

Opinion No. 55-6132

March 17, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. J. B. Contreras, Director, School Tax Division, Bureau of Revenue, Santa Fe, New Mexico

We have received your request for an opinion regarding the proper privilege tax applicable under Section 72-16-4 (B), N.M.S.A., 1953, to the business of making concrete cinder blocks.

Section 72-16-4 (b), N.M.S.A., 1953, reads as follows:

"B. At an amount equal to one-fourth of one per cent of the gross receipts of the business of every person engaging or continuing in each or any or all of the businesses of manufacturing, smelting, refining, reducing, processing compounding, fabricating, packing, preserving, distilling, preparing for sale or commercial use, or the making of wares, commodities or material products by hand or machinery, including the generation of electricity; Provided that the tax provided by this paragraph shall be at the rate of one-half of one per cent of the gross receipts of the business of every person engaging or continuing in the business of smelting, leaching, refining, reducing, or processing oil, natural gas, carbon dioxide gas, potash, copper, gold, silver, limestone, sand, gravel or other metalliferous or nonmetalliferous products or combinations, or compound of mineral products.

"The measure of the tax imposed by this paragraph is the value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside of the state."

Determination of the question requires close examination of the statute in question. It is to be seen that subsection (B) first provides for a tax at 1/4 of 1%, on "any or all of the businesses of manufacturing, smelting, refining, reducing, processing, etc." And, the second part provides for a tax at 1/2 of 1% of the gross receipts on the business of "smelting, leaching, refining, reducing, or processing oil, natural gas, carbon dioxide gas, potash, copper, gold, silver, limestone, sand, gravel or other metalliferous or nonmetalliferous products or combinations, or compound of mineral products." It should be noted that "smelting", "refining", "reducing" and "processing" are terms used in both the first and last part of subsection (B). However, in the first portion, i.e., the 1/4 of 1% portion, the term "manufacturing" is used and this term is omitted in the last portion, i.e., the 1/2 of 1% portion. This leads to the conclusion that the term "manufacturing" denotes something more or something different than "smelting", "refining", "reducing" or "processing." The term "manufacturing" is therefore not synonymous or interchangeable with the other terms above. As applied to a particular product between "processing" and "manufacturing", as used here, some step is necessary to bridge the gap. Something is

done or performed or takes place to or upon the product to change it from a merely processed product to a manufactured product. Thus, within the terms of this statute, if upon those products listed in the last part of subsection (B) is performed upon or takes place therein that which would make them a manufactured product or commodity, the tax applicable is that provided for in the first portion of the subsection, i.e., 1/4 of 1% instead of 1/2 of 1 %.

Although the terms of each statute must be construed in context and what may constitute manufacturing within one statute might not be so in another, the following are general definitions which may be availed of to aid in arriving at the meaning of this term as used in the statute in question:

"Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, . . . there must be transformation; a new and different article must emerge having a distinctive name, character or use." Charles Marchand Company vs. Higgins, D.C.N.Y., 36 Fed. Supp. 792 at 795.

Webster's Dictionary defines "manufacture" as:

"(1) To make wares or other products by hand, by machinery or by other agency; as to manufacture cloth, nails, glass, etc; to produce by labor, especially now, according to a recognized plan and with division of labor, and usually with machinery.

"(2) To work as raw or partly wrought materials into suitable forms for use."

Let us then consider the product you ask about, concrete cinder blocks. Into such a block goes sand, cinders, cement, and water in varying portions. Sometimes coloring is added to produce blocks of colors different than that which these materials mixed in their natural state will render.

Prior to being mixed, the sand and cinders possibly have been graded, maybe even washed. From their natural state, lime, limestone, clay, etc., have been ground, mixed, graded, etc., to make cement. After mixing of the above ingredients the resulting product is poured into forms and shape is given to that which previously had other shape and form. The end result is a block.

Granted that the ingredients having gone into the block may have been "processed", but also something else has taken place, out of the mixture has come a completely new product. There has been a "complete transformation" and a new and different article has emerged having a distinctive name, character and use.

The end result is something which comes within the definition of "manufacture" above and is more than merely something which has been "processed".

It is therefore the opinion of this office that the tax applicable to concrete cinder blocks is that one provided for at the rate of 1/4 of 1% under the first part of subsection (B).

I note that you state that the Field Auditor's Handbook of January, 1954, states that the business of making bricks, hollow tile, and cement products are businesses taxable at 1/2 of 1%. In principle I cannot see any difference between the tax applicable to concrete cinder blocks, and that applicable to bricks and hollow tile. As concerns other cement products, it may be that, for example, "ready mix" may come within the portion of subsection (B) which tax is at 1/2 of 1%.

I hope that this answers your inquiry satisfactorily.

By Santiago E. Campos

Assistant Attorney General