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B-167999, Dec. 31, 1969

Number: B-167999

Date: 1969-12-31

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TAXES--FEDERAL--SURCHARGE--ELEMENT OF COST FOR RECOVERY IN DOING BUSINESS TELEPHONE BILL TO FOREST SERVICE, CALIFORNIA REGION, FROM GENERAL TELEPHONE CO. OF CALIFORNIA, WHICH INCLUDES ITEM LABELLED "ALLOWANCE FOR FEDERAL INCOME TAX SURCHARGE," MAY BE CERTIFIED FOR PAYMENT, NOTWITHSTANDING USE OF TERM "TAX" IN BILLED ITEM, SINCE ITEM IS NOT TAX BUT TEMPORARY RATE INCREASE AUTHORIZED BY CALIFORNIA PUBLIC UTILITIES COMMISSION IN DECISION GRANTING COMPANY PERMISSION TO MAKE CHARGE TO RECOVER IN RATE FEDERAL INCOME TAX SURCHARGE TO PERMIT MAINTENANCE OF ALLOWED RATE ON INVESTMENT DURING PERIOD SUBJECT TO SURCHARGE. TAXPAYER IN BUSINESS MAY CONSIDER "SURCHARGE" COST ELEMENT IN FIXING PRICES. EVEN IF UNDER CONTRACT, PUBLIC UTILITY RATES ARE SUBJECT TO LEGISLATIVE REGULATION AND IF SERVICES ARE RENDERED AND INVOICED PURSUANT TO 7 GAO 22.7 RESULTS WOULD BE SAME.

TO MR. H. C. AGER:

YOUR LETTER OF SEPTEMBER 17, 1969 (YOUR REFERENCE 6540), REQUESTS A DECISION AS TO WHETHER YOU MAY CERTIFY FOR PAYMENT A TELEPHONE BILL FROM THE GENERAL TELEPHONE COMPANY OF CALIFORNIA (COMPANY), WHICH INCLUDES AN ITEM LABELLED "ALLOWANCE FOR FEDERAL INCOME TAX SURCHARGE."

YOUR DOUBT IN THE MATTER APPEARS TO ARISE BECAUSE OF THE USE OF THE TERM "TAX" IN THE BILLED ITEM.

THE GENERAL TELEPHONE COMPANY OF CALIFORNIA ENCLOSED A CARD WITH THE TELEPHONE BILL ADVISING YOU THAT THE CALIFORNIA PUBLIC UTILITIES COMMISSION (COMMISSION) IN DECISION NO. 75873 AUTHORIZED THE COMPANY TO ADD A BILLING SURCHARGE TO EACH CUSTOMER'S TOTAL BILL, EXCLUSIVE OF FEDERAL EXCISE AND CITY TAXES. THE CARD EXPLAINS, "THIS CHARGE RELATES TO THE 10% FEDERAL INCOME TAX SURCHARGE, AND WILL BE SEPARATELY STATED ON YOUR BILL."

ALSO, THE COMMISSION ADVISED YOU BY LETTER DATED SEPTEMBER 10, 1969, THAT THE BILLED ITEM ITSELF IS NOT A TAX BUT "A TEMPORARY RATE INCREASE" DESIGNED TO RECOVER THE REVENUE NECESSARY TO PERMIT THE COMPANY TO MAINTAIN THE ALLOWED RATE OF RETURN ON ITS INVESTMENT DURING THE PERIOD THE UTILITY IS SUBJECT TO THE SURCHARGE. THE COMMISSION POINTS OUT THAT TAXES ARE A COST ELEMENT IN ANY COMMODITY THAT IS BOUGHT AND STATES THAT THE ONLY DIFFERENCE IN THIS CASE IS THAT THE COMMISSION REQUIRES THE COMPANY TO STATE THE CHARGE (ITEM) INVOLVED SEPARATELY ON THE BILL SO THAT IT IS IDENTIFIABLE AND MAY BE REMOVED WHEN THE FEDERAL SURCHARGE TAX IS DISCONTINUED.

IN ITS DECISION (80 PUR 3D 2, 57) GRANTING THE COMPANY PERMISSION TO MAKE THE

CHARGE IN QUESTION, THE COMMISSION EXPLAINED THAT:

"IN DETERMINING RESULTS OF OPERATIONS WE HAVE NOT INCLUDED THE EFFECTS OF THE 10 PER CENT FEDERAL INCOME TAX SURCHARGE, WHICH WAS APPLICABLE DURING THE ENTIRE TEST YEAR. IN OUR OPINION, THIS SURCHARGE, BECAUSE IT IS EXPECTED TO BE TEMPORARY, SHOULD BE TREATED AS A SPECIAL ITEM, SEPARATELY STATED ON THE CUSTOMER'S BILL. BASED ON OUR ESTIMATE OF INTRASTATE FEDERAL INCOME TAXES AT AUTHORIZED RATES WE FIND THAT THE APPLICABLE FEDERAL SURTAX SHOULD BE $2,587,000. AT THE RATES AUTHORIZED HEREIN GROSS COMPANY BILLING WILL APPROXIMATE $367 MILLION. TO RECOVER THE FEDERAL SURTAX APPLICABLE TO INTRASTATE OPERATIONS WE WILL AUTHORIZE GENERAL TO ADD 1.61 PER CENT OF EACH CUSTOMER'S BILL TO SAID BILL. GENERAL SHALL SEPARATELY STATE THIS ADDITIVE ON EACH BILL UNDER THE HEADING 'ALLOWANCE FOR FEDERAL INCOME TAX SURCHARGE.' THIS ADDED PERCENTAGE SHALL TERMINATE IMMEDIATELY UPON EXPIRATION OF THE FEDERAL INCOME TAX SURCHARGE, OR SHALL IMMEDIATELY BE REDUCED IN PROPORTION TO ANY REDUCTION IN THE TAX SURCHARGE. * * *"

IT IS CLEAR FROM THE FOREGOING THAT THE ITEM DESIGNATED "ALLOWANCE FOR FEDERAL INCOME TAX SURCHARGE" WHICH APPEARS ON THE INSTANT TELEPHONE BILL IS NOT A TAX BUT A TEMPORARY RATE INCREASE AUTHORIZED BY THE COMMISSION TO ALLOW THE COMPANY TO RECOVER IN ITS RATE THE FEDERAL INCOME TAX SURCHARGE SO AS TO PERMIT IT TO MAINTAIN ITS ALLOWED RATE OF RETURN ON ITS INVESTMENT DURING THE PERIOD THE COMPANY IS SUBJECT TO THE SURCHARGE.

ALSO, INSOFAR AS THE "FEDERAL INCOME TAX SURCHARGE" IS CONCERNED, WE MIGHT POINT OUT THAT THIS "SURCHARGE" IS NOT A TAX IMPOSED ON THE UNITED STATES (BY THE UNITED STATES) BUT RATHER IS, IN EFFECT, A TAX IMPOSED ON ANY INCOME TAX PAYABLE BY A TAXPAYER TO THE UNITED STATES. UNDER THESE CIRCUMSTANCES WE ARE AWARE OF NO REASON WHY A TAXPAYER ENGAGED IN A BUSINESS MAY NOT CONSIDER THE "SURCHARGE" AS A COST ELEMENT IN FIXING THE PRICES TO BE CHARGED FOR HIS WARES OR SERVICES. CF. B-72101, JANUARY 28, 1948; B-123206, JUNE 30, 1955; B-134602, DECEMBER 26, 1957; B-144550, DECEMBER 16, 1960; 32 COMP. GEN. 577 (1953); 45 COMP. GEN. 192 (1965); AND B-144504, JUNE 9, 1967.

WHILE YOUR LETTER DOES NOT STATE WHETHER THE FOREST SERVICE IN CALIFORNIA OPERATES UNDER A FORMAL CONTRACT WITH THE GENERAL TELEPHONE COMPANY OR WHETHER INVOICES ARE ITEMIZED IN ACCORDANCE WITH 7 GAO 22.7, IT IS A WELL- ESTABLISHED RULE THAT RATES FIXED BY A CONTRACT BETWEEN A PUBLIC UTILITY AND A PATRON ARE NEVERTHELESS SUBJECT TO LEGISLATIVE REGULATION AND ARE SUPERSEDED BY A SCHEDULE OF RATES PRESCRIBED BY THE LEGISLATURE OR A COMMISSION TO WHICH IT HAS DELEGATED ITS REGULATORY POWER. THUS, EVEN IF SERVICES ARE BEING RENDERED UNDER A CONTRACT THE RESULT WOULD BE THE SAME AS IF SUCH SERVICES WERE BEING RENDERED AND INVOICED IN ACCORDANCE WITH 7 GAO 22.7. SEE 32 COMP. GEN. 577 (1953) AND 45 COMP. GEN. 193 (1965).

IN LIGHT OF THE FOREGOING THE TELEPHONE BILL IN QUESTION--WHICH IS RETURNED HEREWITH--MAY BE CERTIFIED FOR PAYMENT, IF OTHERWISE CORRECT.