GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Telephone Charges – State of Utah

File: B-283464

Date: February 28, 2000

DIGEST

The federal government is constitutionally immune from paying telephone charges imposed by the state of Utah because the charges are vendee taxes, 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. § 3529 on the propriety of paying the 911 emergency services telephone charge and the hearing impaired surcharge assessed against federal agencies in the state of Utah.[1] For the reasons set forth below, both the 911 charge and the hearing impaired surcharge are vendee taxes, the legal burden of which falls directly on the federal government as a user of telephone services. Accordingly, the federal government is constitutionally immune from these taxes.

Background

Under section 69-2-5(3)(a) of the Utah Code, any public agency[2] providing 911 emergency telephone service may levy an emergency services telephone charge on

[1] The request letter was initially sent to the General Services Administration's Board of Contract Appeals (BCA) and transferred by the BCA at the request of the Department.

[2] "Public agency" is defined to mean any county, city, town, special service district, or public authority located within the state which provides fire fighting, law enforcement, medical, or other emergency services. Utah Code Ann. § 69-2-2(4).

each "local exchange service switched access line."[3] The charge may not exceed fifty-three cents per month for each access line. Utah Code Ann. § 69-2-5(3)(c). The local exchange telephone company is required to bill telephone customers for the charge and remit the amount collected to the public agency. Utah Code Ann. § 69-2-5(3)(e). The money received by the public agency must be deposited in a special emergency telephone service fund. Utah Code Ann. § 69-2-5(4)(a). The money in the fund is available only to pay the costs of establishing, installing, maintaining and operating a 911 emergency telephone system. Utah Code Ann. § 69-2-5(4)(b).

Under section 54-8b-10(4) of the Utah Code, the Utah Service Commission may impose a surcharge on each residence and business access line to cover the costs of providing low-income hearing and speech impaired persons with telecommunication devices. The surcharge may not exceed twenty-five cents per month for each access line. The local exchange telephone company is required to bill telephone customers for the surcharge and remit the amount collected to the Commission. Id. The amount collected is to be used for certain designated purposes in administering the program. Utah Code Ann. § 54-8b-10(5). If the anticipated collection is less than the actual administrative costs of collection, the local exchange telephone company does not have to collect the surcharge. Utah Code Ann. § 54-8b-10(6).

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.[4] 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,

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[3] "Local exchange service switched access line" means "the transmission facility and local switching equipment used by a wireline common carrier to connect a customer location to a carrier's local exchange switching network for providing two-way interactive voice, or voice capable, services." Utah Code Ann. § 69-2-2(2).

[4] Although Utah has enacted a 911 "charge" and a hearing impaired "surcharge," they are both, nonetheless, taxes. In 65 Comp. Gen. 879, 881 (1986), we identified the characteristics of telephone charges which make them taxes. First, a local government or a quasi-governmental unit provides the telephone service. Second, public funding of the service requires legal authority, e.g., an ordinance or referendum. Third, the service charge is actually based on a flat rate per telephone line and is unrelated to levels of service. The 911 charge and the hearing impaired surcharge assessed under the Utah statute satisfies all these criteria. For further discussion of the characteristics of taxes, see, e.g., In Re Mytinger, 31 F. Supp. 977 (N.D. Tex. 1940); Mich. Employment Sec. Comm'n v. Pratt, 144 N.W. 2d 663, 664-65 (Mich. App. 1966).

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).

We have examined telephone charges in several states, including Alaska, B-2590029, May 30, 1995; Wyoming, B-255092, Feb. 14, 1994; and Indiana, B-248363, Apr. 17, 1992.[5] We held, in these cases, that the telephone charges at issue were vendee taxes not payable by the federal government. Under these state statutes, the telephone companies were merely collection agents, i.e., required to collect the charges from their customers and then remit the amount collected to the state taxing authorities. Cf. B-238410, Sept. 7. 1990.

The Utah statute is not materially different from these state statutes. Under Utah's statute, the telephone company acts merely as a collection agent. The telephone company collects the 911 emergency telephone services charge and the hearing impaired surcharge and remits the amounts collected to the public agency or Utah Service Commission. Also, with respect to the 911 emergency telephone services charge, section 69-2-7 of the Utah Code provides that there is no liability imposed on the telephone company related to the 911 service. The public agency, and not the telephone company, administers the 911 emergency telephone system. Utah Code Ann. § 69-2-4. With respect to the hearing impaired surcharge, the telephone company is not required to collect the surcharge if the anticipated collection is less than the actual administrative costs of collection. Utah Code Ann. § 54-8b-10(6).

Conclusion

Utah's 911 emergency telephone services charge and hearing impaired surcharge are vendee taxes, 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 taxes are not payable by the federal government.

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[5] See also 66 Comp. Gen. 385(1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985)(Texas); B-249007, Jan. 19, 1993 (Nebraska); B-253695, July 28, 1993 (Pennsylvania); B-246517, Apr. 17, 1992 (Kentucky).