

Opinion No. 58-141

June 26, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Hon. James C. Compton, District Attorney, Ninth Judicial District, Portales, New
Mexico

QUESTION

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"Under Section 72-16-5, et seq. N.M.S.A., 1953, does the State have power to exact a school tax against a subcontractor under prime contracts for construction at the Cannon Air Force Base, which said contracts were completed prior to June 6, 1957?"

CONCLUSION

No.

OPINION

ANALYSIS

The inquiry here to be considered is another in a series precipitated by the 1957 Legislative enactments which call to public notice the true nature and distinctiveness of the New Mexico Emergency School Tax statutes. In keeping with the levy imposed by § 72-16-4, N.M.S.A., 1953 Compilation, all business activities or income realized from transactions of either a professional or service nature with the government of the United States or any agency or instrumentality thereof was specifically exempted in determining the tax owed. Before the Twenty-Third Legislature acted in effect to repeal the federal exemption (See Attorney General Opinions No. 57-247 and 58-71) Section 72-16-5 provided:

"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, nor to sales to the state of New Mexico or any of its political subdivisions; Provided that deposits of gold and silver with the United States' mint shall not be considered as sales to the government of the United States and shall not be exempt hereunder; 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, or to sales made to societies, hospitals, fraternal or religious organizations not organized for profit."

By Chapter 187, Laws 1957 however the exemption as had earlier effected transactions with the federal government and its agencies was eliminated from the law, leaving only an effective exemption with regards to sales made to the State of New Mexico, its political subdivisions and charitable organizations.

Considering the above question put we find that the transactions considered were completed prior to the effective repeal date afore discussed and accordingly only the original law may be looked to in answering your question. Accordingly and in view of the specific language used, "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), . . .", it is our opinion that the state is without power to exact a School Tax against the sub-contractor as above suggested.

It is the further opinion of this office that a sub-contractor performing under prime contracts is also entitled to the tax exemption provided prior to the effective date of Chapter 187, supra, even though such sub-contractor is otherwise independently liable for the payment of taxes levied against the privilege of his performance. It is not to be assumed, we believe, that a sub-contractor, while working under a prime contractor who has dealt directly with the federal government, is not in effect performing for the ultimate benefit of the government of the United States or its agencies.

It is pointed out that the effect of this opinion in no way alters, overrules or amends the earlier opinions cited, supra.