

Opinion No. 54-6027

October 20, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. J. C. Bergere, Director School and Compensating Tax Divisions Bureau of Revenue Santa Fe, New Mexico

{*492} Recently, you requested the opinion of this office as to whether or not national and state banks are subject to the payment of the 2% emergency school tax provided for by our State Sales Tax or Emergency School Tax Act, Section 76-1401 et seq., N.M.S.A., 1941, upon purchases of goods and services made by such banks; and as to whether {*493} or not national and state banks are subject to the collection of the compensating or use tax provided for by Section 76-1501 et seq., N.M.S.A., 1941, upon tangible personal property purchased outside of the State of New Mexico.

It is well settled in the law that national banks are instrumentalities of the United States government. See: Chase National Bank v. Spokane County, 125 Wash. 1, 215 P. 374; State v. Clement Natl. Bank, 84 Vt. 167, 78 A. 944, judgment affirmed, 231 U.S. 120, 34 S. Ct. 31, 58 L. Ed. 147.

There is a line of authority which holds that national banks are not subject to the payment of sales tax upon purchases of goods and services, for the reason that, as federal instrumentalities, they may not be taxed, either directly or indirectly, without the express consent of Congress, and then only in a manner expressly provided for by Congress.

Another line of authority holds that a sales tax which is levied against the vendor of goods or services to a national bank, and passed on for collection to such a bank, is a tax solely upon the vendor, and therefore not a burden upon the federal government, and that such tax must be paid by national banks. We believe that this latter view constitutes the more reasonable approach to the problem.

Our Legislature, however, has specifically provided that transactions involving any federal instrumentalities are not subject to our sales tax. Section 76-1405, N.M.S.A., 1941, provides, in part:

"None of the taxes levied by this act shall be construed to apply to sales made to the government of the United States or any agency or instrumentality (thereof)"

Thus, under our existing statute, sales to national banks of goods or services are not subject to the sales tax.

We pass now to a consideration of the position of state banks in relation to the sales tax.

Section 76-105, N.M.S.A., 1941, provides:

"Corporations doing banking business in this state, whether organized under the laws of the United States or under the laws of the state of New Mexico, shall be subject to no other taxation than that provided by law, except upon real property."

We believe that the Legislature, in passing that statute, clearly intended to place state banks in New Mexico upon the same footing as national banks, with regard to taxation, in order to eliminate any possibility of tax discrimination between the two type of banks.

While it must be admitted that to require a state bank to pay a 2% sales tax upon an item of merchandise purchased by it would not be to levy a tax upon such a purchase, for the reason that, technically, the sales tax is a tax not upon the purchaser, but rather upon the vendor, even though it is collectible from the purchaser by the vendor, nevertheless, to require a state bank to pay such a tax as a part of the purchase price of a commodity purchased by it, would be to impose an indirect tax burden upon such a bank, a burden which cannot be placed upon national banks.

It is our opinion, therefore, that the correct interpretation of Section 76-105, N.M.S.A., 1941, precludes the collection of the tax from state banks.

As we read that section, the phrase: ". . . than that provided by law . . ." {⁴⁹⁴} refers to taxation provided by law with specific reference to banking institutions.

Passing now to consideration of the use tax, it appears that the Use Tax Act does not specifically make that act applicable to banking institutions; hence it is clear that Section 76-105 precludes the collection of the use tax from either national or state banks.

Trusting that the foregoing will answer your questions satisfactorily, we are

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