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[Comments on Senate's Liability for Special Charges and Taxes Related to Telephone Service]

Number: B-225123

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B-225123, MAY 1, 1987, OFFICE OF GENERAL COUNSEL

APPROPRIATIONS/FINANCIAL MANAGEMENT - APPROPRIATION AVAILABILITY - PURPOSE AVAILABILITY - SPECIFIC PURPOSE RESTRICTIONS - UTILITY SERVICES - USE TAXES DIGEST: COMPREHENSIVE ANALYSIS OF GENERAL RULES APPLIED TO FEDERAL, STATE AND LOCAL TAXES, LATE PAYMENT CHARGES AND OTHER SERVICE CHARGES APPEARING ON TELEPHONE BILLS SHOWS THAT SOME CHARGES ARE PAYABLE BY THE UNITED STATES SENATE, WHILE OTHERS ARE NOT. TENTATIVE OPINIONS ARE OFFERED AS TO THE VALIDITY OF 14 TAXES ITEMIZED ON SAMPLE TELEPHONE BILLS SENT FOR ANALYSIS, BUT WHEN DOUBT EXISTS AS TO WHETHER A PARTICULAR TAX IS PAYABLE, THE SENATE FINANCIAL CLERK IS ADVISED TO INITIATE A PRACTICE OF REQUIRING TELEPHONE COMPANIES TO DEMONSTRATE THAT TAXES OR OTHER CHARGES ARE PAYABLE BY THE FEDERAL GOVERNMENT.

THE HONORABLE STUART F. BALDERSON:

YOUR LETTER OF OCTOBER 22, 1986 REQUESTED GUIDANCE ON WHETHER THE SENATE SHOULD PAY A MYRIAD OF SPECIAL CHARGES AND TAXES LISTED ON INVOICES FOR TELEPHONE SERVICE PROVIDED TO SENATORS' HOME STATE OFFICES. APPARENTLY, NO FEDERAL AGENCY MAINTAINS A MASTER LIST OF THOSE STATE TAXES WHICH THE FEDERAL GOVERNMENT SHOULD PAY, AND THE GENERAL SERVICE ADMINISTRATION ADVISED YOU THAT IT DOES NOT VERIFY THE GOVERNMENT'S LIABILITY FOR THE ASSORTED STATE, LOCAL, AND OTHER TAXES WHICH APPEAR ON TELEPHONE BILLS. ACCORDINGLY, YOU NEED ASSISTANCE IN DETERMINING THE SENATE'S LIABILITY FOR THE TAXES AND OTHER CHARGES ITEMIZED ON THE BILLS. THERE IS NO ONE GENERAL RULE THAT PROVIDES AN ANSWER TO ALL THE QUESTIONS YOU HAVE POSED. HOWEVER, WE WILL GROUP THE VARIOUS CHARGES YOU HAVE INQUIRED ABOUT, AND PROVIDE INFORMATION ABOUT EACH TYPE OF CHARGE OR TAX.

COSTS OF DELAYED PAYMENT

MANY TELEPHONE COMPANIES HAVE BEEN PERMITTED BY THEIR STATE REGULATORY BODIES TO CHARGE CUSTOMERS A FEE WHEN PAYMENT IS RECEIVED AFTER A CERTAIN DATE. WE HAVE HELD THAT THE IMPOSITION OF AND THE LIABILITY FOR LATE CHARGES ALLOWED BY AN AUTHORIZED TARIFF IS A MATTER OF CONTRACT, AND THAT THE UNITED STATES IS RESPONSIBLE FOR PAYMENT ACCORDING TO THE CONTRACT TERMS, INCLUDING AUTHORIZED LATE CHARGES. 63 COMP.GEN. 517 (1984); B-173725, SEPT. 16, 1971. CONTRACTUAL LATE CHARGES ARE IN LIEU OF ANY STATUTORY INTEREST PENALTIES UNDER THE PROMPT PAYMENT ACT. SEE 63 COMP.GEN. AT 519.

FOR UTILITIES THAT DO NOT HAVE TARIFFED LATE PAYMENT CHARGES, THE FEDERAL GOVERNMENT IS GENERALLY OBLIGATED UNDER THE PROMPT PAYMENT ACT TO ADD INTEREST TO ITS OVERDUE BILLS PAID AFTER A STATUTORY GRACE PERIOD. B-214479, SEPT. 22, 1986, 65 COMP.GEN. ***. HOWEVER, THE PROMPT PAYMENT ACT DOES NOT APPLY TO THE

SENATE, AND THEREFORE, IF THE TARIFF DOES NOT PROVIDE FOR IT YOU ARE NOT OBLIGED TO ADD INTEREST TO LATE PAID BILLS. SEE 31 U.S.C. SEC. 3901(A)(1); 5 U.S.C. SEC. 551(1)(A).

FEDERAL EXCISE TAXES

SOME OF THE BILLS YOU FORWARDED FOR OUR OPINION SHOW ENTRIES FOR FEDERAL EXCISE TAX IMPOSED BY 26 U.S.C. SEC. 4251. THE SECRETARY OF THE TREASURY HAS DETERMINED (PURSUANT TO STATUTORY AUTHORITY IN 26 U.S.C. SEC. 4293) THAT TELEPHONE SERVICES RENDERED TO AGENCIES OF THE FEDERAL GOVERNMENT ARE EXEMPT FROM EXCISE TAX. REV. RUL. 68-276, 1968 1 C.B. 493. THIS EXEMPTION EXTENDS TO A MEMBER'S LOCAL OFFICE PHONE BILLS PAID OUT OF CONGRESSIONAL FUNDS. THERE IS NO EXEMPTION, HOWEVER, WHEN THE MEMBER PAYS OFFICE TELEPHONE BILLS FROM PERSONAL FUNDS. THE MEMBERS, THEREFORE, ARE REQUIRED TO SUBMIT EXEMPTION CERTIFICATES MONTHLY, LISTING THE AMOUNT OF SERVICES TO BE PAID FROM CONGRESSIONAL FUNDS AND THE AMOUNT OF TAX EXEMPTION CLAIMED. REV. RUL. 73-319, 1973 2 C.B. 366-67.

IF THE SENATOR FILES THE EXEMPTION CERTIFICATE, THE CALLS TO WHICH THE CERTIFICATE APPLIES ARE EXEMPT FROM THE TAX. IF THE SENATOR DOES NOT SUBMIT THE CERTIFICATE, THE PRESUMPTION IS THAT THE CHARGES WERE NOT EXEMPT FROM TAXATION AND THAT THE SENATOR WILL PAY THE BILL WITH PRIVATE FUNDS. IN EITHER EVENT, YOU SHOULD NOT PAY THE EXCISE TAX.

STATE TAXES

THE PRINCIPLE THAT THE FEDERAL GOVERNMENT IS CONSTITUTIONALLY IMMUNE FROM TAXATION BY STATES AND THEIR INFERIOR GOVERNMENTAL UNITS DATES BACK TO MCCULLOCH V. MARYLAND, 17 U.S. (4 WHEAT.) 316 (1819). MUCH LATER THE SUPREME COURT EXPOUNDED ON THAT RULE IN ALABAMA V. KING AND BOOZER, 314 U.S. 1 (1941). IN DOING SO, THE COURT DISTINGUISHED BETWEEN STATE TAXES IMPOSED DIRECTLY ON THE PURCHASER OF GOODS OR SERVICES AND STATE TAXES IMPOSED DIRECTLY ON THE SELLER OR PROVIDER OF THE GOODS OR SERVICES. THE PURCHASER IS KNOWN AS THE "VENDEE"; THE SELLER OR PROVIDER IS CALLED THE "VENDOR".

IN BOTH CASES, THE AMOUNT OF THE TAX IS REMITTED BY THE VENDEE TO THE VENDOR. HOWEVER, WHEN THE BURDEN OR "INCIDENCE" OF THE TAX FALLS SQUARELY ON THE VENDEE, THE VENDOR ACTS SOLELY AS A COLLECTION AGENT FOR THE STATE.

IF THE VENDEE HAPPENS TO BE THE UNITED STATES OF AMERICA, ITS PURCHASES ARE CONSTITUTIONALLY IMMUNE FROM TAXATION, AND NO TAX MAY BE COLLECTED. SEE 55 COMP.GEN. 1358, 1359 (1976).

IF, ON THE OTHER HAND, THE INCIDENCE OF THE STATE TAX IS ON THE VENDOR, THERE IS NOTHING TO PREVENT HIM FROM PASSING ON THE FINANCIAL BURDEN OF THE STATE TAX TO HIS CUSTOMERS, INCLUDING THE UNITED STATES, AS AN ADDED COST OF DOING BUSINESS. THIS IS TRUE EVEN IF HE CHOOSES TO IDENTIFY THE COST SEPARATELY AS A STATE TAX ON THE INVOICE HE PRESENTS TO THE VENDEE. 55 COMP.GEN. AT 1359. THE FEDERAL GOVERNMENT MAY NOT CLAIM ITS CONSTITUTIONAL EXEMPTION SINCE IT IS NOT BEING TAXED DIRECTLY BY THE STATE. NOTE THAT THE 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. SEE 63 COMP.GEN. 49.

WITH REGARD TO STATE-REGULATED PUBLIC UTILITIES, THERE IS YET ANOTHER ELEMENT TO CONSIDER IN DECIDING WHETHER A PARTICULAR TAX IS PAYABLE BY THE UNITED STATES. THE PUBLIC UTILITY COMMISSION OF THE STATE MUST APPROVE THE INCLUSION OF THE TAX

AS A PART OF THE TARIFF. SEE, 45 COMP.GEN. 192 (1965). IN THAT CASE, THE KENTUCKY VETERANS BONUS SALES AND USE TAX, A "VENDOR" TAX, WAS HELD TO BE NOT PAYABLE BY THE UNITED STATES BEFORE THE DATE ON WHICH THE PUBLIC UTILITY COMMISSION APPROVED IT AS A PART OF THE STATE TARIFF.

FROM TIME TO TIME, PUBLIC UTILITY COMMISSIONS ALSO APPROVE AN ADDED COST LABELED AS "TAX SURCHARGES". THESE ARE ACTUALLY RATE INCREASES IMPOSED TO COVER THE ADDITIONAL OPERATING EXPENSES INCURRED BY UTILITIES BECAUSE OF TAX INCREASES IMPOSED ON THEM. B-171756, FEB. 22, 1971. IN THESE INSTANCES, THE INCREASE, WHETHER LABELED "TAX SURCHARGE" OR NOT, SHOULD BE REGARDED AS A VENDOR TAX AND IS PAYABLE BY ALL VENDEES AS AN ADDED COST OF DOING BUSINESS WITH THE UTILITY.

ALTHOUGH THE GENERAL RULES ARE SIMPLE, IN ORDER TO MAKE A DEFINITE RULING ON A PARTICULAR TAX, IT IS NECESSARY TO EXAMINE IN DETAIL THE LAW THAT IMPOSES IT. LABELS AND GENERALIZATIONS CAN BE DECEPTIVE. WITH THIS IN MIND, WE HAVE ATTEMPTED TO RESOLVE THE VENDOR/VENDEE STATUS AS TO THE PARTICULAR TAXES ITEMIZED ON THE SAMPLE INVOICES YOU SENT TO US. THESE ARE LISTED IN AN ATTACHMENT TO THIS LETTER. WE HAVE NOT CHECKED WITH THE PUBLIC UTILITY COMMISSIONS TO DETERMINE WHETHER THESE CHARGES ARE A PART OF THE TARIFF OF THE PARTICULAR STATE. HOWEVER, WE ASSUME THAT TELEPHONE COMPANY BILLING PRACTICES CONFORM TO STATE REGULATIONS.

"SERVICE CHARGES"

THE GOVERNMENT'S RESPONSIBILITY TO PAY 9-1-1 EMERGENCY NUMBER FEES, ITEMIZED AND DENOMINATED AS SERVICE CHARGES ON SOME TELEPHONE BILLS, HAS BEEN A RECENT SUBJECT OF CONTROVERSY. THE MERE FACT THAT THE FEE IS CALLED A SERVICE CHARGE DOES NOT DETERMINE ITS ACTUAL CHARACTER. WE HAVE HELD THAT THE CHARGES COVER THE COST OF A MUNICIPAL SERVICE (ACCESS TO POLICE, FIRE AND OTHER EMERGENCY SERVICES) WHICH LOCAL GOVERNMENTAL UNITS ARE TYPICALLY OBLIGATED BY LAW TO PROVIDE TO ALL THEIR RESIDENTS. SUCH, ADDITIONAL CHARGES FOR SUCH SERVICES CONSTITUTE TAXES FROM WHICH THE FEDERAL GOVERNMENTS IS IMMUNE. 64 COMP.GEN. 655 (1985). IN EACH CASE WE HAVE EXAMINED, THE TAXES HAVE BEEN IMPOSED DIRECTLY ON THE CONSUMER, WITH THE TELEPHONE COMPANY ACTING ONLY AS A COLLECTION AGENT. THAT MAKES THEM DIRECT TAXES ON THE GOVERNMENT AS A BUYER OF GOODS AND SERVICES AND THUS CONSTITUTIONALLY IMPERMISSIBLE.

CONCLUSION

WE TRUST THE FOREGOING WILL BE HELPFUL TO YOU. HOWEVER, WE RECOGNIZE THAT IT DOES NOT DEFINITIVELY RESOLVE THE STATUS OF EACH AND EVERY CHARGE THAT APPEARS ON SENATE DISTRICT OFFICE TELEPHONE BILLS.

WE SUGGEST THAT IF YOU HAVE FURTHER DOUBTS AS TO THE PROPRIETY OF PAYING ANY PARTICULAR CHARGE, YOU REQUIRE THE UTILITY TO DEMONSTRATE THAT THE CHARGE IS PROPERLY PAYABLE BY THE UNITED STATES. THIS MIGHT INVOLVE PROVIDING YOU WITH COPIES OF JUDICIAL OR ADMINISTRATIVE OPINIONS DETERMINING THAT A TAX IS NOT A VENDEE TAX, AND PUBLIC UTILITY TARIFFS AUTHORIZING THE UTILITY TO RECOVER THE COST OF THE TAX IN ITS CHARGES. HAVE ENCLOSED A FORM LETTER YOU MIGHT USE FOR THIS PURPOSE.