

## Opinion No. 58-72

April 4, 1958

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

**TO:** Mr. Charles B. Barker, Attorney, Bureau of Revenue, Santa Fe, New Mexico

### QUESTION

#### QUESTIONS

1. Under the provisions of the New Mexico Emergency School Tax Law, Chapter 72, Art. 16, NMSA, Laws of 1953, as amended, are the gross receipts received from the Atomic Energy Commission subject to taxation in the following situations:

A. "The International Business Machines Corporation (IBM) pursuant to a contract with the Government furnished the Commission with machines during the period from July 1, 1956 through June 30, 1957 at monthly rates established in the contract. The contract which was effective for the period July 1, 1956 through June 30, 1957, provided among other terms and conditions, the following:

'When Federal State, Territorial, municipal and other local taxes (Excise, Privilege, Sales, Use, Compensating, Occupational, Gross Income, Gross Receipts, etc.) are levied or based on (or payable by the Contractor in respect of) the charges listed in the catalog, amounts are to be added to the total charges equivalent to such taxes. In the event such additional charges are made, the Government is to pay such increases in charges equal to such taxes.'

B. "The Mountain States Telephone and Telegraph Company pursuant to a contract with the Government furnished telephone services to the Commission at rates established in the contract. The contract made no provision for the payment of any tax by the Government. The contract was entered into by Mountain States Telephone and Telegraph Company and the Government prior to June 7, 1957 and continues until terminated by the parties."

C. "The Southern Union Gas Company pursuant to a contract with the Commission furnishes gas to the Commission at rates established in the contract. The contract contains the following provision in regard to taxes:

'The commodity charge rates set forth or determined as above provided shall be increased concurrently with and in equal amount to the net increase over and above the present tax liability of the Contractor on account of any new or increased taxes imposed upon or absorbed by Contractor by operation of law or by agreement with respect to the production, treating, transportation, purchase, delivery or sale, or combination thereof,

of natural gas for purposes of this contract; provided, however, any such additional tax liability imposed upon or absorbed by the Contractor occasioned by its agreement(s) with any other(s), and not by operation of law, shall be given effect hereunder only if the Contractor's said contractual assumption of tax, or of liability equal thereto, is consistent with its general practice in the Santa Fe - Albuquerque system.'

The contract was entered into by Southern Union Gas Company and the Government prior to June 7, 1957 and continues until June 30, 1974."

D. "The Commission and certain vendors entered into purchase agreements prior to June 7, 1957 for delivery of merchandise and payment subsequent to June 7, 1957. The purchase price did not include any amount for the school tax."

## CONCLUSIONS

A. Yes.

B. Yes.

C. Yes.

D. Yes.

## OPINION

### ANALYSIS

By earlier opinion, A.G. Opn. No. 57-247, dated September 27, 1957, it was authoritatively concluded that any person, firm or business identified under the provisions of Sec. 72-16-4, NMSA, 1953 (PS), is not exempt from the payment of the School Tax by reason of contractual relationships with the Federal Government. In addition to other decisive reasoning, the repeal of specific exemptions by the 1957 Legislature were cited as controlling. While the aforesaid opinion provides a basis for response to the inquiries above stated, more immediate examination might well be made of other pertinent legislation.

The Atomic Energy Act of 1946 set out its purpose and manner of accomplishment in rather refined legislative detail and as a part thereof and in an attempt to ward off any interference at the hands of the several sovereign states, specifically included the protective exemption found as Section 9(b), to-wit:

"The Commission, and the property, activities and income of the Commission, are expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision thereof."

Even in view of the quoted exemption, it has been the position of this office, as manifested by Opn. 57-247, supra, and by brief filed in Cause No. 6182, presently pending before the Supreme Court, that the New Mexico School Tax law is not affected, and is distinguishable, in part, by the fact that the legal incident of the tax falls upon the privilege of continuing in one's business or profession and not upon the sale or other transaction with the Atomic Energy Commission, or other agency of the Federal Government.

Regardless, however, of the final judicial determination as shall come to pass regarding the effect of the federal exemption in light of New Mexico Law, Public Law 262, 83rd Congress, amended the Atomic Energy Act so as to repeal the afore considered exemption and bring the "activities" of the Atomic Energy Commission in line with other federal projects accomplished by the efforts of independent contractors and suppliers. Accordingly, and in keeping with the holdings in **General Construction Co. v. Earl Fisher**, 149 Ore. 84, 39 P. 2d 358, and **James v. Dravo Contracting Co.**, 302 U.S. 134, 58 S. Ct. 208, there is no reason, based upon the implied immunity theory, why parties, as herein considered, should not contribute their just proportion to the maintenance of a protecting government and the fact that cost to the Federal Government might be increased is not an acceptable argument. In the **Dravo** case, supra, the Supreme Court said in part:

"The fact that the tax on the gross receipts of the contractor in the Alward Case, 282 U.S. 509, 75 L. ed. 496, 51 S. Ct. 273, 75 A.L.R. 9, supra, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

Further, and as is pointed out in the Attorney General's Opinion cited supra, the Legislature in 1957 specifically took advantage of the holding afore-cited and specifically amended Sec. 72-16-5 so as to eliminate even the state exemptions provided. Thus, today there remains no specific federal or state law which exempts a New Mexico School Tax Licensee from paying taxes on the receipts realized from contracts with the Federal Government or the Atomic Energy Commission.

Considering briefly the specific questions stated, the fact that the IBM Corporation is permitted under its contract to include local taxes in its charges to the Commission in no way exempts this taxpayer from paying his due obligation to the State. Under the afore-cited opinion of this office, there is no obligation on the taxpayer to **pass-on**, to his customer, the tax imposed, but there likewise is no prohibition therefore. Such becomes a matter of contract, and apparently in this case the Commission was willing to enter into a "tax plus" agreement.

In the case of Mountain States Telephone and Telegraph, no agreement was reached concerning taxes payable by the Company. However, by reason of the tax liability following on the telephone company for its privilege of continuing in business and further that there is no requirement that this liability be passed on to the Commission,

then it must be concluded that no exemption prevails and the tax must be paid as suggested by the question put.

The contract relied on by Southern Union Gas is again one whereby the Commission agrees to price increases when the supplying company is required, by law, to pay new or additional taxes. As in the case of IBM, the supplier is fortunate in enjoying, under its contract, benefits of having its School Taxes paid for, in effect, by the Commission. Again, the gross receipts considered are taxable.

Finally, the referred to "certain vendors" are also liable for the payment of taxes in keeping with reasons hereinbefore presented.