

## Opinion No. 59-130

August 28, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Honorable James R. Patton Member, House of Representatives P. O. Box 392 Las Cruces, New Mexico

{\*199} This is in response to your recent request for an opinion on the following question:

Is water, gas and electricity "tangible personal property" within the meaning of Section 72-16-5, N.M.S.A., 1953 Comp. PS?

It is my opinion that your question would be answered in the affirmative.

Section 72-16-5 referred to above reads as follows:

"None of the taxes levied by the Emergency School Tax Act, as amended [72-16-1 to 72-16-47], {\*200} shall be construed to apply to:

A. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to the government of the United States, its departments or agencies;

B. Sales of tangible personal property or services made to the state of New Mexico or any of its political subdivisions;

C. Sales of tangible personal property or services made to societies, hospitals, fraternal or religious organizations not organized for profit."

The legislature did not define "tangible personal property" in the Emergency School Tax Act. There is, however, a definition of the phrase in the Complimentary Compensating Tax Act, (Chapter 95, Laws of 1939, Section 1 (h).) In this Act, it is defined as:

"Personal property which may be seen, weighed, measured, felt, touched or is in any other manner perceptible to the senses."

This definition is broad enough to cover gas, water and electricity. Although not conclusive, we feel that this definition should be given great weight in arriving at the legislative intent.

The New Mexico Supreme Court has not decided any cases in which it was necessary to define tangible personal property, but in **LaFollette v. Albuquerque Gas & Electric Co's. Rates**, 37 N.M. 57, in determining the jurisdiction of the State Corporation

Commission, the Court characterized gas and light companies as being engaged in "manufacturing, buying and selling gas and electricity and distributing its **products to customers.**" (Emphasis Supplied)

Personal property is defined in Black's Law Dictionary as:

"everything that is the subject of ownership not coming under denomination of real estate."

Tangible property is:

"that which may be felt or touched, and is necessarily corporeal, although it may be either real or personal."

Cases from other jurisdictions universally hold gas and electricity are personal property when confined, stored or contained. Under even the most technical application of the definitions, it is clear that water is tangible and would come under this exemption even if it were not specifically exempted under Section 72-16-15 (11). The definition of gas has given the Courts a little more trouble. Yet, the Courts almost universally treat gas as a tangible personal property and it is, in our opinion, the intent of the legislature that it be included in the phrase "tangible property."

The definitions of electricity offered by Courts in other jurisdictions are not too helpful in defining electricity in relation to this question. It has been held that electricity may be stored, measured and sold in determinate quantities precisely as are coal, kerosene, oil and gas.

In **Commonwealth v. Northern Electric & Power Light Co.**, 22 Atl. 839, 145 Pa. 105, it was stated:

"whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt."

Again in **Fickeisen v. Wheeling Electrical Co.**, 67 S.E. 788, 67 W. Va. 335:

"Electricity is 'personal property' capable of sale."

{\*201} Also, in **Hetherington v. Camp Bird Mining, Leasing & Power Co.**, 292 P. 1087, 79 Colo. 531:

"Electricity made by artificial means is a product of manufacture, and is a personal property."

Other cases have held that electricity is personal property and that taken by attaching wires to conductors is a crime within the meaning of the "larceny statutes."

These definitions of electricity, although not precisely in point, coupled with the broad definition under the Compensating Tax Act indicate that the Legislature intended electricity to be considered "tangible personal property." We are of the opinion therefore that water, gas and electricity are classified as "tangible personal property" and come under the exemption set out in Section 73-16-5 N.M.S.A., 1953 Comp. PS.

By: B. J. BAGGETT,

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