

## Opinion No. 62-23

January 30, 1962

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

**TO:** Mr. Robert D. Castner, State Auditor, Santa Fe, New Mexico

### QUESTION

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Can the seller of professional services in a municipality which has a one percent "sales" tax pass this tax on to the State of New Mexico when the State is the purchaser of such services?

#### CONCLUSION

Yes.

### OPINION

#### ANALYSIS

Section 72-16-4.9, N.M.S.A., 1953 Compilation, enacted in 1959 as a part of the Emergency School Tax Act, provides as follows:

"The tax shall be computed at an amount equal to two per cent of the gross receipts of any person engaging or continuing in the practice of any profession, or of any business in which the service rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer."

We see then that the gross receipts of persons engaging in professional services are subject to the Emergency School Tax. While the legal incidence of this privilege tax is on the seller, it has been the general practice in this State for the seller to pass the tax on to the purchaser, usually segregating the tax on the billing.

In view of the long-standing legislative recognition of and acquiescence in this method of operation, as well as the implied authority to so operate contained in Section 72-16-2, subsections D and E, N.M.S.A., 1953 Compilation, this office has taken the position that the seller can pass the tax on to the purchaser **as a tax**. See Opinion No. 61-82. And since the 1961 Legislature removed the tax exemption on the sale of services to the state, the State stands in the same position as do other purchasers of services.

We might mention that the importance of provisions, or the lack of them, either permitting or prohibiting the shifting forward of this type tax has probably been overemphasized. A tax levied on a seller will tend to shift forward in the form of higher prices if the passing of the tax on to the purchaser as a tax is prohibited.

The basic authority under which municipalities are permitted to levy a one percent "sales" tax is contained in Section 14-42-25, N.M.S.A., 1953 Compilation (P.S.). This section provides in part as follows:

"Authority is hereby granted to the governing body of any municipality to fix and have collected a municipal sales tax of any amount to and including one per cent of the gross receipts of all retail business and services within the corporate limits of said municipality; said gross receipts to be measured by the amount or volume of business done. Any ordinance adopted by any municipality providing for a municipal sales tax shall exempt from municipal taxation receipts from sales presently or hereafter exempted by the Emergency School Tax Act."

It is true that this tax is denominated a sales tax rather than a privilege tax. However, since the municipal "sales" tax act is so intimately connected with the Emergency School Tax Act and the municipal tax is to be both "collected in the same manner and at the same time as the emergency school tax is collected" and "enforced in the same method and manner as the emergency school tax," we attach no particular significance to the characterization of such municipal tax as a sales tax. Sections 14-42-29 and 14-42-32, N.M.S.A., 1953 Compilation (P.S.). In fact, the privilege tax imposed by the Emergency School Tax Act has been and often still is referred to as a sales tax. It is even so denominated by the compiler of the New Mexico Statutes. Article 16, Volume 10, Part II, New Mexico Statutes Annotated.

We conclude, therefore, that the municipal tax authorized by Section 14-42-25, *supra*, was intended to operate in the same manner as the tax imposed by the Emergency School Tax Act. Consequently, the municipal tax on the gross receipts from the sale of professional services can be passed on by the seller to the purchaser (including the State) just as the school tax is.