



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

June 29, 1990

Mary Ann B. Clancy  
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New Hampshire Credit Union League  
P.O. Box 2167  
Concord, NH 03302-2167

Dear Ms. Clancy:

This letter is in response to your request for an advisory opinion as to the applicability of a recently enacted New Hampshire statute to federal credit unions. The legislation in issue is a tax on "communication services". Laws of 1990, Ch. 9 (New R.S.A., Chapter 82-A).

Section 122 of the Federal Credit Union Act, 12 U.S.C. §1768, expressly exempts federal credit unions from all taxation, except nondiscriminatory taxes on real property and tangible personal property. Under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, federal instrumentalities are immune from taxation by a state, unless the taxation is specifically authorized by Congress. See, McCulloch v. Maryland, 17 U.S. 316, 436-37 (1819). In numerous instances, courts have found that federal credit unions are federal instrumentalities. United States v. State of Michigan, 851 F.2d 803 (6th Cir. 1988); Tabco Federal Credit Union v. Goldstein, 220 A.2d 568 (1966); and Wekearnyan Federal Credit Union v. Zuna, 31 A.2d 490 (1943). Since the "communication service tax" is not a tax on real or tangible personal property, it is not one which Congress has specifically authorized.

However, states have been allowed to levy a sales tax that is ultimately paid by a federal instrumentality, but only when the legal incidence of the tax fell on the retailer, not on the federal instrumentality purchasing at retail. James v. Dravo Contracting Co., 302 U.S. 134 (1937). Where the retailer is merely a collector of the tax, and the tax is intended to be passed on to the purchaser, the legal incidence is on the purchaser and is clearly prohibited. New Hampshire state law makes it clear that the "communication service tax" is to be paid by the purchaser:

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Retailers shall collect the tax from the taxpayer by adding the tax to the gross charge for communications services in this state, in the manner prescribed by the department. ... The tax imposed by this chapter shall constitute a debt of the purchaser to the retailer who provides such taxable services until paid, and if unpaid, is recoverable at law in the same manner as the original charge for such taxable services.

RSA 82-A:6. This tax is prohibited, because it falls on the federal credit unions rather than their retailers.

IRS, REV RUL 73-431 Exemption from Excise Taxes, Federal Credit Unions held that Section 4251 of the Internal Revenue Code, a federal communications tax, could not be levied on federal credit unions because the legal incidence of the tax falls on the credit union. This Section is analogous to the New Hampshire statute at issue. The Commission stated in pertinent part that:

... Federal credit unions are the persons paying for certain communication services and the legal incidence of the tax would otherwise fall directly upon them, the specific exemption provided by the Federal Credit Union Act extends to communication services furnished to Federal credit unions organized under the Act. Therefore, the tax imposed by section 4251 of the Code does not apply to amounts paid by them for such services.

Rev Rul 73-431.

Based on the authorities cited above, it is NCUA's opinion that federal credit unions are exempt from New Hampshire's recently enacted "communications services tax".

Sincerely,



Allan Meltzer  
Associate General Counsel

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