



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 89-4

TO: The Honorable Cecil D. Andrus
Governor, State of Idaho
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

Is the state required to pay Emergency Communications Act charges for 911 service pursuant to Idaho Code § 31-4804? If so, is the state nevertheless exempt from making such payments pursuant to Idaho Constitution, art. 7, § 4?

CONCLUSIONS:

Emergency Communications Act charges were not intended to apply to the state. If applied to the state, the charges would likely be held to violate Idaho Constitution, art. 7, § 4.

ANALYSIS:

A. Constitutional Considerations

The Emergency Communications Act was enacted in 1988 to provide an alternative to property taxes for funding county 911 emergency communication systems.

As discussed below, Emergency Communications Act charges are taxes rather than fees. Consequently, we have considered the applicability of Idaho Constitution art. 7, § 4, which prohibits payment of certain taxes by the state and political subdivisions.

The distinction between "taxes" and "fees" was most recently discussed by the Idaho Supreme Court in Brewster v. City of Pocatello, 88 I.S.C.R. 1431 (December 29, 1988). The case involved an ordinance which purported to impose a "street restoration and maintenance fee" upon all owners of property

adjoining streets. Owners were to be charged based upon a formula reflecting the traffic generated by the particular property.

The court held the charge was a tax rather than a fee, stating:

We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets.

We agree with appellants that municipalities at times provide sewer, water and electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services such as the recording of wills or filing legal actions. In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.

...

We hold therefore, that the attempted imposition of the "fee" by the city of Pocatello is in reality the imposition of a tax.

88 I.S.C.R. at 1435. [Emphasis added].

Thus, a fee is "a charge for a direct public service rendered to a particular consumer." A tax is "a forced contribution by the public at large to meet public needs," regardless of whether a direct public service is provided to the particular consumer. Mere availability of public streets to adjacent property owners was not equivalent to a direct public service to a particular consumer. Thus, the charge was a tax rather than a fee.

In our opinion, the Emergency Communications Act charge is likewise a tax rather than a fee. The "line user fee" is described as follows in Idaho Code § 31-4804:

The telephone line user fee provided pursuant to the provisions of this chapter shall be a uniform amount not to exceed one dollar (\$1.00) per month per exchange access line, trunk line, network access register, or equivalent, and such fee shall be used exclusively to finance the initiation, maintenance, or enhancement of a consolidated emergency communications system within the boundaries of one (1) county. The fee shall be collected from customers on a monthly basis by all telecommunications entities which provide local telephone service within the county, . . .

Thus, the charge is defined as a uniform amount per exchange access line, trunk line, network access register, or equivalent and the charge is collected from telephone customers. The charge does not fit the definition of a fee given in Brewster, supra. In that case, the mere availability of public streets adjoining one's property was not equivalent to a direct public service rendered to a particular consumer. Likewise, mere availability of 911 service to phone customers is not equivalent to a direct public service rendered to a particular consumer. As such, the charge is a tax rather than a fee.

Idaho Constitution art. 7, § 4, provides:

The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation.

This constitutional provision has been construed as applying to property taxes, taxes in lieu of property taxes, and license taxes upon all public property. Robb v. Nielson, 71 Idaho 222, 229 P.2d 981 (1951); State ex rel. Pfost v. Boise City, 57 Idaho 507, 66 P.2d 1016 (1937); City of Idaho Falls v. Pfost, 53 Idaho 247, 23 P.2d 245 (1933). The exemption of public property from the "taxation" specified in Idaho Constitution art. 7, § 4, however, has been construed as not applying to excise taxes. State ex rel. Pfost v. Boise City, 57 Idaho 507, 66 P.2d 1016 (1937).

Since Idaho Constitution art. 7, § 4, only applies to certain types of taxes, it is necessary to consider the type of tax involved in the Emergency Communications Act. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938),

describes three categories of taxes. The court quoted earlier Idaho case law with approval as follows:

Excises, in their original sense, were something cut off from the price paid on sale of goods, as a contribution to the support of government. The word has, however, come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excise includes every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation. (Diefendorf v. Gallet, 51 Idaho 619, 633, 10 P.2d 307 (1932))

Thus, the court recognized three categories of taxes: excise taxes, taxes levied directly on persons (poll tax), and taxes levied on property (property tax).

Later, in Employment Security Agency v. Joint Class A School District, 88 Idaho 384, 400 P.2d 377 (1965), the court recognized license taxes as distinct from excise taxes, holding the employment security tax to be an excise tax, not a license tax. The court noted that the employment security tax was an excise upon the privilege or right of employing others whereas a license tax permits an individual to work in a certain field.

As noted previously, Idaho Constitution art. 7, § 4, exempts public entities from property taxes, taxes levied in lieu of property taxes, and license taxes. (Poll taxes likewise could not apply to public entities since poll taxes are by definition taxes upon persons.) However, as noted previously, excise taxes may be applied to public entities.

Of the tax types recognized by the court, it is apparent that the Emergency Communications Act charge is neither a poll tax (a tax on persons) nor a license tax (a tax upon a business or profession).

The Emergency Communications Act charge does have characteristics of both a tax in lieu of property tax and an excise tax. However, the tax would appear to be best characterized as a tax in lieu of property tax. It is imposed in a uniform amount per item of property (exchange access line, trunk line, network access register or equivalent). Also, Idaho Code § 31-4803(5) provides:

Any net savings in operating expenditures realized by any taxing district utilizing a consolidated emergency communication system shall be used by that taxing district for a reduction in the ad valorem tax charges of that taxing district.

We infer from this provision that the legislature intended the tax as an alternative to the property tax. If construed to be a tax in lieu of property tax, the state cannot constitutionally pay it. Robb v. Nielson, supra. That case involved a statute providing for payments by the Idaho Department of Fish and Game under a formula approximating what would have been paid by a private party. The court found the statute to be unconstitutional holding:

Under our constitutional provisions, the legislature cannot, either directly or indirectly, tax or authorize the taxation of public property, or provide for the same result, and cannot waive the exemption provided for in the constitution and voluntarily pay taxes on public property.

We are constrained to hold that said Chapter 85 indirectly provides for taxation of state lands by authorizing payments which accomplish the same result as taxation, and that it is void because of conflict with Article VII, Section 4 of the constitution.

71 Idaho at 228.

Thus, if Emergency Communications Act charges are viewed as a means of indirectly taxing public property, the charges are unconstitutional. Our hesitation in labeling the charges as property taxes is due to the fact that while the legislature apparently intended the charge as an alternative to property taxes for funding 911 service, the formula by which the tax is imposed is quite different from the normal ad valorem tax formula.

The tax could, in the alternative, be viewed as an excise tax (a tax upon the performance of an act or the enjoyment of a privilege). It might be viewed as a tax upon the right or privilege to access 911 service. The problem with this analysis is that Idaho Code § 31-4811 requires all pay telephones to be converted to permit 911 dialing without deposit of a coin or other charge to the caller. In other words, the act contains provisions to make 911 service universally available whether or not a charge

is imposed. This provision does not support the theory that the tax is imposed for the right or privilege to access 911 service.

In our opinion the tax is something of a hybrid between a property and privilege tax. Consequently, it is somewhat difficult to predict how it would be treated by the Idaho Supreme Court. However, it was apparently intended as an alternative to property taxes which public entities are prohibited from paying. Consequently, it would likely be held that public entities are prohibited from paying it pursuant to Idaho Constitution art. 7, § 4.

B. Statutory Interpretation

In addition to the potential constitutional problems with the Act discussed above, we have also considered whether the statute should be interpreted as applying to the State of Idaho.

As discussed above, Idaho Code § 31-4804 provides for a means of financing emergency communications systems in the form of a "telephone line user fee" of \$1.00 "per exchange access line, trunk line, network access register, or equivalent," to be collected from "customers" on a monthly basis by "all telecommunications entities" providing local telephone service within the county. The Act does not define "customers."

There is no language in the Emergency Communications Act which states whether the legislature intended the State of Idaho to be subject to the monthly charge. However, there is language in the Act from which it may be logically inferred that the legislature intended that the state not be subject to the charge.

Section 31-4803(5) of the Act provides that any net savings in operating expenditures caused by "utilizing a consolidated emergency system" shall be applied to reduce ad valorem taxes of that taxing district. As discussed above, this language, which tends to equate the monthly user fees with ad valorem taxes, may indicate a legislative intent that the State of Idaho not be subject to the fees, in view of the state's exemption from property taxes as provided in article 7, section 4, of the Idaho Constitution.

The legislature's intent that the State of Idaho not be subject to the user fee is most clearly revealed in the Statement of Purpose for HB 577, which became the Emergency Communications Act. In the Statement of Purpose, the legislature stated that enactment of the Emergency Communications Act would have "no

fiscal impact" upon the State of Idaho. In view of the multitude of telephone lines maintained by the state, the legislature's unequivocal language that the Act would have no fiscal impact on the State of Idaho is clear evidence the legislature did not intend the act to apply to the state.

In determining what construction to place on a statute, legislative intent is controlling. In Interest of Miller, 110 Idaho 298, 299, 715 P.2d 968 (1986); Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 618, 661 P.2d 1214 (1983).

Consequently, Emergency Communications Act charges imposed by Idaho Code § 31-4804 should not be construed as applying to the state.

AUTHORITIES CONSIDERED:

Constitutions:

Idaho Constitution, art. 7, § 4.

Statutes:

Chapter 48, Title 31, Idaho Code.
Idaho Code § 31-4803(5).
Idaho Code § 31-4804.
Idaho Code § 31-4811.

Cases:

Brewster v. City of Pocatello, 88 I.S.C.R. 1431
(December 29, 1988).

City of Idaho Falls v. Pfoost, 53 Idaho 247, 23 P.2d 245
(1933).

Employment Security Agency v. Joint Class A School District,
88 Idaho 384, 400 P.2d 377 (1965).

Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 618, 661
P.2d 1214 (1983).

Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d
105 (1938).

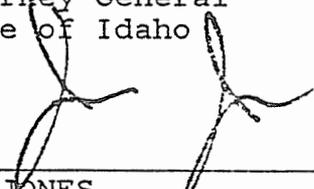
In Interest of Miller, 110 Idaho 298, 299, 715 P.2d 968
(1986).

Robb v. Nielson, 71 Idaho 222, 229 P.2d 981 (1951).

State ex rel. Pfost v. Boise City, 57 Idaho 507, 66 P.2d
1016 (1937).

DATED this 17th day of April, 1989.

JIM JONES
Attorney General
State of Idaho



JIM JONES

Analysis by:

DAVID G. HIGH
Deputy Attorney General
Chief, Business Regulation and
State Finance Division

A. RENE' FITZPATRICK
Deputy Attorney General

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library