

Opinion No. 59-199

December 11, 1959

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Richard H. Robinson Chief Counsel Bureau of Revenue Santa Fe, New Mexico

QUESTION

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Under § 72-16-5 B, N.M.S.A., 1953 Compilation (P.S.), does the State have the power to exact the emergency school tax from a subcontractor under a prime contract for the sale of tangible personal property or services made to the State of New Mexico or any of its political subdivisions?

CONCLUSION

Yes.

OPINION

{*309} **ANALYSIS**

The pertinent provision of the Emergency School Tax Law relative to your question is § 72-16-5, N.M.S.A., 1953 Compilation (P.S.), which reads, in part, as follows:

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

...

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

..."

You have informed us that the School Tax Division of the Bureau of Revenue has construed this section to mean that subcontractors under a prime contract with the State of New Mexico or any of its political subdivisions for sales of tangible personal property or services must pay the emergency school tax since they are not by the provisions of subsection B explicitly made exempt. You ask whether, in our opinion, this interpretation is correct.

In our opinion, the position taken by the School Tax Division is correct and, therefore, the tax may properly be collected from the subcontractor.

Subsection B spells out an exemption from taxes levied under the Emergency School Tax Act. It is axiomatic that statutes setting forth exemptions from taxes are to be strictly construed against the party claiming the exemption. See Annotation 157 A.L.R. 804, **McKee v. Bureau of Revenue**, 63 N.M. 185, 315 P. 2d 832. Nowhere in this subsection is it stated that a subcontractor may claim the benefit of the exemption. The exsales of tangible personal propemption, by its terms, applies to erty or services made **to** the State of New Mexico or any of its political subdivisions. Therefore, in our opinion, the only party who can claim such an exemption is the contractor with whom the State of New Mexico or any of its political subdivisions has a contract, as such contractor is the only party in privity with the State of New Mexico or the political subdivision and, therefore, is in no position to claim an exemption.

We are aware that in Opinion No. 58-141, dated June 26, 1958, there is dicta to the effect that a subcontractor, while working under a prime contract with the United States, is, in effect, performing for the ultimate benefit of the United States and is not subject to payment of the emergency school tax. While that opinion dealt with sales to the United States and not to the State of New Mexico, you state that it might be construed to be applicable to the exemption in issue at this time. Therefore, to the extent that Opinion No. 58-141 may be in conflict with our views as expressed herein, it should no longer be considered as the position of this office.

By: Philip R. Ashby

Assistant Attorney General