

## **Opinion No. 60-111**

June 17, 1960

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

**TO:** Mr. Carl Folkner Director, School Tax Division Bureau of Revenue Santa Fe, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. Are Severance Tax and Emergency School Tax payments due and owing to the State up to the date of establishment of the Oil and Gas Accounting Commission, but not yet paid, made to such Commission or to the Bureau of Revenue, the agency collecting such payments prior to the establishment of such Commission?
2. If the answer to Question No. 1 is that such payments are made to the Bureau of Revenue, is there any authority for the Commissioner of Revenue to make refunds of such Severance Taxes and Emergency School Taxes in cases where a taxpayer applies for such refund on the basis of a disallowance of rate or price increase by a regulatory agency?

#### **CONCLUSIONS**

1. Such payments should be made to the Bureau of Revenue.
2. Yes, but see analysis.

### **OPINION**

#### **{\*484} ANALYSIS**

An oil company paying taxes in this State owes certain Emergency School Taxes and Severance taxes as yet unpaid, due and owing prior to the establishment of the Oil and Gas Accounting Commission. This company has pending before the Federal Power Commission a request for a price increase for oil and gas products sold by the company in many states, including New Mexico. The company has put the price increases into effect, under bond, pending a final determination of the validity of such increase by the FPC. The company is willing to pay to the State the full amount of Emergency School Tax and Severance Tax payments due on the amount of the price increase. However, as to such taxes due prior to the establishment of the Oil and Gas Accounting Commission, the company questions which agency the taxes should be paid to and if the payments are to be made to the Bureau of Revenue whether a refund can be made

should the FPC disallow all or any part of the price increase. You ask for our opinion in connection with these questions.

In answer to Question No. 1, our opinion is that payments of Severance and Emergency School Taxes due and owing to the State prior to the establishment of the Oil and Gas Accounting Commission should be made to the Bureau of Revenue.

Chapter 52, Sections 1 through 25, Laws of 1959, entitled The Oil and Gas Severance Tax Act (Sec. 72-19-1 through 25, N.M.S.A., 1953 Comp. (PS)), provides that Severance Taxes collected on oil, natural gas and liquid hydrocarbons should be paid to the Oil and Gas Accounting Commission. The general Severance Tax Law, being Sections 72-18-1 through 28, 1953 Comp., (PS), wherein Severance Tax payments are made to the Bureau of Revenue does not apply to Severance Taxes paid on oil, natural gas or liquid hydrocarbons. Chapter 54, Sections 1 through 25, Laws of 1959, entitled The Oil and Gas Emergency School Tax Act (Sections 72-21-1 through 25, N.M.S.A., 1953 Comp, PS), provides that such Emergency School Taxes assessed on the privilege of engaging in the business of severing oil, natural gas and liquid hydro-carbons from the soil of the State shall be paid to the Oil and Gas Accounting Commission. The general Emergency School Tax Laws, being Sections 72-16-1 through 47, N.M.S.A., 1953 Comp., as amended, providing for payments of such taxes to the Bureau of Revenue, no longer apply to businesses engaged in serving oil, natural gas or liquid hydrocarbons from the soil of this State. The Oil and Gas Accounting Commission was established by Chapter 50, Sections 1 through 20, Laws of 1959. Among the duties of the Commission is the collection of Severance and Emergency School Taxes and other taxes prescribed by the legislature. Therefore, all taxes payable to the Oil and Gas Accounting Commission since its establishment must, of course, be paid to such Commission. However, there is nothing in the enabling legislation allowing the Commission to collect taxes due and owing the State prior to its establishment nor does the Commission have any authority to collect under the regular Severance and Emergency School Tax Acts. The collection of taxes under such acts remain {\*485} under the authority of the Bureau of Revenue. We must conclude, in view of the general rule against construing statutes retroactively, that the Oil and Gas Accounting Commission is not empowered with the authority to collect Emergency School and Severance Taxes due and owing prior to its establishment.

Regular Severance and Emergency School Taxes due and owing to the State prior to the establishment of the Oil and Gas Accounting Commission, should be made to the Bureau of Revenue, the agency charged with the collection of such taxes prior to the 1959 legislation above cited.

In answer to your second question, we conclude that there is authority for the Commissioner of Revenue to make refunds of both Severance Taxes and Emergency School Taxes in cases where such taxes are paid on a price increase put in effect, under bond, while such increase is pending determination by the Federal Power Commission.

Sec. 72-18-21, N.M.S.A., 1953 Comp., provides that the State Treasurer shall cover 3% of the moneys collected under the Severance Tax Act into a suspense fund to be held for the purpose of making refunds. The section further provides that refunds of any amounts of Severance Tax more than the amount due the State upon application and approval by the Commissioner of Revenue may be made to the taxpayer from such suspense fund or if the applicant for refund consents the Commissioner of Revenue may issue credit memoranda in place of cash refunds. A six-months' limitation is imposed upon the time for making application of refund after payment of excessive Severance Taxes. However, there is no time limitation fixed during which the Commissioner is required to act upon the refund application.

You state that the oil company in this instance may not know the final determination of the FPC until long after the six-months' period from the time of payment has elapsed and, therefore, the company questions whether any refund could be made by the Commissioner after such six-months' period if the FPC disallows the company's price increase. There is no authority in the law for the Commissioner of Revenue to waive the six-months' requirement. However, we see nothing illegal with a procedure whereby the company would pay in all Severance Taxes due to the Bureau of Revenue, apply for refund within six months, and then the Commissioner may wait until a final determination of the price increase by the FPC before making his own determination as to whether a refund is in order. If the price increase is, in whole or in part, disallowed by the FPC, the Commissioner could then refund all excessive Severance Tax payments based on the refund application made less than six months from payment.

In connection with refunds of Emergency School Taxes, we refer you to Section 72-16-44, N.M.S.A., 1953 Comp. (PS). This section provides for an Emergency School Suspense Fund of \$ 120,000.00 or as much thereof as may be necessary for the purpose of making refunds, penalties and interest and allows approval of refunds by the Bureau of Revenue to be paid out of such fund. There is no maximum time limit within which such refund could be approved. In our opinion, this section authorizes the payment of refund at any time to the oil company if and when the FPC disallows in whole or in part the price increase.

By: Philip R. Ashby

Assistant Attorney General