Opinion No. 62-13

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BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees Retirement Association, Santa Fe, New Mexico

QUESTION

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Did the 1961 amendment of the statutes relative to State income tax have the effect of making annuities and benefits paid pursuant to the Public Employees Retirement Act subject to State income tax?

CONCLUSION

No.

OPINION

ANALYSIS

There are two statutory provisions that must be examined in order to answer your question. The first is Section 5-5-21, N.M.S.A., 1953 Comp., which provides in pertinent part that annuities and benefits paid pursuant to the Public Employees Retirement Act "shall be exempt from any state income tax."

This enactment was simply a recognition by the legislature that for the most part persons drawing state retirement benefits are those of advanced age whose economic situation in living on a small fixed income in a period of rising prices is already perilous.

The second statutory enactment which must be examined is Section 72-15-6, N.M.S.A., 1953 Comp., passed in 1961 and dealing generally with State income tax. It provides that State income tax is to be paid on "that part of that taxpayer's income generally defined as federal taxable income and upon which the federal income tax is calculated less the federal income tax payable for the taxable year."

Since with a few exceptions not here involved retirement benefits are taxable for purposes of the Federal income tax (although under certain conditions persons retired under a public retirement system are given a credit against the tax), some income tax accountants are advising that State retirement benefits are now subject to State income tax.

As can be readily ascertained, the answer depends upon whether or not Section 72-15-6, supra, repealed Section 5-5-21, supra. Certainly, it neither amended nor repealed this latter section expressly. The specific question then is whether the 1961 enactment repealed Section 5-5-21, supra, by implication. We are of the opinion that it did not have this effect.

What we have here is a situation where a later general statute dealing broadly with State income tax conflicts in part with an earlier specific statute dealing with State income tax insofar as benefits received pursuant to the Public Employees Retirement Act are concerned.

Such a conflict between legislative enactments is not unusual and the courts have, over the years, laid down certain rules of statutory interpretation and construction to be used in resolving these conflicts. The controlling principle in situations such as we have here is stated thusly in **Maxwell on Interpretation of Statutes** (1937) p. 156:

"It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general act is to be construed as not repealing a particular one * * * a general **later** law does not abrogate an earlier special one by mere implication.

In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act.

Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special act. **In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one."** (Emphasis added).

The same principle is stated in 50 **Am. Jur., Statutes,** § 561, as follows:

"As a general rule, however, general or broad statutory provisions do not control, modify, limit, affect or interfere with special or specific provisions. To the contrary, to the extent of any irreconcilable conflict, the special or specific provision modifies, qualifies, limits, restricts, excludes, supersedes, controls, and prevails over the general or broad provisions . . ."

50 **Am. Jur., Statutes,** § 562, goes on to state as follows:

"The rule that a statute relating to a specific subject controls a general statute which includes the specific subject in the generality of its terms **is not dependent upon the time of the enactment of such statutes. It prevails without regard to priority of enactment..** . ." (Emphasis added)

Our Supreme Court adopted this rule in **Levers v. Houston,** 49 N.M. 169, 159 P. 2d 761. A few of the many cases applying the above-quoted rule in other jurisdictions are the following: **Faver v. Cleveland Circuit Court,** Ark., 227 S.W. 2d 453; **State v. Toups,** La., 95 So. 2d 55; **State v. Board of Examiners of State,** 121 Mont. 402, 194 P. 2d 633; **Henrich v. Hoffman,** 148 Ohio St. 23, 72 N.E. 2d 458; **C.I.R. v. Rivera's Estate,** 214 F.2d 60.

It is true that this rule of interpretation or construction must yield where there is a manifest legislative intention that the general act shall be of universal application notwithstanding the prior specific act. **Homestead Valley Sanitary Dist. v. Donohue,** Cal., 81 P. 2d 471. But in the face of two important canons of statutory construction (presumption against repeal by implication and rule that special act controls over general act to extent of any conflict), it takes a strong showing of such legislative intention to create an exception to the general rule. **Haffner v. Director of Public Safety of Lawrence,** 329 Mass. 409, 110 N.E. 2d 369. See Opinion No. 61-126.

We find nothing in the 1961 enactment which even tends to imply that the legislature meant to repeal Section 5-5-21, supra.