

## **Opinion No. 61-129**

December 14, 1961

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Marvin Baggett, Jr., Assistant Attorney General

**TO:** Col. John W. Chapman, Chief Counsel, Bureau of Revenue, Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. Is a purchaser-consumer of aviation gasoline liable for the compensation or use tax where the purchaser-consumer claims a refund because of the fuel's use in aviation?
2. Is the purchaser-consumer of aviation gasoline liable for the state school tax on such purchases?

#### CONCLUSIONS

1. No.
2. No.

### **OPINION**

#### ANALYSIS

Section 72-17-3, N.M.S.A., 1953 Comp., (PS) imposes an excise tax "on storage, use or other consumption in this state of tangible personal property purchased from a retailer . . . for storage, use or other consumption in this state at the rate of 2% of the sales price of such property. . . ."

Section 72-17-2, N.M.S.A., 1953 Comp., defines a "retailer" to be "every person engaged in the business of making sales for storage, use or other consumption. . . ." Thus, the purchaser-consumer of aviation gasoline would normally be liable for the compensating tax on such purchases were it not for the exemptions subsequently enumerated in the statutes.

Section 72-17-4 (E), N.M.S.A., 1953 Comp., exempts from the compensating or use tax "gasoline or motor fuel on which a tax for the sale or use thereof is imposed by the laws of this state." It could be contended logically that this provision provides an exemption even though the purchaser-consumer does, in fact, apply for and receive a refund of the State Excise Tax on gasoline imposed by Section 64-26-2, N.M.S.A., 1953 Comp., of 6 [cents] a gallon.

However, we do not find it necessary to question this exemption but rather look to Sec. 72-17-4 (A), N.M.S.A., 1953 Comp. (PS).

Section 72-17-4 (A), N.M.S.A., 1953 Comp., exempts from the compensating or use tax, "property sold in this state, the receipts from the sale of which are required to be included in the measure of the tax imposed by section [72-16-4.5]."

Section 72-16-4.5, N.M.S.A., 1953 Comp. (PS), imposes a sales tax of 2% of the gross receipts of retailers.

Section 72-16-15 (8), N.M.S.A., 1953 Comp., exempts from the sales tax "proceeds from the sale of gasoline or motor fuel on which a tax for the sale or use thereof is imposed by the laws of this state. . . Provided, further, that this exemption shall not apply to the proceeds of the sale of gasoline or motor fuel on which a refund is granted under the provisions of sections 64-26-31, 64-26-32. . ."

Thus, the sale of aviation gasoline upon which a refund is claimed is subject to the 2% sales tax. Since the receipts from these sales are taxable under the sales tax provision, the purchaser-user is not liable for the compensating or use tax.

Your second question pertains to the liability for the payment of sales tax. Although the consumer generally pays the tax to the seller, he is in no way liable for the sales tax. Section 72-16-4.1, N.M.S.A., 1953 Comp., provides that the sales tax is levied against the gross receipts of persons engaged in any business enumerated. Section 72-16-4.5, N.M.S.A., 1953 Comp., provides that a 2% tax shall be computed against the gross receipts of the business of persons engaging in the selling at retail.

Section 72-16-2, N.M.S.A., 1953 Comp. (PS), defines "retail" as being the "sale of tangible personal property for consumption and not for resale. . ." Thus, the sales tax clearly is a levy against the retailer and not the purchaser-consumer. See Attorney General's Opinion No. 61-81, dated September 6, 1961.