Opinion No. 51-5347

March 28, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: General Charles H. Corlett Commissioner, Bureau of Revenue Santa Fe, New Mexico

*{*23}* I have received your letter of March 26, 1951, together with enclosures of a copy of a letter *{*24}* written to you by Holman Jenkens and a copy of your reply to him. You inquire as to whether the following statement, made in your letter to Mr. Jenkens, is correct:

"Contractors in such cases are obligated for Compensating or Use Tax on any material purchased from a vendor not subject to our School Tax. Our holding on this subject is supported by Curry 25, U.S. 314, U.S. 1462, S. Ct. 48. (Curry v. United States, 314 U.S. 14). The court held that the Government were not purchasers of material on cost-plus contracts, hence, tax immunity furnished the Federal Government did not extend to the contractor."

As I understand it, you question if the state can levy a tax on an individual, or partnership, or corporation which will be assumed by the United States Government under a cost-plus contract on a housing project at Walker Air Force Base, Roswell, New Mexico. This question could be broadened to include other areas under the control and jurisdiction of the United States.

The Supreme Court of the United States, in the case of Mayo v. U.S., 319 U.S. 441, held that a tax which was laid directly upon the United States violated the immunity of the federal government from taxation and was, therefore, invalid. In that case, the action was one to enjoin the Commissioner of Agriculture, of the State of Florida, from enforcing against the United States an act requiring the affixing of inspection tax stamps to bags of fertilizer owned by the government prior to distribution thereof as part of a national Soil Conservation program. It was specifically held by the Supreme Court "that these inspection fees are laid directly upon the United States." Also, in the case of United States v. County of Allegheny, 322 U.S. 174, the Supreme Court held invalid an ad valorem property tax assessment based upon the declared value of machinery owned by the United States and leased to the manufacturer. The expressed theory of the above holding is that the tax was imposed directly upon property owned by the United States and the burden indirectly laid upon the government although the tax was assessed against the private owner of the real property.

The Supreme Court of the United States in two decisions, Alabama v. King and Goozer, 314 U.S. 1, and Curry v. U.S., 314 U.S. 14, held that a state use tax, imposed upon a contractor in respect of materials which he purchased outside of, and used within, the state in performance of a cost-plus contract with the government, cannot be adjudged

invalid as a tax upon the United States, either upon the assumption that the contractor is the government's agent or representative in the matter, or because of the fact that the economic burden of the tax is shifted to the United States when the government, pursuant to the contract, reimburses the contractor for the cost of materials, tax included.

In the above case, the Supreme Court of the United States reversed the decision of the Supreme Court of the State of Alabama. The Supreme Court of the State of Alabama held in effect that the state could not tax materials purchased by a contractor; the cost of the materials and tax included would be assumed by the federal government under a contract. The theory of the Supreme Court of the State of Alabama being that since the cost and tax would be assumed by the federal government the tax places an undue financial burden on the federal government in violation of the United States Constitution. However, on page 18 of the Curry case, supra, the Supreme Court states as follows:

"Upon the record as comes to us, we are not called upon to determine whether the taxing statute is applicable to transactions of contractors on the camp site, a government reservation. *{*25}* We decide only the question passed upon by the Supreme Court of Alabama, that if the statute is applicable to, and taxes, the contractors upon a cost-plus contract like the present, if entered into with a private person, they are not immune from the taxes when, as here, the contract is with the government."

The wording of the above quotation raises an important question which is very pertinent to the question propounded to this office, and that is: "Is the 2% tax applicable to transactions of contractors on the camp site, a government reservation?"

The Supreme Court of the United States in the case of Wilson v. Cook, 327 U.S. 474, held that a privilege or license tax, enacted by the state of Arkansas, was valid against a person cutting timber on United States lands but specifically stated in its opinion that since the United States lands were purchased from the State of Arkansas without the United States reserving within itself exclusive jurisdiction over the lands and the right to legislate over those lands as provided for in the United States Constitution and, further, since the State of Arkansas did not specifically relinquish its jurisdiction over said United States lands that the State of Arkansas in this particular case could legislate over said lands. However, in the case of Arledge v. Mabry, 52 N. Mex. 303, 197 P. 2d 884, at page 312, it is stated as follows:

"The constitutional provision mentioned in U. S. Const. Art. 1, § 8, cl. 17, giving congress power, among other things: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Building.

"The New Mexico statute whereby consent was given to the United States to acquire any land in New Mexico under the clause of the federal constitution quoted above for sites for arsenals and other purposes was enacted in 1912 as L. 1912, c. 47, the portions thereof material to this controversy, reading:

'The consent of the State of New Mexico is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom-houses, court-houses, postoffice, arsenals, or other public buildings whatever, or for any other purposes of the government.'

"Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands."

Continuing in the above case, the Court said:

"Furthermore, the term 'exclusive legislation' employed in said Clause 17 of the federal constitution is held to be synonymous with and to carry the same meaning as if the term 'exclusive jurisdiction' had been employed."

And continuing further in the above case, on page 313, the Court stated:

*{*26}* "In Standard Oil Co. v. People of State of California, 291 U.S. 242, 54 S. Ct. 381, 383, 78 L. Ed. 775, the court ruled that gasoline sold on the Presidio Military Reservation was not subject to tax. The court said: 'A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

In the case of Collins v. Yosemite Park Co., 304 U.S. 518, the Court said as follows:

"Except as to this reserved jurisdiction (the right to serve civil and criminal processes) California put that area beyond the field of operation of her laws." (Ceded to United States.)

In reviewing the above, we have decisions by the United States Supreme Court and the Supreme Court of the State of New Mexico which states that territory ceded to the United States, without the state reserving any jurisdiction except the right to issue processes in civil and criminal proceedings, prohibits the state from legislating over that area ceded to the United States exclusively as stated above and reserves to the United States government the exclusive jurisdiction of the right to exclusively legislate over said area.

We now come to the question of which federal lands within the boundaries of the State of New Mexico have been ceded by the State of New Mexico to the United States government without reserving any jurisdiction except as provided in Sec. 8-202 and Sec. 8-203, New Mexico 1941 Compilation. As cited in the case of Arledge v. Mabry, supra, the Secretary of War addressed a letter to the Honorable John J. Dempsey, accepting on behalf of the United States exclusive federal jurisdiction over all lands acquired by it for military purposes within the State of New Mexico. However, there are other federal lands in the State of New Mexico, as cited in the case of State v. Mimms, 43 N. Mex. 318, over which the United States government does not have exclusive jurisdiction but certain jurisdiction is retained by the State of New Mexico. Therefore it may become a question of fact as to which government lands are subject to the State School Tax.

In summarizing the above, we come to these inescapable conclusions:

1. That the State of New Mexico may tax contractors who have entered into a cost-plus contract, which tax is eventually assumed by the United States government, so long as no federal area in which the United States government has exclusive jurisdiction is involved.

2. Assuming from the facts that federally-owned property within the boundaries of the State of New Mexico, has been ceded by the State of New Mexico, giving exclusive jurisdiction to the federal government, then under the prevailing authorities the School Tax would not be applicable to the above described federal property. However, in view of the decision in the case of Curry v. United States, supra, in which the Supreme Court of the United States did not answer the question of the "applicability of the taxing statute to transactions of the contractors on the camp site, a government reservation," it would appear that a court test in the matter would be a reasonable solution to the issue since the Supreme Court has left the door open to the determination of the question.

Trusting that the above satisfactorily answers your question, I am