

Opinion No. 62-25

January 31, 1962

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

TO: Mr. Philip Carter, Administrator, Carrie Tingley Hospital, Truth or Consequences, New Mexico

QUESTION

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1. Are hospitals, as purchasers of services, now responsible for paying the two percent tax imposed by the Emergency School Tax Act on the gross receipts of the seller of such services.
2. If so, in what manner are the hospitals to be reimbursed for this tax expenditure?

CONCLUSIONS

1. Yes.
2. See Analysis:

OPINION

ANALYSIS

The issue presented arises by virtue of a 1961 amendment of the Emergency School Tax Act. The particular amendment referred to is that of Section 72-16-5, N.M.S.A., 1953 Compilation. As amended in 1961, this Section no longer exempts from the privilege tax the gross receipts derived from the sale of services to the State, its political subdivision, non-profit hospitals and religious or charitable organizations.

While the legal incidence of the tax imposed by the Emergency School Tax Act is on the seller, it has been a long standing practice in this State for the seller to pass the tax on to the purchaser, usually segregating the tax on the billing.

Section 72-16-2, subsections (D) and (E), N.M.S.A., 1953 Compilation, at least impliedly sanction this method of operation. Such being the case, this office has held that the seller is permitted to shift the tax forward to the purchaser **as a tax**, and in the case of services this includes hospitals. A more extended discussion of our reasoning in this regard may be found in Opinion No. 61-82.

We see then that the gross receipts of a seller of services to a hospital are subject to the two percent privilege tax imposed by the Emergency School Tax Act. And under our holding in Opinion No. 61-82, the seller can pass this tax on to the purchasing hospital.

Now even if the gross receipts of a hospital were subject to the two-percent privilege tax and this tax was passed on to the patient, this would not aid the hospital. The incidence of the tax being on the seller, the hospital as a seller of both property and services would have to remit the tax to the Bureau of Revenue. Consequently this would not aid the hospital in offsetting the tax which is passed on to it when it purchases services. In any event, it will be noted that under Section 72-16-15 (5), N.M.S.A., 1953 Compilation, the gross receipts of hospitals are exempt from the tax imposed by the Emergency School Tax Act. Since no tax is imposed on these gross receipts, the hospital would have no justification whatever for billing the patient two percent for taxes which neither the hospital nor the patient owe.

Insofar as the status of the hospital is concerned, whether or not its gross receipts are subject to the Emergency School Tax Act is immaterial. From the hospital's standpoint its position is identical. As a result, the only manner by which hospitals could offset the tax passed on to them by the seller of services would be to increase prices by the calculated or estimated amount of the taxes.

We understand that the issue discussed herein has been called to the attention of one or more legislators in order that the February Special Session of the New Mexico Legislature may examine the problem and take any action it deems appropriate.