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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-195246

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Mr. Edmund J. Wiatr, Jr.
National Weather Service, Eastern Region
National Oceanic and Atmospheric
Administration
Department of Commerce
585 Stewart Avenue
Garden City, New York 11530

August 3, 1979

Dear Mr. Wiatr:

This is in response to your question about whether State sales taxes or late payment charges on utility bills may be paid by a Federal agency.

The general rule is, of course, that the Federal Government is immune from payment of State taxes. However, in Alabama v. King and Boozer, 314 U.S. 1 (1941), the United States Supreme Court held that the Federal Government is not constitutionally immune from bearing the financial burden of a State tax as long as the legal incidence of the tax is not laid directly upon the Federal Government. See United States v. Mississippi Tax Commission, 421 U.S. 599 (1979); United States v. County of Fresno, 429 U.S. 452 (1977).

The determination of where the incidence falls--i.e., which party is legally responsible for the payment of the tax, is a matter of statutory construction. For example, in 55 Comp. Gen. 1358 (1976) our Office discussed the legal incidence of the gasoline taxes of several States. In that opinion, our decision on whether the Federal Government should pay the tax charged when it purchased gasoline in those States turned upon whether the statute places the legal incidence of the tax upon the seller or the purchaser. If the tax is placed on the seller, he is legally liable for payment of the tax. The increased costs to him of selling his product can be passed on to the Federal Government, as purchaser. Even though the tax is separately listed, the amount of the tax can be viewed as part of the price of the goods or services.

On the other hand, if the statute requires that the tax be collected from the purchaser, then the legal incidence of the tax falls upon the Federal Government as consumer. Because payment of the tax is required of the Federal Government by law in those instances, the tax imposes an unconstitutional burden on the Federal Government and may not be paid.



B-195246

Accordingly, no general rule can be stated as to the Government's liability for a sales tax which will apply in every State. The particular State taxing statute must be examined.

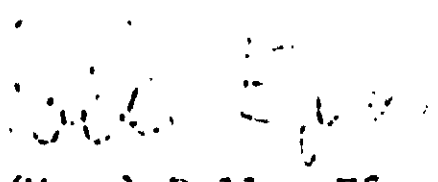
There is another consideration in dealing with utility contracts. Sometimes the sales tax is a part of the utility's approved tariff. If the Government has agreed to pay the tariff, it is obligated to pay the part of the tariff attributable to the tax, too. B-190293, September 22, 1978.

As to your question about the payment of late charges on utility bills, the United States Supreme Court held that the United States may agree in a valid contract to pay interest. United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947). See 51 Comp. Gen. 251 (1971). Therefore, if a utility company's rate schedule requires late payments for overdue accounts, and the Government accepts service in accordance with the rate schedule, it becomes bound to pay the late payment charges. B-188616, May 12, 1977; B-173725, September 16, 1971.

Further, in a number of jurisdictions, the late payment charge on utility bills is not regarded as a charge of interest or penalties for late payments. Instead, the charge is a means of recouping the excess costs incurred by the utility in collecting late accounts. The charge is equitable because it requires only those parties who are the cause of the excess costs to bear those costs. E.g., State ex rel Utilities Commission v. North Carolina Consumers Council, Inc., 18 N.C. App, 717, 198 S.E. 2nd 98, cert. denied, 284 N.C. 124, 199 S.E. 2nd 663 (1973). The late charge is deemed to be an actual part of the rate schedule. Therefore, even if the Federal Government agrees by contract that it will not be liable for any interest or penalties for overdue utility bills, it may still be liable for payment of the late charge if it is part of the tariff. See, B-186494, July 22, 1976.

We are enclosing copies of the three unpublished decisions of this Office cited above. We trust that this information will be helpful to you in making determinations regarding these charges for your regional offices.

Sincerely yours,


(Mrs.) Rollee Efros
Assistant General Counsel

Enclosures