Opinion No. 54-6046

December 3, 1954

BY: RICHARD H. ROBINSON, Attorney General

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

*{*516}* Receipt is acknowledged of your letter dated November 12, 1954, enclosing two memorandum briefs prepared by John E. Cochran, Jr., and an affidavit by Ralph A. Shugart, concerning the Maljamar Cooperative Repressuring Agreement severance tax, conservation tax and school tax. You request an opinion concerning the issues involved relative to this repressuring group.

The first memorandum is concerned with the 1/2 of 1% manufacturing tax apparently exacted under the provisions of § 76-1404, sub-section B, 1941 Comp., p.s., which exacts a tax of 1/2 of 1% of the gross receipts of the business of *{*517}* every person engaged or continuing in the business of smelting, leaching, refining, reducing, or processing oil, natural gas, and other products.

The Maljamar Cooperative Repressuring Agreement is composed of a group of persons owning leases in an area covered by the Agreement organized for the purpose of using natural gas to repressure underground areas containing oil and natural gas in order to increase production of the wells in the area. Apparently a part of the natural gas used for this purpose is purchased from sources outside the area and there is no dispute as to the payment of severance and conservation tax on the natural gas so purchased. The contention, however, is made that the repressuring process costs more than the by-products resulting therefrom will produce, and since the manufacture of the by-products is incidental to the main purpose and since the manufacture of the by-products is incidental to the main purpose and is produced at a loss, no manufacturing tax should be exacted.

Attached to the memorandum is an affidavit of Mr. Ralph A. Shugart, who was the first Secretary of the Maljamar Cooperative Repressuring Agreement, to the effect that the school tax returns were made but no school tax paid on the manufacturing process based upon a ruling in the form of a letter from the Director of the School Tax Division that no manufacturing tax was due since the group was not engaged in the business of manufacturing, but was only engaged in the business of repressuring for the greater ultimate recovery of oil and gas from the area. Due to this ruling by the School Tax Division, the State would now be stopped from collecting any manufacturing tax that may have been due prior to the hearing on this matter held on July 28, 1954, by virtue of § 76-1447 of the 1941 Comp., p.s.

However, it is our opinion that the by-products manufactured as a result of the repressuring process do come within the provisions of the School Tax Act and are

subject to the tax of 1/2 of 1% imposed under § 76-1404, sub-section B, regardless of the fact that such manufacturing is incidental to the main purpose of repressuring.

The second memorandum deals primarily with the severance and conservation tax. Apparently since 1948, the group, under an agreement with the Severance Tax Division, used an estimated figure to determine the value of the severed products. Commencing in January, 1948, however, the group began purchasing natural gas from operators owning leases outside of the cooperative area at a price of 1 3/8 [cents] per thousand cubic feet plus royalty due the Federal Government and State of New Mexico, which at that time established a posted field price as the basis for determining gross value under the provisions of § 76-1302, as amended in 1949. The group is thus contending that since in the past several years it has overpaid its severance tax and conservation tax in the amount of some $ 3,000.00, that it is entitled to a refund or credit of that amount on future taxes. As to the severance tax, § 76-1319b, 1941 Comp., p.s., provides for a suspense fund and for the payment of refunds, but this language appears:

"Any person who shall have paid more than the amount of severance tax due to the state may within six (6) months from the payment thereof, or within six (6) months from the effective date of this act, whichever is later, apply for a refund of the overpayment, and if such application *{*518}* is approved by the commissioner of revenue, such refund shall be paid from the suspense fund provided for herein. If the applicant for refund consents, the commissioner of revenue may issue credit memoranda in place of cash refunds in the event of overpayments as provided herein."

It is thus apparent that prior to 1951 there was no provision for refunds or credits and that under the foregoing language, refunds are limited to taxes paid within six months prior to the date of application for refund by the person having made the overpayment. There is no provision in the Conservation Tax Law for a refund or credit. Thus, if the Cooperative group applies for a refund or credit and the same is approved by the Commissioner, such refund or credit for overpayment would be limited to overpayments made within six months prior to the date of application for refund.

There seems to be little question but that the posted field price should be the basis of determining gross proceeds in the future, at 1 3/8 [cents] per thousand as at present or whatever price may be hereafter established under § 76-1302, 1941 Comp., p.s.

In connection with the repressuring process, the memorandum states that natural gas severed from the repressuring area is forced back into the ground and re-severed on an average of three times and that it would be unfair to exact a tax on the same gas more than once. There is merit to this contention and it is felt that the proposals submitted in the memorandum could be a fair basis for exacting tax upon the natural gas severed from the repressuring area only once. However, this is a matter requiring more technical skill and knowledge than is possessed by the writer, and it is suggested that the Conservation Commission and the Severance Tax Division determine a fair basis upon

which a tax on the natural gas severed from the repressuring area may be exacted only once.

Trusting the foregoing sufficiently answers your inquiry in which no specific questions were asked but merely a request made for an opinion.

By: C. C. McCulloh

Assist. Attorney General