

Opinion No. 54-5994

July 27, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Wm. J. Malloy, Director Income Tax Division Bureau of Revenue Santa Fe, New Mexico

{*449} In your letter dated July 13, 1954, you request an opinion concerning the legality of deducting certain items from adjusted gross incomes. Your first question is whether or not the New Mexico School Tax is a deductible item from adjusted gross income.

Chapter 7, Special Session Laws of 1934, in Section 204, declared the purpose of the emergency school tax to be that it is levied upon persons engaged in business, and upon the privilege of engaging in business, rather than upon the income of said persons. It further stated that it was {*450} the legislative intent that such tax should be a part of their operating overhead and, as far as possible, be passed on in their cost calculations as such.

Section 76-1406 of the 1941 Compilation, sub-section B, provides as follows:

"It shall be unlawful for any person engaged in any business or profession to directly advertise that any tax imposed by this act is not considered as an element of the price of property sold or service rendered."

Section 76-1404 of the 1941 Compilation, pocket supplement, levies the tax as a privilege tax measured by the amount of business done in the State of New Mexico.

In Opinion No. 886, in construing Section 204 of Chapter 7, Laws of 1934, containing language which has since been changed and superseded, it was held by this office that the seller could deduct the amount of the tax as a business expense, but that since the purchaser merely paid the tax as an increased cost of the service or commodity, the purchaser was not entitled to deduct the amount of the tax paid to the seller. Since this opinion has been followed by the Division in connection with deductions of sales tax for some nineteen years, we do not feel inclined to overrule the same at this time, and should the Legislature desire to allow a deduction to the purchaser specifically of the amount of sales tax paid to the seller, we feel that is the proper manner in which a change in administrative policy should now be effected.

Your second question is with regard to the validity of deduction from adjusted gross incomes of campaign expenses of a candidate for office, such as campaign cards, posters, radio and television time, newspaper advertisements, etc.

Section 76-1203, sub-paragraph (p), 1941 Compilation, defines the term "business" as including trades, professions, occupations or employment for income tax purposes.

Section 76-1207 of the 1941 Compilation, pocket supplement, in sub-section (a), provides for a deduction of "all the ordinary and necessary expenses paid during the taxable year in carrying on any trade or business". In construing similar language in the Internal Revenue Act, the Federal Courts and the U. S. Supreme Court have held that political contributions and expenses of campaigning for political office do not constitute engaging in a business. In this connection, see *Lucas v. Read*, 281 U.S. 699; *McDonald v. Commissioner*, 323 U.S. 57, 65 S. Ct. Rep. 96; *Mayes v. Bowers*, 201 Fed. 2d 401.

In view of these Federal authorities upon a similar question, it is, therefore, our opinion that campaign expenses for a political office are not deductible from adjusted gross income as ordinary and necessary business expenses. It should be noted, however, that *Mayes v. Bowers*, supra, recognizes that conducting and performing the duties of a public office for compensation does constitute engaging in business.

Your third question is whether cost of stationery supplies and secretarial salary for handling of correspondence to constituents, publicity to newspapers, etc., while actively occupying an elective office, constitute deductible items from adjusted gross income.

If such expenses are incurred primarily for the purpose of campaigning for reelection, under the authorities cited above, they are not deductible. However, if such expenses {*451} are incurred and can be shown to be ordinary and necessary expenses incurred in performing the duties and conducting an elective office, then they would be deductible in our opinion.

Your fourth question is whether entertainment of constituents prior to election is an item which would be deductible from adjusted gross income.

The same authorities would seem to indicate that such an item constitutes campaign expenses and is in the nature of personal expenses rather than ordinary and necessary expenses incurred in the performance of the duties of the business of a public elective office, and, therefore, are not deductible.

Your fifth question is whether entertainment of constituents while occupying an elective office is a deductible item from adjusted gross income.

If such entertainment is primarily for the purpose of campaigning for reelection, the item would not be deductible. However, if entertainment expenses can be shown to be ordinary and necessary expenses incurred in performing the duties of the public office, as such they would constitute a business expense which could be deducted.

Your sixth question is whether travel and subsistence expenses, while engaged in official business resulting from occupancy of an elective office for which reimbursement is not obtained, or not fully obtained, is a deductible item from adjusted gross income.

Such expenses certainly would come under the meaning of ordinary and necessary expenses in connection with performance of the duties of the office, and as such would

be business expenses. If no reimbursement is claimed or obtained, the total expenses could be deducted. If reimbursement is obtained in an amount less than the total expense, and the amount reimbursed is reported as income, the total expense could be deducted as business expense.

Trusting this satisfactorily answers your inquiry,

By: C. C. McCulloh

Assist. Attorney General