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9-1-1 Emergency Telephone Charge - Commonwealth of Pennsylvania

Number: B-253695

Date: 1993-07-28

Matter of: 9-1-1 Emergency Telephone Charge - Commonwealth of Pennsylvania File: B-253695 Date: July 28, 1993

APPROPRIATIONS/FINANCIAL MANAGEMENT Appropriation Availability Purpose availability Specific purpose restrictions Utility services Use taxes The Department of Agriculture may not pay a 9-1-1 charge imposed by the Commonwealth of Pennsylvania. The federal government is constitutionally immune from paying the 9-1-1 emergency telephone charge because the charge is a tax, the legal burden of which falls directly on the federal government as a user of telephone services.

DECISION An authorized certifying officer of the Department of Agriculture's National Finance Center has requested an advance decision under 31 U.S.C. Sec. 3529 (1988) on the propriety of paying the 9-1-1 emergency telephone charge assessed against federal agencies in the Commonwealth of Pennsylvania. For the reasons set forth below, we conclude that the fee is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services, and that the government is therefore constitutionally immune from the tax. Accordingly, the Department of Agriculture may not pay the charge.

BACKGROUND

Pennsylvania's Public Safety Emergency Telephone Act authorizes counties to operate and maintain 9-1-1 emergency telephone systems. Pa. Stat. Ann. tit. 35, Secs. 7011-7021 (Purdon 1993). The Act allows counties to assess fees known as "contribution rates" against telephone subscribers[1] for nonrecurring costs, as well as maintenance and operating expenses, of a 9- 1-1 system. Section 7017(a) authorizes local telephone companies to collect the fees from each subscriber and to forward collections quarterly to the county treasurer, who is required by section 7017(c) to deposit the moneys received in an account used solely for the purpose of the charges billed to the 9-1-1 system. However, telephone companies are allowed to retain the fair and reasonable cost of establishing the 9-1-1 contribution rate billing system as well as an amount not to exceed 2 percent of the gross receipts collected to cover actual administrative costs. Pa. Stat. Ann. tit. 35, Sec. 7017(a).

Before any county may establish a contribution rate, it must obtain public comment from its residents at a public meeting. Pa. Stat. Ann. tit. 35, Sec. 7016. After approval of the county's plan and contribution rate by the specified state agencies under section 7015, the contribution rate may be imposed at any time subsequent to the execution of a contract with the provider of a 9-1-1 service at the discretion of the governing body of the county. The definition of contribution rate in section 7012 establishes maximum rates that can be charged,

and rate increases must be approved by the Public Utility Commission. Pa. Stat. Ann. tit. 35, Secs. 7013(c), 7015(e) and (h). For subscribers with multiple lines, the contribution rate is determined by the number of lines categorized under section 7017(b). As provided by section 7017(a), the amount of a telephone subscribers' contribution is stated separately in the subscribers' billing.

ANALYSIS

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. Direct taxation occurs when the legal incidence of a 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). These direct taxes, known as "vendee" taxes, are not payable by the federal government unless expressly authorized by Congress. 64 Comp.Gen. 655, 656-57 (1985).

Although the Pennsylvania statute labels the 9-1-1 emergency telephone charge as a "contribution rate," it is, nonetheless, a tax. In 65 Comp. Gen. 879, 881 (1986), we identified the characteristics of 9-1-1 fees which make them constructive taxes. 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 fee is based on a flat rate per telephone line and is unrelated to levels of service. The 9-1-1 surcharge assessed under the Pennsylvania statute satisfies all these criteria.

We recently examined 9-1-1 charges in Nebraska, B-249007, Jan. 19, 1993; Washington, B-248777, July 6, 1992; Kentucky, 71 Comp.Gen. 358 (1992); and Indiana, B-248363, Apr. 17, 1992.[2] We held, in these cases, that the 9-1-1 service charges at issue were vendee taxes not payable by the federal government. Under these states' statutes, the telephone companies were merely collection agents, i.e., required to collect the 9-1-1 charges from their customers and then remit the amount collected to the state taxing authorities. Cf. B-238410, Sept. 7, 1990.

The Pennsylvania statute is not materially different from these state statutes. Under the Pennsylvania 9-1-1 statute, the money collected from the contribution rate is a county fee collected by the telephone company and "shall not be considered revenue of the telephone company for any purpose." Pa. Stat. Ann. tit. 35, Secs. 7015(i). Furthermore, the local telephone company has no obligation to take any legal action to enforce the collection of any 9-1-1 charge and is not liable for uncollectible amounts. Pa. Stat. Ann. tit. 35, Sec. 7017(e). This means that the legal burden of the tax is not on the telephone company as vendor but on the consumer of telephone services--the vendee. The Pennsylvania 9-1-1 fee is, therefore, a vendee tax, the legal incidence of which falls directly on the federal government as a user of telephone services in the state. Consequently, the United States is constitutionally immune and the Department of Agriculture may not pay the tax.

1. A 1992 amendment to the Act's definition of "telephone subscriber" specifically refers to the federal government as included in this definition. 1992 Pa. Legis. Serv. 170 (Purdon).

2. See also 66 Comp.Gen. 385 (1987) (Florida); 65 Comp.Gen. 879 (1986)

(Maryland); 64 Comp.Gen. 655 (1985) (Texas); B-239608, Dec. 14, 1990 (Rhode Island); B-230691, May 12, 1988) (Tennessee).