

Opinion No. 55-6146

April 20, 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 opinion concerning the applicability of sales tax to certain activities of the University of New Mexico. Your specific question is whether or not the University is subject to payment of the tax upon the gross receipts derived from the operation of its golf course at Albuquerque. We note that the course is open to the public and that a charge or fee is made to those who use it.

Section 72-16-4, N.M.S.A., 1953, provides, in part:

"There is hereby levied, and shall be collected by the Bureau of Revenue, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the state of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

...

G. At an amount equal to two (2) per cent of the gross receipts of the business of every person engaging or continuing in the business of conducting any amusement enterprise, including theatres, picture shows, radio broadcasting stations, location businesses, sales of punch-board operations, carnivals, circuses, amusement parks, menageries, dog-shows, horseshows, fairs, races, rodeos, games, dance-halls, pool or billiard halls, or any business charging admission for any exhibition for amusement, edification, or instruction; Provided that any religious, fraternal, educational or other non-profit organization not regularly engaged in such enterprises shall be exempt from taxation on the gross receipts of such operations conducted exclusively by them and for their sole benefit, and upon the gross income received by them as sponsors of any such enterprise. All persons conducting dog-shows, traveling circuses, horse-shows, rodeos, and amusement enterprises of all kinds shall be subject to and pay the tax on the gross receipts of any and all concessions operated in connection therewith."

If then the tax applies, it is by virtue of this provision. Whether or not the University is subject to payment depends on whether or not the activity in question falls within any of the exemptions provided in this Act. In addition to the exemption contained in subsection G above, two others should be noted.

Section 72-16-5 provides, in part:

". . . nor shall such taxes apply to any business or transactions exempted from taxation under the Constitution of the United States or the state of New Mexico,"

and § 72-16-15, N.M.S.A., 1953, provides, in part:

"There are exempted from the taxes imposed by this act (72-16-1 to 72-16-5, 72-16-7 to 72-16-46) the following:

(a) All sales or services made or performed by societies and other organizations not organized or operated for gain or profit.

. . .

(1) Gross receipts from dormitories and dining halls of state educational institutions.

. . ."

If the activities in question do not fall in any of the three exemptions above, of necessity the sales tax applies.

Firstly, concerning the exemption in § 72-16-4, subsection G: It is apparent that the exemption contained in the proviso was intended to apply to those activities of the various organizations listed which are merely occasional, casual or isolated; to those "not regularly engaged in such enterprise". The activity here is a continuing one. It is operated on the same basis as any other business or private enterprise. We note, and with some pride, the reports that throughout the year there are but few days when this sport cannot be indulged at this course. Certainly in view of this, the activity here does not fall within this exemption.

In order to determine whether or not § 72-16-5 affords exemption to the activity in question, this section should be read together with Article VIII, § 3 of the New Mexico Constitution, which provides, in part:

"The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the state of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation"

Under the constitutional provision above, it is apparent that **property** of the University is not taxable. A **property tax** cannot be levied against that **property**. However, there is a difference between a property tax and an excise or privilege tax such as the sales tax in question here. We cannot conceive that the constitutional exemption extends to more than that to which it plainly refers -- property and property taxes. It falls short of exempting from the imposition of an excise tax such as the sales tax. Independent

School District v. Pfof, 51 Idaho 240, 4 P. 2d 893, 84 A.L.R. 820; Crockett v. Salt Lake County, 72 Utah 337, 270 P. 142, 62 A.L.R. 667. The activity in question thus is not exempt from the sales tax under § 72-16-5 and Article VIII, § 3 of the New Mexico Constitution.

Now we consider the third possible exemption, that under § 72-16-15 above. It is noted that under subsection (a) "all sales or services made or performed by societies and other organizations not organized or operated for gain or profit" are exempt. Had the Legislature stopped here, it would not be difficult to bring the activity in question within the exemption. In ordinary circumstances, the University of New Mexico could certainly be held to be an "organization not organized or operated for gain or profit". However, the Legislature must have viewed the University as not being within that group of organizations provided for in this subsection, for in subsection (1) of the same statute, it provided a specific exemption for gross receipts derived from the operation of dormitories and dining halls. Were state educational institutions included within those organizations provided for in subsection (a), then it would have been a futile thing to provide, at the same time and in the same statute, a provision applying to certain proceeds from state educational institutions. The maxim, **expressio unius est exclusio alterius**, is patently applicable.

In this connection, a prior opinion of the Attorney General, No. 753, 1933-34, requires attention. In considering the sale of books and supplies by the State College at Las Cruces, the Attorney General ruled that under subsection (a) of § 72-16-15 such sales were "probably" exempt from the sales tax so long as no profit was made on the sales. Firstly, it was assumed that the College at Las Cruces was within that group of organizations provided for in subsection (a). Secondly, it was further assumed that being one of those organizations, no sales tax was applicable only if a profit was not realized from its operations.

As we have shown above, the College at Las Cruces, being a state educational institution, is not within that group of organizations provided for in subsection (a). Further the second assumption is also deemed by this office to be erroneous. Whether or not a profit on a particular operation is made by an organization comprehended within subsection (a) is immaterial. If an organization is of that general type which is not operated for gain or profit, it is exempt. It may perhaps be that a profit is derived from one of its activities. The latter is not the test. The latter does not necessarily change the character of the organization which, in essence, may still be a non-profit organization such as is provided for in subsection (a). For these reasons, the above opinion is to this extent overruled.

In this connection, it may further be noted that the activity in question was not commenced until after § 72-16-15 was passed. This, however, does not change our view. It may perhaps be that had the Legislature which passed these provisions foreseen that the University would some day engage in this activity, that it would have exempted it from payment of the tax on the proceeds therefrom. We take the view that at the time the statute was passed no exemption for state educational institutions was

made other than on proceeds derived from operation of dormitories and dining halls. The subsequent action of the University in establishing and operating a golf course could not change the law as passed. The activity in question, does not escape the sales tax under the exemptions in § 72-16-15.

In the absence, therefore, of any exemption which would cover the institution and activity in question, it is the opinion of this office that the University is subject to payment of the sales tax on the gross receipts derived from the operation of its golf course.

I trust this answers your inquiry satisfactorily.

By Santiago E. Campos

Assistant Attorney General