



2004 - 173

STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

TROY KING  
ATTORNEY GENERAL

July 9, 2004

ALABAMA STATE HOUSE  
11 SOUTH UNION STREET  
MONTGOMERY, AL 36130  
(334) 242-7300  
WWW.AGO.STATE.AL.US

Honorable Bobby Hayes  
Mayor, City of Pelham  
3162 Pelham Parkway  
Pelham, Alabama 35124

Telecommunications - Service Charges -  
Federal Taxes - Municipalities - Shelby  
County

The City of Pelham ("City") is generally exempt from the payment of the CMRS service charge for "lines" used in its core governmental functions where the service charge could be funded only through its taxes.

The refunds for these service charges and other similar type taxes, if warranted, are made through direct application to the taxing authority rather than with the service provider.

The refund should be for the entire limitations period as set forth in the applicable federal and state statutes.

Dear Mayor Hayes:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Pelham.

QUESTION ONE

Are agencies of the State of Alabama and municipalities exempt from paying the telecommunications service charge, which is defined as the CMRS charge in

Act 98-338 (sections 11-98-1 through 11-98-12 of the Code of Alabama)?

FACTS AND ANALYSIS

The Commercial Mobile Radio Service ("CMRS") Board was created by the Alabama Legislature through Act 98-338 as a funding mechanism to implement wireless 911 and wireless enhanced 911 services in Alabama and to fulfill conditions as required by the Federal Communications Commission ("FCC"). The Board is authorized to levy a CMRS emergency telephone service charge of \$.70 per month per CMRS connection and to distribute the proceeds to the emergency communications districts and to service providers in Alabama. This Board operates by authority of sections 11-98-6 through 11-98-9 of the Code.

The service charge levy is found in section 11-98-7(b)(1), which provides as follows:

The [CMRS] board shall have the following powers and duties:

(1) To levy a CMRS emergency telephone service charge on each CMRS connection that has a principal wireless service address (or billing address, if the principal wireless service address is not known) within the state. The rate of such CMRS service charge shall be seventy cents (\$.70) per month per CMRS connection beginning on May 1, 1998, which shall not be increased except by the Legislature. The CMRS service charge shall have uniform application and shall be imposed throughout the state. The board is authorized to receive all revenues derived from the CMRS service charge levied on CMRS connections in the state and collected pursuant to Section 11-98-8.

ALA. CODE § 11-98-7(b)(1) (Supp. 2003).

Section 11-98-8(a) provides as follows:

Each CMRS provider shall act as a collection agent for the CMRS Fund and shall, as part of the provider's normal monthly billing process, collect the

CMRS service charges levied upon CMRS connections pursuant to Section 11-98-7(b)(1) from each CMRS connection to whom the billing provider provides CMRS service and shall, not later than 60 days after the end of the calendar month in which such CMRS service charges are collected, remit to the board the net CMRS service charges collected after deducting the fee authorized by subsection (b). Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

ALA. CODE § 11-98-8(a) (Supp. 2003).

From the above, it is clear that the CMRS service charge is a tax in the nature of an assessment. The last sentence of section 11-98-8 makes it likewise clear that the incidence of the tax is upon the consumer (because the service charge "shall" be added as a separate entry on each bill) and that not all consumers will be subject to the service charge. One class of consumer that is not subject to the service charge is the State of Alabama and its agencies and subdivisions. The exemption of a municipality, a corporate entity, is not presumed from the exemption of the sovereign. The exemption of a municipality from taxation depends on the specific wording of the statute and applicable judicial principles.

In the previous Attorney General's opinions cited in your request (86-00002, 91-00400, and 98-00197), the exemption for the municipality was found in the statute. Those Opinions, however, addressed a different charge or assessment than the CMRS service charge in question here. Opinion 98-00197 does refer to the CMRS service charge.

The exemption of the State and of its subdivisions from all forms of taxation is premised upon sovereign prerogative and the separation of powers of government in article III of the Alabama Constitution. Thus, the Legislature has no constitutional authority to tax the State directly. This restriction, however, has no application to forbid a tax whose legal incidence is upon a contractor doing business with the sovereign, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the sovereign. *Community Action Agency, Inc. v. State*, 406 So. 2d 890, 893 (Ala. 1981).

Section 91 of the Alabama Constitution exempts the property of the State, county, and municipal corporations from all taxes. But that section of the Constitution does not prohibit an excise tax (like the CMRS service charge) from

being levied against a city or county. *City of Anniston v. State*, 265 Ala. 303, 91 So. 2d 211 (Ala. 1956). The general rule, however, is that when a tax levy is made in general terms, with nothing to indicate that it was intended to apply to the city, it will be held not to so apply. *Id.*, 265 Ala. at 305, 91 So. 2d at 212. This so-called rule of exemption is court-made, based on the theory that the city must levy a tax to pay the tax, which is not ordinarily presumed as intended by the Legislature. *Id.* In *Town of Mulga v. Town of Maytown*, 502 So. 2d 731, 734 (Ala. 1987), the Court held that it was "well established that the state may levy an excise tax on a municipality, provided the intention to tax is clear and no constitutional inhibition exists." *Id.* That Court also recognized an exception to the court-made rule of exemption of municipalities from taxation holding that "[w]here a municipality engages in the business of furnishing electricity, lights, water or gas to the public, it is not then discharging or exercising governmental functions or powers, but is exercising proprietary or business powers, and as to such business it is governed by the same rules of law which are applicable to ordinary business corporations." *Id.* (citations omitted).

This Office understands that the City of Pelham has been charged the CMRS service charge on devices or "lines" used by its personnel, including but not necessarily limited to, its employees in the civil complex, its fire and police forces, its public golf course, its public racquet club, and its public works (including the water utility and parks departments). Some, but not all, of these "lines" may be exempt from the CMRS service charge. The factors that must be considered for this determination cannot be gleaned from the opinion request. To assist, however, in making this determination, the following guidance is set forth below.

The first factor the city must consider to determine if the exemption applies is whether the city is contracting for the service directly. If the contract for the "line" is between a city employee and the provider, with the employee being reimbursed for the charges made (or payments are being made by the city on their behalf), the CMRS service charge is proper, and the city's exemption is not invoked. If the city is the contracting party, the city must then make a determination of whether the use of the "line" is in whole or in part for a proprietary or business function of the city in contrast to a governmental function or power of the city. Indeed, the theory upon which the court-made rule is based (i.e., that a municipality would be compelled to levy a tax to pay a tax) is not supported where the use of the "line" is to engage in a business to raise revenue. In that case, the expense of the "line" would simply be a business expense that the City of Pelham should be able to pay from the funds generated from the associated proprietary function. It should also be noted that the court-made exemption is strictly construed against the exemption and in favor of the

right to tax, and the right to the exemption is not presumed unless the principles of the court-made rule are "clearly" met. *See Brundidge Milling Co. v. State*, 45 Ala. App. 208, 228 So. 2d 475 (1969).

### CONCLUSION

The City of Pelham ("City") is generally exempt from the payment of the CMRS service charge for "lines" used in its core governmental functions where the service charge could be funded only through its taxes.

### QUESTION TWO

Are telecommunications service providers required to issue credits or refunds for taxes and service charges that they incorrectly charged their customers?

### FACTS AND ANALYSIS

This Office has been unable to locate any statutory authority to specifically govern the refund procedure for Alabama assessments such as for a refund of the CMRS service charge. The rules and regulations for the Alabama Commercial Mobile Radio Service Emergency Telephone Service Board, found in chapter 225-1-1, *et seq.*, of the Code of Alabama, likewise give no guidance on this issue. The service provider, however, acts as a collector for the Board and is required to remit the CMRS service charges to the Commercial Mobile Radio Service Emergency Services Board when these charges are collected from its customers. Refund requests therefore should be made with the Board directly. The procedure for seeking an administrative remedy for a refund is to request a declaratory ruling directly from the CMRS Board. *See* ALA. CODE § 41-22-11 (2000). If other taxes or service charges are involved, a different procedure may be involved. Because this Office does not know the state taxes and service charges that are involved, this Office cannot advise you of the refund procedure for that particular charge.

As to federal taxes, your request specifically states that the tax of 26 U.S.C. § 4251 is involved. If you are claiming that the City of Pelham is exempt from this tax, you need to have already obtained an exemption certificate in compliance with 26 U.S.C. § 4253(k). This Office does not know

whether this has been accomplished. If it was accomplished and the City of Pelham is exempt, the refund request is made directly to the IRS. You should call the IRS directly to obtain the appropriate forms or have your accountant make the refund demand for you. Requesting a refund directly from the service provider, as suggested in your request, is improper. *See Du Pont Glore Forgan Inc. v. American Tel. & Tel. Co.*, 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1366 (1978), 578 F.2d 1367 (1978), *cert. denied*, 439 U.S. 970, 99 S.Ct. 465, 58 L.Ed.2d 431 (1978).

### CONCLUSION

The refunds for these service charges and other similar type taxes, if warranted, are made through direct application to the taxing authority rather than with the service provider.

### QUESTION THREE

Are telecommunications service providers required to issue tax credits and/or refunds for the full statute of limitations period defined in Internal Revenue Code § 6511 for taxes and service charges that they incorrectly collected?

### FACTS AND ANALYSIS

This Office again points out that the refund request for federal taxes (as well as for state taxes) is not made with the service provider. The refund request is made with the administering governmental entity as described above. The limitations period for federal taxes, as stated in Internal Revenue Code § 6511 (26 U.S.C. § 6511), is two years from the time the City of Pelham paid the taxes.

### CONCLUSION

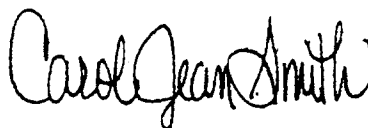
The refund should be for the entire limitations period as set forth in the applicable statute.

Honorable Bobby Hayes  
Page 7

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Carol Jean Smith of my staff.

Sincerely,

TROY KING  
Attorney General  
By:

A handwritten signature in black ink that reads "Carol Jean Smith". The signature is written in a cursive style with a large initial 'C' and 'S'.

CAROL JEAN SMITH  
Chief, Opinions Division

TK/DEA/bsl

150697v1/65931