



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: National Weather Service—Georgia 911 Charge

File: B-301126

Date: October 22, 2003

DIGEST

The federal government is constitutionally immune from paying the Georgia 911 charge because it is a vendee tax, the legal burden of which falls directly on the federal government as a user of telephone services. In addition, Georgia statutes bar the assessment of this charge against federal entities. The National Weather Service should not pay assessments of this fee by its telephone service provider.

DECISION

The Chief of the Financial Management Division for the Mountain Administrative Support Center of the Department of Commerce has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying the emergency 911 telephone charge assessed against National Weather Service telephone lines by its service provider on behalf of several counties in the State of Georgia under the Georgia Emergency Telephone Number “911” Service Act of 1977, as amended, Ga. Code Ann. §§ 46-5-120 to 139 (Michie 1992 & Supp. 2003). Although the National Weather Service has informed the telephone service supplier of the federal government’s constitutional immunity from the Georgia 911 charge based on our prior 911 tax decisions, the supplier has nevertheless refused to remove these assessments. For the reasons set forth below, we conclude that the Georgia emergency telephone 911 charge is a vendee tax that may not be assessed against the federal government under the U.S. Constitution unless expressly authorized by Congress. Georgia law already bars application of the 911 charge to federal entities such as the National Weather Service. Ga. Code Ann. §§ 46-5-134(a)(1), (2)(C). Accordingly, the National Weather Service should not pay and may disregard those portions of the service provider’s invoices that assess 911 charges.

BACKGROUND

Like many other states, Georgia has established an emergency “911” telephone service system intended to “[p]rovide citizens with rapid, direct access to public safety agencies by dialing telephone number ‘911’ with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.” Ga. Code Ann. § 46-5-121(a). Under the Georgia Emergency Telephone Number ‘911’ Service Act of 1977, as amended, local governments are authorized to adopt resolutions imposing a monthly 911 “charge” on users of local telephone services situated in areas of the state that are served or would be served by the local government’s emergency 911 system.¹ Ga. Code Ann. § 46-5-133. The 911 charge is assessed on each “exchange access facility,” which is defined as the access from a particular telephone subscriber’s premises to the telephone system of a service supplier; in other words, the 911 charge is assessed on each telephone line. Ga. Code Ann. §§ 46-5-133, -134(a), -122(4). See generally Ga. Code Ann. § 46-5-122. The Georgia statute explicitly holds every telephone subscriber in the area served by the emergency 911 system liable for the 911 charge, which may not exceed \$1.50 per line. Ga. Code Ann. §§ 46-5-134(b), -134(a)(1).

Each service supplier must, on behalf of the local government, collect the 911 charge from those telephone subscribers to whom it provides telephone service in the area served by the emergency 911 system and must list the 911 charge separately on each invoice.² Ga. Code Ann. § 46-5-134(a)(1). Service suppliers are entitled to three percent of the gross 911 charges collected as an administrative fee. Ga. Code Ann. § 46-5-134(d)(1). The balance of the 911 charges must be remitted quarterly to the local government for deposit into an “Emergency Telephone System Fund,” a separate, restricted revenue fund which the local government is required to maintain. Id. Money from this fund is available only to pay for, inter alia, the lease, purchase, or maintenance of emergency telephone equipment, the cost of leasing or purchasing a building used as a public safety answering point and the actual cost of salaries, including benefits, of employees hired by the local government solely for the operation and maintenance of the emergency 911 system. Ga. Code Ann. § 46-5-134(e).

Significantly, the Georgia statute mandates that “all exchange access facilities billed to the federal, state, or local governments shall be exempt from the 911 charge.” Ga. Code Ann. § 46-5-134(a)(1). See also Ga. Code Ann. § 46-5-134(a)(2)(C) (all wireless

¹ “Local government” means any city, county, military base or political subdivision of Georgia and its agencies. Ga. Code Ann. § 46-5-122(5).

² BellSouth is the telephone service supplier for the National Weather Service in Georgia.

telecommunications connections billed to the federal, state or local governments shall be exempt from the wireless enhanced 911 charge).

ANALYSIS

The issue before us is whether the National Weather Service must pay the 911 charge assessed by BellSouth on behalf of Georgia county governments. 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. See 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, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. Allegheny County, 322 U.S. 174 (1944). When the legal incidence of such a tax falls directly on the federal government as the “vendee,” the tax is not payable unless expressly authorized by Congress.³ 64 Comp. Gen. 655, 656-7 (1985).

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).⁴ One court described a “classic tax” as one imposed by a legislature upon many, or all citizens, raises money, and is spent for the benefit of the entire community. San Juan Cellular Tel. Co. v. Public Service Comm’n, 967 F.2d 683, 685 (1st Cir. 1992). Other courts employ this same three-part test in distinguishing a tax from a fee. See, e.g., Valero, 205 F.3d at 134; Bidart Bros. v. California Apple Comm’n, 73 F.3d 925, 931 (9th Cir. 1996).⁵

In addition to the analysis of where the legal incidence of the tax falls, we also consider additional characteristics of the 911 charges to determine whether they are “taxes.” First, does a local government or quasi-governmental unit provide the emergency telephone service; second, does the public funding of the service require legal authority, e.g., an ordinance or a referendum, and third, is the service charge

³ On the other hand, if the legal incidence of the tax falls directly on a business enterprise (the “vendor”), which is supplying the federal government as a customer with goods or services, immunity does not apply. 61 Comp. Gen. 257 (1982). See also 63 Comp. Gen. 49 (1983).

⁴ The Georgia statute labels its 911 tax a “charge,” not a “fee.” These terms, however, are synonymous. See Black’s Law Dictionary 629 (7th ed. 1999) (defining “fee” as a charge for labor or services).

⁵ See also Collins Holding Corp. v. Jasper County, 123 F.3d 797, 800 (4th Cir. 1997); National Cable Television Ass’n v. United States, 425 U.S. 336, 340 (1974); 49 Comp. Gen. 72 (1969).

actually based on a flat rate per telephone line, unrelated to levels of service. 64 Comp. Gen. 655 (1985); 65 Comp. Gen. 879 (1986).

Although the Georgia statute labels it a 911 “charge,” it is clearly a tax imposed by local governments on a class of citizens, namely, those with telephone service.⁶ San Juan Cellular Tel. Co., 967 F.2d 683 at 685. The local government operates or contracts for the operation of the emergency 911 system. Ga. Code Ann. §§ 46-5-133(a), -134. The monthly charge is adopted by a resolution of the local government and applies to every billed telephone subscriber, without regard to level of service. Ga. Code Ann. §§ 46-5-133, -134. The 911 charge raises money that is spent to provide rapid, direct access to public safety agencies for the benefit of the entire community. San Juan Cellular Tel. Co., 967 F.2d 683 at 685. Thus, the Georgia 911 tax is a vendee tax, the legal burden of which falls directly on the National Weather Service as a user of services. The federal government is immune from paying such charges. We note that Georgia explicitly exempts federal, state, or local governments from the 911 charge. Ga. Code Ann. § 46-5-134(a)(1). See also Ga. Code Ann. § 46-5-134(a)(2)(C).

CONCLUSION

The Georgia 911 charge is a vendee tax that is not payable by the federal government unless expressly authorized by Congress. In addition, the Georgia Emergency Telephone Number “911” Service Act of 1977, as amended, explicitly exempts the federal government from the charge. Although the National Weather Service has informed the telephone service supplier, BellSouth, of its constitutional immunity from the Georgia 911 charge, the supplier has nevertheless refused to remove these assessments. To the extent that federal agencies are threatened with discontinuation of telephone or other utility services for non-payment of such taxes, we suggest you and your counsel first discuss the issue with the relevant state taxing authority, and if that fails, consult with the Department of Justice.

/signed/

Anthony H. Gamboa
General Counsel

⁶ We have examined 911 charges imposed by nearly two dozen states, most recently in Alabama. See B-300737, June 27, 2003 and decisions cited therein. In all but one case, B-238410, Sept. 7, 1990 (statute imposed Arizona 911 tax on vendor, not vendee and offices of the two United States Senators from Arizona not constitutionally immune), we held that the 911 surcharges were vendee taxes not payable by the federal government. See also 61 Comp. Gen. 257, 260 (1982).