

Opinion No. 53-5636

January 14, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. O. Erwin Chief Highway Engineer State Highway Department State Capitol Santa Fe, New Mexico

{*21} You have asked the opinion of this office as to whether the Special Provision for Transportation Tax Exemption, which is included in highway contracts, would relieve the contractor from payment of the 2% Emergency School Tax.

This Provision permits the contractor to arrange for all construction materials transported by carriers to be consigned to the State Highway Department, in care of the contractor. It requires the contractor to save the State Highway Department harmless from any and all responsibility in connection with the payment of charges and costs of materials, and further provides the ownership of the materials will not vest in the State Highway Department until such materials are incorporated into the work and accepted by the Department.

Although Sec. 76-1404 N.M.S.A., 1941 and subsection "F" thereof levies a gross receipts tax of 2% on highway contractors for the privilege of doing business, it permits a deduction for the cost of materials expended upon or which become a part of the job and upon which the school tax of 2% has been paid. We assume, therefore, that your question does not concern this tax as one levied directly upon the contract, but rather the indirect sales tax which is passed on to him when he purchases the materials.

Sec. 76-145 of the same law exempts sales made to the United States, the State of New Mexico, and its political subdivisions, but can it be said that the mere consigning of the materials purchased to the Highway Department in care of the contractor is a sale to the State of New Mexico?

We think not. In Attorney General Opinion No. 4369 rendered to the School Tax Division on August 19, 1943, it was concluded that a consignment of eggs to the United States which were paid for by a Texas company, was not a sale to the United States so as to be exempt from the tax. And in Attorney General Opinion No. 4905 rendered May 23, 1946, the School Tax Division was again advised that the sale of materials to a contractor operating under a cost-plus fixed fee contract with the United States, was not exempt from the tax, even though the United States ultimately bore the tax.

"The word 'sale' means the passage of title and possession of property for money which the buyer pays or promises to pay." Raton Wholesale Liquor Co. v. Besre 49 NM 121.

We find these elements present on the fact of the Special Provision for Transportation Tax Exemption included {*22} in the highway contract, but it appears to be the

contractor and not the Highway Department which acquires title, and pays for the goods, and if they are consigned in his care he also obtains possession.

In our opinion, therefore, the Special Provision in the contract providing for consignment to the State Highway Department does not exempt those who sell materials to the contractor from the tax, nor from their passing it on to the contractor. However, it would seem to be deductible along with the cost of materials which go into the job from his gross receipts upon which he must account for the tax.

By: John Watson

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