

Opinion No. 61-14

February 1, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

TO: Mr. Fred M. Standley, Special Assistant Attorney, General Legal Section, State Highway Department, P. O. Box 1641, Santa Fe, New Mexico

QUESTION

FACTS

A privately-owned utility company has privately owned right-of-way and is required by the New Mexico State Highway Department to remove their pipes, lines and other facilities from the right-of-way owned by them. The utility company employs a contractor to accomplish this removal and enters into the contract in the name of the utility company and in the name of the contractor. The Highway Department must reimburse the utility company for the removal of their pipes and lines from the right-of-way. The contractor pays school tax or use tax, whichever is applicable.

QUESTIONS

1. Is the contractor required to pay school tax or use tax, whichever is applicable?
2. Does the contractor gain an exemption by reason of the ultimate reimbursement by the State Highway Department?
3. Does the State Highway Department have to pay this as an increased cost or does the Highway Department take an exemption even if the contractor has to pay the taxes?

CONCLUSIONS

1. Yes.
2. No.
3. Pay is increased cost.

OPINION

ANALYSIS

Answers to the above three questions will be given on the basis of the stated facts. Discussion of questions 1 and 2 will be consolidated since the problems raised are interrelated.

Questions 1 and 2 deal with the applicability of the School Tax Act (Secs. 72-16-1 to 72-16-47, N.M.S.A., 1953 Comp., as amended) and the Use Tax Act (Secs. 72-17-1 to 72-17-30, N.M.S.A., 1953 Comp., as amended) to the contractual arrangement described above. It appears to us that the contractor would be subject to the applicable tax and does not qualify for an exemption under either of the above-mentioned tax statutes. Exemption from taxes can arise only from statutory grant and the universal rule is that a tax exemption provision is to be construed strictly against the person claiming the exemption in the absence of expressed legislative intent that the exemption is to be construed otherwise. 51 Am. Jur. 526, 527, and cases cited. The presumption is always against any surrender of the taxing powers by the grant of an exemption in favor of any particular property unless the legislature has clearly indicated a deliberate purpose to do so **Markham Hospital v. Longview**, 191 S. W. 2d 695; **Tennessee v. Whitworth**, 117 U.S. 129. There is no section in either of the above-mentioned tax statutes by which the legislature has indicated an intention to exempt a contractor such as that referred to in the above facts from the payment of school taxes or use taxes. It is well-settled law in New Mexico that a statute of exemption from taxes must receive a strict construction and no claim of exemption should be sustained unless within the express letter or necessary scope of an exempting clause. **Robert E. McKee, General Contractor, Inc. v. Bureau of Revenue of State of New Mexico**, 63 N.M. 185, 315 P. 2d 832.

No provision of law has been found that authorizes a company to obtain an exemption certificate merely because such company is performing work required by the state. The school tax is a tax upon the privilege of doing business within the State of New Mexico and under proper circumstances would be applicable to the described contractor, performing services under a contract with a utility company. The use tax or compensating tax is an excise on the storage, use or other consumption of tangible personal property and under proper circumstances would be equally applicable to such a contractor. The exemption provisions of the School Tax Act are contained in Secs. 72-16-5 and 72-16-15, neither of which provides a basis for exemption under the described circumstances. The same is true of use tax exemptions contained in Sec. 72-17-4 of the Compensating or Use Tax Act. We, therefore, conclude that a contractor is required to pay the school tax or use tax, whichever is applicable, and is not eligible for an exemption therefrom.

Assuming the hypothesized fact that the Highway Department must reimburse the utility company for the removal of pipes or lines, we conclude that taxes paid pursuant to the subcontract for removal would be a legitimate element in the cost of removal for which the utility is entitled to reimbursement. It is our view that if the contractor has passed on the school or use tax to the utility, it has become an element of cost to the utility which may properly be passed on to the State Highway Department by the utility. We, therefore, conclude that there is no impediment to prevent reimbursement of this tax by the State of New Mexico acting through the State Highway Department.