than on consumers (vendees).

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies in order to establish a factual record and to establish the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. The record in this case consists of AOUSC's Request Letter and AOUSC's written response to questions posed by our office, dated December 13, 2010 (AOUSC Response Letter). The record also includes a letter from the Manager, E-Waste Recycling Program, California Department of Resources, Recycling and Recovery (CalRecycle), to the Assistant General Counsel for Appropriations Law, GAO, received on December 3, 2010 (CalRecycle Letter), responding to questions posed by our office. We also interviewed officials from the California Board of Equalization (BOE) via teleconference, regarding the collection of the e-waste recycling fee and payment liability on December 22, 2010 (BOE Interview). BOE also provided us with a redacted copy of a legal opinion issued by BOE to the Department of Defense, regarding the e-waste recycling fee and dated September 14, 2006 (BOE Opinion).

BACKGROUND

The term "electronic waste," or "e-waste," is a popular, informal name for discarded electronic devices. CalRecycle, *What Is E-Waste?*, *available at*

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[1] Section 2 of RCRA, Pub. L. No. 94-580, 90 Stat. 2795 (Oct. 21, 1976), amended the Solid Waste Disposal Act, Pub. L. No. 89-272, title II, 79 Stat. 997 (Oct. 20, 1965), *codified, as amended, at* 42 U.S.C. §§ 6901–6992k, in its entirety. Among the RCRA amendments was the addition of the federal facilities provision. Thus, when discussing the federal facilities provision, courts and scholars often refer to it as a provision of RCRA, as opposed to the Solid Waste Disposal Act. We will follow the same construct and refer to the Solid Waste Disposal Act herein as RCRA.

www.calrecycle.ca.gov/electronics/WhatisEWaste (last visited Mar. 30, 2011). The improper disposal or handling of e-waste that contains hazardous materials can pose a serious risk to both human health and the environment. For instance, cathode ray tubes (CRTs), the glass "picture tubes" found in video display devices such as televisions and computer monitors, typically contain lead, a toxic metal that may cause adverse health effects in adults and children. *Id.*; *see also Hazardous Waste Management System; Modification of the Hazardous Waste Program; Cathode Ray Tubes*, 71 Fed. Reg. 42928, 42930 (July 28, 2006) (final rule).

As of April 2011, 25 states have enacted some form of e-waste management legislation. *See generally* Electronics TakeBack Coalition, *State Legislation*, *available at* www.electronicstakeback.com/promote-good-laws/state-legislation (last visited Apr. 29, 2011) (ETBC, State by State E-Waste Law Summary). Except for California, these states place the financial burden of the collection and recycling of e-waste on the manufacturers of certain electronic products sold within the state. *See* Hannah G. Elisha, *Addressing the E-Waste Crisis: The Need for Comprehensive Federal E-Waste Regulation within the United States*, 14 Chap. L. Rev. 195, 213–14 (2010); Library of Congress, Congressional Research Service, *Managing Electronic Waste: An Analysis of State E-Waste Legislation*, No. RL34147 (Feb. 6, 2008), at 7. California, however, has opted to impose the financial burden of e-waste collection and recycling on the consumer by assessing a fee at the time of purchase. *Id.*

California enacted the Electronic Waste Recycling Act of 2003 (as amended, EWRA) to establish a statewide program to promote and fund the collection and recycling of "covered electronic devices" (CEDs), defined as electronic devices deemed by the California Department of Toxic Substances Control (DTSC) to be hazardous waste when discarded. Cal. Pub. Res. Code §§ 42461, 42464(e); *see also*, Cal. Health & Safety Code § 25124; two DTSC publications: *Fact Sheet: SB20 Testing Results for LCD Monitors and Laptop Computers* (Mar. 2004), and *Managing Waste Cathode Ray Tubes: Fact Sheet* (Aug. 2001), *available at* www.dtsc.ca.gov/PublicationsForms/pubs_fs_by_keyword.cfm (last visited Mar. 30, 2011). Among other things, EWRA is intended "to ensure that any cost associated with the proper management of covered electronic devices be internalized by the producers *and consumers* of covered electronic devices *at or before the point of purchase, and not at the point of discard.*" Cal. Pub. Res. Code § 42461(d)

(emphasis added). Toward that end, consumers, retailers and manufacturers of CEDs have statutory obligations under EWRA.[2]

Specifically, section 42464 of the California Public Resources Code provides, in pertinent part, as follows:

> "(a) . . . a consumer shall pay a covered electronic waste recycling fee upon the purchase of a new or refurbished covered electronic device. . . .
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> * * * *
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> (b) . . . a retailer shall collect from the consumer a covered electronic waste recycling fee at the time of the retail sale of a covered electronic device."

Cal. Pub. Res. Code §§ 42464(a)–(b). Thus, retailers are obligated to charge and collect from California consumers, and consumers are obligated to pay, at the point of sale, the e-waste recycling fee.[3] *Id.* Retailers may, but are not required to, pay the e-waste recycling fee on behalf of consumers, in which case, the fee is paid by the retailer to its vendor (typically, the manufacturer). Cal. Pub. Res. Code § 42464(d). Retailers or their vendors, as applicable, must register with, and remit the e-waste recycling fee to BOE, the state agency charged with collecting California state sales and use taxes, as well as other taxes and fees that provide revenue for state government and essential funding for counties, cities, and special districts. Cal. Pub. Res. Code § 42464.2; BOE Interview. The retailers or their vendors are entitled to

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[2] EWRA defines "consumer" as "a person who purchases a new or refurbished covered electronic device in a transaction that is a retail sale." Cal. Pub. Res. Code § 42463(c). The term "person" includes "the United States and its agencies and instrumentalities *to the extent permitted by law*." Cal. Pub. Res. Code § 42463(n) (emphasis added). California has asserted that because the United States is a "person" under EWRA, federal agencies are required to pay the e-waste recycling fee. Request Letter, at 2. However, as we explain further in this decision, because we conclude that the Supremacy Clause prohibits the assessment of this tax on the United States, the statutory definition of "person," by its own terms, does not include the United States.

[3] Currently, the e-waste recycling fee ranges from $6 to $10 per CED and is based on the screen size of the device. Cal. Pub. Res. Code § 42464(a). The e-waste recycling fee is also subject to adjustment periodically by CalRecycle in order to accommodate any changes in the costs associated with collecting and recycling CEDs. Cal. Pub. Res. Code § 42464(f).

keep three percent of the monies collected as reimbursement for all costs associated with collecting the e-waste recycling fee. Cal. Pub. Res. Code §§ 42464(c).

E-waste recycling fees are deposited into the Electronic Waste Recovery and Recycling Account (EWRA Account). Cal. Pub. Res. Code § 42476(a). The funds in the EWRA Account are available without further appropriation to, among other things, make e-waste recovery payments to authorized providers of e-waste collection and recycling services, typically local governments or their service providers, to cover costs incurred from managing discarded CEDs (referred to as "covered electronic waste," or "CEW").[4] Cal. Pub. Res. Code § 42476(a). In addition to collecting payments from the state, an approved provider may charge a fee to consumers for collection services, if the payments the provider receives from the state do not cover the provider's net cost of collection. Cal. Code Regs. title 14, § 18660.6(d); CalRecycle Letter, at 2.

DTSC and CalRecycle jointly administer EWRA. DTSC regulates hazardous waste management and disposal, while CalRecycle manages the system created by EWRA for compensatory payments to authorized collectors and covered e-waste recyclers. Cal. Pub. Res. Code §§ 42476–42479; *see also* CalRecycle Letter, at 1. Both DTSC and CalRecycle have enforcement authority under EWRA, while BOE has authority to enforce collection of the e-waste recycling fee under the California Revenue and Taxation Code.

For each sale of a CED "for which [the e-waste recycling fee] has not been paid" pursuant to section 42464, CalRecycle may impose administrative penalties of up to $2,500 per offense, and seek civil penalties of up to $5,000 per offense in state court. Cal. Pub. Res. Code §§ 42474(a)–(b). Section 42474 places liability for administrative and civil penalties on both consumers and retailers. Similarly, a consumer is subject to BOE's fee collection procedures if the e-waste fee is not paid because a consumer is deemed to be a "feepayer" under California's Fee Collections Procedures Law. Cal. Pub. Res. Code § 42464.2; Cal. Rev. & Tax Code § 55061.

DISCUSSION

The issue before us is whether the California e-waste recycling fee constitutes a vendee tax that AOUSC is constitutionally immune from paying, or whether that fee is a requirement respecting hazardous waste disposal and management, such as a regulatory fee, within RCRA's waiver of sovereign immunity.

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[4] Funds in the EWRA Account are also available, when appropriated by the legislature, for: (1) administration of EWRA by CalRecycle, (2) reimbursement of BOE's collection costs, (3) funding DTSC to implement and enforce state hazardous waste control laws as they apply to CEDs, and (4) establishing a public information program to educate the public on opportunities to recycle CEDs. Cal. Pub. Res. Code §§ 42476(b), (d).

It is an unquestioned principle of constitutional law that under the Supremacy Clause, the activities of the United States and its instrumentalities are immune from direct taxation by state and local governments, unless Congress has legislated a "clear and unambiguous" waiver of sovereign immunity. *See Hancock v. Train*, 426 U.S. 167, 178–79 (1976); *Mayo v. United States*, 319 U.S. 441, 445 (1943); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Supreme Court has described a tax as an "enforced contribution to provide for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931). However, a fee charged by a state or political subdivision for a service rendered or convenience provided is a permissible fee and not a tax. *See Packet Co. v. Keokuk*, 95 U.S. 80, 84 (1877) (wharf fee levied only on those using the wharf is a user fee not a tax); *State of Maine v. Department of Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992) (licensing fee may be viewed as a kind of charge for a regulatory or administrative service); *United States v. City of Columbia, Missouri*, 914 F.2d 151, 155–56 (8th Cir. 1990) (utility charge imposed by the city as a vendor of goods and services is not a tax). Regulatory fees are assessed against an identifiable class of persons as part of a regulatory scheme to defray the cost of regulating the particular business or activity engaged in by such persons (*e.g.*, permit and license fees). *See National Cable Television Association v. United States*, 415 U.S. 336, 340–41 (1974) (reasoning that a fee, as opposed to a tax, is incident to a voluntary act, is paid in exchange for a benefit bestowed on the payer that is not shared by other members of society, and is sufficient to recoup the cost to the government); *see also Maine v. Department of Navy*, 973 F.2d at 1012.

Distinguishing a tax from a fee for service requires careful analysis because the line between tax and fee can be a blurry one. *Collins Holding Corp. v. Jasper County, South Carolina*, 123 F.3d 797, 800 (4th Cir. 1997). In determining whether a charge is a tax or fee, the nomenclature is not determinative, and the inquiry must focus on explicit factual circumstances. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000); *see also City of Columbia*, 914 F.2d at 154 (applying a facts and circumstances test rather than reducing the case to a question of pure semantics). One court has described a classic tax as one satisfying a three-part inquiry—an assessment that (1) is imposed by a legislature upon many, or all, citizens, and (2) raises money that (3) is spent for the benefit of the entire community. *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683,

685 (1st Cir. 1992). [5] On the other hand, a classic regulatory fee is imposed by an agency upon those subject to its regulation, may serve regulatory purposes, and may raise money to be placed in a special fund to help defray the agency's regulation-related expenses. *Id.*; *see also* B-306666, Jun. 5, 2006, at 5–9 (citations omitted) (applying *Valero* and *San Juan Cellular* in tax versus fee analysis). When the characteristic of a charge places it somewhere between a tax and a fee, the most important factor becomes the purpose underlying the statute or regulation imposing the charge in question. *See Valero*, 205 F.3d at 134, *citing South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983). If the ultimate use of the revenue benefits the general public, then the charge will be considered a tax; the charge will more likely be considered a fee if the revenue's benefits are narrowly circumscribed. *San Juan Cellular*, 967 F.2d at 685.

Concluding that an assessment constitutes a tax does not end the sovereign immunity analysis. A determination must be made as to whether the legal incidence of the tax, as opposed to the economic burden of the tax, falls on the United States. The general rule is that when a statute assesses a tax directly on the purchaser (vendee), even if collected by the seller of the goods or services (vendor), the legal incidence of the tax falls on the purchaser. *See*, *e.g.*, *United States v. State Tax Commission of Mississippi*, 421 U.S. 597 (1975); *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *United States v. Allegheny County*, 322 U.S. 174 (1944); *Alabama v. King & Boozer*, 314 U.S. 1 (1941*)*. In such instances, the United States, as the vendee, is constitutionally immune from payment of the tax, unless Congress has consented to its payment by legislating a waiver of sovereign immunity. On the other hand, if the legal incidence of the tax is on the vendor, the United States could ultimately bear the economic burden of the tax, such as an increased purchase price. *See King & Boozer*, 314 U.S. 1.

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[5] We applied *San Juan Cellular* in our decision concluding that a surface water management fee assessed by King County, Washington, against property owned by the U.S. Forest Service was a tax. *See* B-306666, June 5, 2006. The *San Juan Cellular* test has also been applied by the Fourth, Fifth, Ninth, and Tenth Circuit Courts of Appeal, and by the U.S. Department of Justice, Office of Legal Counsel. *See Valero*, 205 F.3d at134; *Marcus v. State of Kansas Department of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999); *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Mississippi*, 143 F.3d 1006, 1011 (5th Cir. 1998); *Bidart Bros. v. The California Apple Commission*, 73 F.3d 925, 931 (9th Cir. 1996); 20 Op. Off. Legal Counsel 12 (1996) (concluding that a Clean Air Compliance Fee assessed by the District of Columbia against property, including property owned by the federal government, was a tax).

California E-Waste Recycling Fee

Based on the facts and other information provided to us by the State of California, we conclude that, under the *San Juan Cellular* test, the e-waste recycling fee charged to AOUSC is a tax, the legal incidence of which falls directly on the federal government as a purchaser of computer monitors. See *San Juan Cellular*, 967 F.2d at 685.

The e-waste recycling fee (1) has been levied by the California legislature against purchasers of CEDs (2) to raise revenue that (3) is to be spent for the public benefit, that is, to fund a statewide program that provides "consumers and the public" with cost free and convenient opportunities to recycle CEDs. Cal. Pub. Res. Code § 42461(b). Payment of the e-waste recycling fee by purchasers of CEDs is not linked to a specific benefit or service provided by the State of California to the payers of the fee. *See* 20 Op. Off. Legal Counsel 12. California acknowledges as much, stating that "[t]he fee is not designed to be strictly tied to the device the fee was levied upon" and that CED purchasers are a "relatively anonymous population." CalRecycle Letter, at 1, ¶ A, and 2, ¶ 3; BOE Interview. Further, consumers are not guaranteed cost-free recycling services in California, nor are they entitled to a refund of the fee if they elect not to avail themselves of recycling services in California. Cal. Code Regs. title 14, §18660.6(d); CalRecycle Letter, at 2. Rather, recycling services from authorized providers are offered to the public at large and no distinction is made between those who have paid the e-waste recycling fee and those who have not. CalRecycle Letter, at 1; BOE Interview. Thus, the benefit of the e-waste recycling fee is not narrowly circumscribed to the consumers paying the e-waste fee, but rather, is conferred on the general public.[6]

In fact, AOUSC may not use collection and recycle services in California. According to AOUSC, in general, when computer monitors no longer meet the needs of the agency, they may be transferred to another judiciary unit or to another agency, may

[6] In two cases, courts have applied a test based on *Massachusetts v. United States*, 435 U.S. 444, 466–67 (1978), to determine whether certain state environmental regulatory assessments were taxes or fees. *See Jorling v. New York State Department of Environmental Conservation*, 218 F.3d 96 (2nd Cir. 2000); *Maine v. Department of Navy*, 973 F.2d at 1011. However, the facts in those cases are not analogous here. Both *Maine v. Department of Navy* and *Jorling* involved a regulatory fee imposed under a state hazardous waste program, and the issue before each court was whether the challenged regulatory fee assessed against regulated entities was reasonable as a matter of law under the provision of the RCRA that waives federal sovereign immunity for "reasonable service charges." *Jorling*, 218 F.3d at 98; *Maine v. Department of Navy*, 973 F.2d at 1012-1013. As noted above, the California e-waste recycling fee is a tax, not a regulatory fee assessed against regulated entities. For a more detailed discussion of the *Massachusetts* test, see B-306666, at n. 9.

be used in an exchange or sale, or may be donated to state agencies.[7] AOUSC Response Letter, at 2. If the monitors are transferred to another unit within the judiciary, they may ultimately be disposed of in another state, where there may be a disposal fee. *Id.*

Consumers bear the legal incidence, as well as the economic burden, of this tax. *See* Cal. Pub. Res. Code §§ 42464, 42474. EWRA requires the retailer to collect the tax from its customers at the point of sale. Although the retailer may opt to pay the e-waste recycling fee on behalf of the customer, the customer is not relieved of liability in the event the fee is not remitted to BOE. BOE Interview. Both the retailer and the customer are subject to civil penalties for any sale of a CED for which an e-waste recycling fee "has not been paid pursuant to section 42464." Cal. Pub. Res. Code § 42474. Although CalRecycle and BOE maintain that, as a practical matter, an enforcement action for nonpayment of the fee would most likely be taken against a retailer, as opposed to the relatively anonymous consumer population, this administrative convenience does not operate to alleviate the liability imposed by statute on consumers. BOE Interview; *see also* Cal. Pub. Res. Code §§ 42464.2, 42474; CalRecycle Letter, at 2, ¶ 3.

If the vendee is legally responsible for the payment of the tax, the federal government as a buyer cannot be held responsible for such payment. *United States v. State Tax Commission of Mississippi*, 421 U.S. 597 (1975); *see also* B-215735, July 1, 1985. The California e-waste recycling fee is not unlike the 9–1–1 charges assessed against telephone consumers pursuant to state statutes and collected by telephone companies. *See*, *e.g.*, 64 Comp. Gen. 655 (1985) (Texas); B-288161, Apr. 8, 2002 (District of Columbia); B-283464, Feb. 28, 2000 (Utah); B-265776, Nov. 29, 1995 (Illinois); B-249007, Jan. 19, 1993 (Nebraska). In each of those cases, we held that the state emergency telephone surcharges assessed to defray 9–1–1 costs were vendee taxes not payable by the federal government because the telephone companies had merely collected surcharges for submission to the state taxing authorities. EWRA is not materially different from the 9–1–1 statutes in these states. For example, the District of Columbia (District) statute had many provisions similar to EWRA: District local exchange carriers were required to collect the taxes from their customers and remit them to a public agency; and the public agency was required to deposit such revenues into a special fund available only to pay the costs of the 9–1–1 emergency phone systems.[8] B-288161. Also similar to EWRA, the Texas 9–1–1 statute made clear

[7] If none of these parties elects to acquire the monitors, AOUSC states that it otherwise disposes of the monitors in accordance with applicable federal, state, and local requirements. Teleconference with AOUSC, Apr. 28, 2010.

[8] The District subsequently amended the 9–1–1 statute to explicitly impose the tax upon telephone service vendors, rather than upon telephone service customers. *See* B-302230, Dec. 23, 2003 (discussing the implications of the amendment to the District statute).

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.

On the other hand, when the legal incidence of a tax falls directly on a vendor supplying the federal government as a customer with goods or services, a "vendor" tax results and the immunity does not apply, even though the economic burden of the tax is transferred to the customer. *See*, *e.g.*, 61 Comp. Gen. 257 (1982). In B-238410, Sept. 7, 1990, we considered Arizona's 9–1–1 surcharge and concluded that it constituted a "vendor" tax that could be reimbursed by the federal government. The Arizona statute differed in significant ways from those of other states that we concluded imposed a vendee tax. Most importantly, Arizona explicitly imposed its tax on telephone carriers (rather than directly on telephone subscribers, as in the other states) and allowed, but did not require, the telephone companies to pass the Arizona tax on to their customers as part of their costs of doing business. Because the companies were allowed to pass the tax on to their customers, it was clear that the economic burden of the Arizona tax would fall on the shoulders of the telephone companies' customers, but this did not alter the outcome.[9] If the tax went unpaid, it was the telephone company, not the customers, to whom the state would look for payment. In other words, the legal incidence of Arizona's tax fell not on the government as a telephone subscriber, but on the telephone service vendors.

Similarly, 24 of the 25 states that have enacted e-waste legislation to date have placed the financial burden of recycling e-waste on producers of the electronic products sold within the state concerned. Methods of revenue generation include assessing a manufacturer's registration fee, requiring manufacturers to establish a collection and recycling program, or charging manufacturers a fee based on the amount of electronic products sold in the state. *See*, *e.g.*, Md. Code, Envir. §§ 9-1727–9-1730; Minn. Stat. §§ 115A.1310–115A.1330; Or. Rev. Stat. §§ 459A.300–459A.365; Wa. Rev. Code §§ 70.95N.010–70.95N.902; *see also*, ETBC, State by State E-Waste Law Summary; CRS No. RL34147. Such methods of financing an e-waste recycling program, even though the costs are ultimately passed on to the customer in the form of an increased purchase price, would not run afoul of the Supremacy Clause because the manufacturers, not the federal government, bear the legal burden of such an assessment. However, the legal incidence of the California e-waste recycling fee falls

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[9] Courts have generally rejected the notion that legal incidence necessarily follows the economic burden of the tax. *See*, *e.g.*, *United States v. New Mexico*, 455 U.S. 720, 734 (1982); *Gurley v. Rhoden*, 421 U.S. 200 (1975); *United States v. Maryland*, 471 F. Supp. 1030, 1037 (D. Md. 1979); *United States v. City of Leavenworth*, 443 F. Supp. 274, 281 (D. Kan. 1977). Thus, the legal incidence of a vendor tax does not shift to the vendee when the vendor passes the tax on to customers as a cost of doing business. B-238410 ("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").

directly on the federal government as a purchaser of computer monitors that are CEDs. The United States, therefore, is constitutionally immune from paying this direct tax, unless Congress has legislated a waiver of sovereign immunity.

RCRA and Federal Sovereign Immunity

The law regarding waivers of the sovereign immunity of the United States is firmly established. Only Congress can waive the sovereign immunity of the United States, and it must do so explicitly in statutory text. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) ("[t]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."); *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (a waiver of sovereign immunity cannot be implied but must be unequivocally expressed); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954) (local government cannot impose a tax upon the United States or its instrumentalities "without a clear congressional mandate"). In construing waivers of sovereign immunity, federal courts have adhered to the rule that waivers of sovereign immunity are enforceable only if they are clear and unambiguous. *See Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984) (federal government's waiver of sovereign immunity must be clear on its face to be enforceable); *Mitchell*, 445 U.S. at 538 (United States is immune from suit unless sovereign immunity waived unequivocally on face of statute); *King & Boozer*, 395 U.S. at 4 (federal government's waiver of sovereign immunity must be clear and unambiguous). Nothing less than an act of Congress clearly and explicitly conferring the privilege of taxing the federal government will suffice. *Domenech*, 294 U.S. at 205. In addition, waivers of sovereign immunity "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–86 (1983) (citations omitted).

RCRA establishes a federal system to deal with the management and disposal of solid waste and hazardous waste in a manner that protects human health and the environment and fosters the conservation of valuable materials and energy resources. *See* 42 U.S.C. § 6902. Section 6001(a) of RCRA, 42 U.S.C. § 6961(a), subjects federal agencies to state, local, and interstate regulation respecting hazardous waste disposal and management, including the payment of reasonable service charges. The question arises whether section 6001(a) waives federal immunity from state and local taxation and permits AOUSC to use appropriated funds to pay the California e-waste recycle fee.

Section 6001(a) of RCRA provides, in part:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal and management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local

> requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), *respecting control and abatement of solid waste or hazardous waste disposal and management* in the same manner, and to the same extent, as any person is subject to such requirements, *including the payment of reasonable service charges*. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). *The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.*"

42 U.S.C. § 6961(a) (emphasis added).

The United States Supreme Court has determined that the "all . . . requirements" language of section 6001(a) "'can reasonably be interpreted as including substantive

standards and the means for implementing those standards.'"[10] *United States Department of Energy v. Ohio*, 503 U.S. 607, 627–28 (1992), *quoting Mitzfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990); *see also Parola v. Weinberger*, 848 F.2d 956, 961 (9th Cir. 1988) (stating that the meaning of "requirement" includes substantive environmental standards as well as the "procedural *means* by which those standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspections" (emphasis in original)); *State of Florida Department of Environmental Regulation v. Silvex Corp.*, 606 F. Supp. 159, 163 (M.D. Fla. 1985) ("requirements" are objective and ascertainable state regulations, *e.g.*, state pollution standards or limitations, compliance schedules, emission standards, and control requirements). Thus, as it pertains to hazardous waste, section 6001(a) of RCRA subjects the United States to substantive standards respecting "hazardous waste disposal and management," as those terms are defined by RCRA, and the procedural means for implementing such standards, including the payment of reasonable service charges.

RCRA defines "hazardous waste" as:

> "*solid waste*, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—

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[10] Following the Supreme Court's decision in *United States Department of Energy v. Ohio*, 503 U.S. 607, Congress amended section 6001(a) to its current form by enacting the Federal Facilities Compliance Act of 1992 (FFCA), Pub. L. No. 102-386, 106 Stat. 1505 (Oct. 16, 1992), to address the Court's holding that punitive fines were not subject to the RCRA waiver. In addition to clarifying that the RCRA waiver extended to punitive fines, FFCA expounded on the types of "reasonable services charges" covered by the RCRA waiver. The FFCA amendments did not, however, alter the limitation of the waiver to "substantive and procedural" requirements nor the general rule that waivers of sovereign immunity must be unequivocally expressed in statutory text and are strictly construed. *See*, *e.g.*, H.R. Rep. No. 102-111, at 5-6 (1991); *see also Lane v. Pena*, 518 U.S. 187, 192 (1996) (observing that firmly grounded in precedent is the requirement that a waiver of the federal government's sovereign immunity "must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.") (citations omitted); *McLellan Highway Corp. v. United States*, 95 F.Supp.2d 1, 16 (D.Mass. 2000) (citing *Lane v. Pena* in construing the RCRA waiver). The FFCA amendments did not remove the limitation of the RCRA waiver to requirements respecting hazardous waste disposal or management. *See Marina Bay Realty Trust LLC v. United States*, 407 F.3d 418, 423 n.8 (1st Cir. 2005). As we discuss below, the e-waste recycling fee is not a requirement regarding the disposal or management of hazardous waste.

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5) (emphasis added). "Solid waste" is defined as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other *discarded material*. . . ." 42 U.S.C. § 6903(27) (emphasis added). The term "disposal" means:

> "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."

42 U.S.C. § 6903(3). Finally, "hazardous waste management" means "the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7).

We recognize that EWRA establishes a funding system for a government program intended to encourage the recycling of CEDs that become hazardous waste when discarded. However, CEDs, when purchased, do not constitute "hazardous waste" and, therefore, are not subject to RCRA regulation; they become subject to regulation when they are discarded. 42 U.S.C. §§ 6903(5), (27); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041–42 (9th Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005) (noting that while RCRA does not define the term "discarded material," the verb "discard" is defined by dictionary and usage as to "cast aside; reject; abandon; give up."); *United States v. ILCO Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993) (holding that EPA's authority under RCRA is limited to regulating materials that are actually discarded).

Similarly, under California law, a substance must be discarded in order to be regulated as "waste." Cal. Health & Safety Code § 25124. Indeed, CalRecycle told us, "it seems clear to CalRecycle that at the time of purchase, a CED does not constitute a 'hazardous waste' under either California hazardous waste laws or RCRA because it is not 'discarded.'" CalRecycle Letter, at 2–3, ¶ 7. Yet, California imposes the e-waste recycling fee on the purchase of CEDs entering the stream of commerce before they even become subject to regulation as hazardous waste. Further, EWRA imposes the e-waste recycling fee without a concomitant requirement on the part of the payor under EWRA to take any action with respect to hazardous waste disposal and management (such as a requirement to dispose of the CED at an authorized collector). Thus, the payment of the e-waste recycling fee cannot reasonably be said to be a "requirement" that imposes a substantive disposal and management standard

respecting discarded hazardous material. *See United States Department of Energy v. Ohio*, 503 U.S. at 627–28.

Moreover, as discussed above, the e-waste recycling fee is a tax, not a service charge. The payor of the e-waste recycling fee does not receive any administrative or regulatory service directly linked to the payment of the fee. Section 6001(a) of RCRA does not provide that federal agencies must pay state and local taxes.[11] Congress has, for example, explicitly waived sovereign immunity for taxes in section 4(b)(1)(B) of the Low-Level Radioactive Waste Policy Act, which subjects low-level radioactive waste generated by the federal government and disposed at nonfederal facilities "to the same conditions, regulations, requirements, fees, *taxes*, and surcharges . . . imposed by the State in which such facility is located, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government." 42 U.S.C. § 2021d(b)(1)(B) (emphasis added). More recently, Congress amended the section 313 of the Clean Water Act to waive sovereign immunity for the payment of stormwater assessments that satisfy the statutory criteria, "regardless of *whether that reasonable fee, charge, or assessment is denominated a tax.*" 33 U.S.C. §1323(c)(1) (emphasis added).

Unlike the waivers of sovereign immunity contained in the Low-Level Radioactive Waste Policy Act and the Clean Water Act, Congress has not included language in RCRA's sovereign immunity waiver that would encompass the California e-waste recycling fee. It is the position of the State of California that, under RCRA, the United States has waived its sovereign immunity with respect to the e-waste recycling fee because the revenue generated funds a government program related to the collection of certain hazardous wastes. BOE Opinion. The state would have us essentially interpret section 6001(a) as removing all barriers to the state's imposition of fees upon the federal government as long as the fee is assessed in a nondiscriminatory manner and has some relationship to hazardous waste, however attenuated.

If considered in isolation, the phrase, "any other nondiscriminatory charges . . . assessed in connection with a . . . State . . . solid waste or hazardous waste regulatory program," might be viewed to embrace a wide range of revenue raising measures to

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[11] Courts have consistently construed the RCRA waiver narrowly. *See*, *e.g.*, *United States Department of Energy v. Ohio*, 503 U.S. at 627–28 (RCRA waiver not sufficiently clear and unambiguous to waive sovereign immunity with respect to state civil fines that were punitive in nature); *Marina Bay Realty Trust LLC*, 407 F.3d at 423 (RCRA did not expressly waive sovereign immunity from private suits for costs associated with clean-up of oil contamination on former Navy base); *State of Maine v. Department of Navy*, 973 F.2d at 1011–12 (RCRA does not waive sovereign immunity from unreasonably high fees, which the law typically treats as "taxes" that the Constitution forbids the state to assess against the federal government without explicit consent).

fund government programs, including taxes. However, established interpretative canons counsel against such a broad interpretation and, particularly, the parsing of one phrase out of the context of the whole statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997) (The meaning of a statute is to be determined not just "by reference to the language itself," but also by reference to "the specific context in which that language is used and the broader context of the statute as a whole."). The canon of *ejusdem generis* provides that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (internal citations omitted). Here, the phrase "any other nondiscriminatory charges" is preceded by a specific list of charges with a common attribute; that is, they are assessed in exchange for a particularized privilege or benefit incident to regulation, such as inspection and monitoring services or a permit to undertake certain activities. *See Dolan v. Postal Service*, 546 U.S. 481,
486-87 (2006) (concluding that where specific items in the list addressed the "failings in the postal obligation to deliver mail in a timely manner to the right address," the general term "negligent transmission" must be similarly limited); *Keffeler*, 537 U.S. at 383-85 (finding that the term "other legal process" was limited to the legal processes of the same nature as the specific items listed).[12] Nothing in the list that precedes "any other nondiscriminatory charges" is a tax.

Neither the text of RCRA nor its legislative history suggests a willingness to have the federal government pay taxes of the nature contemplated here. Rather, as it relates to hazardous waste, the statutory text limits the waiver of sovereign immunity to substantive waste disposal and management requirements, including the procedural means to implement those requirements and reasonable service charges incident thereto.

CONCLUSION

The California e-waste recycling fee is not a regulatory fee, but is a tax, the legal incidence of which falls on the United States as a vendee. While section 6001(a) of RCRA subjects federal agencies to state and local regulation of hazardous waste disposal and management, a vendee tax unrelated to any requirement respecting

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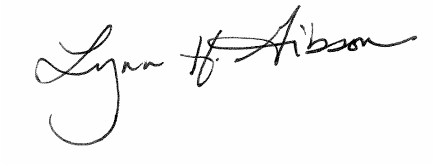
[12] A different interpretation might result where, unlike here, there is no evident substantive connection among the items in a list within which the meaning of the general term could be circumscribed. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 224-26 (2008); *see also Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, ___ U.S. ___, 130 S.Ct. 1396, 1403-04 (2010).

hazardous waste disposal and management is not one of the governmental powers to which federal agencies are subjected under section 6001(a). Accordingly, appropriated funds are not available to pay the e-waste recycling fee.



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