

## Opinion No. 65-18

February 2, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Joel M. Carson, Assistant Attorney General

**TO:** Philip T. Manly, Attorney, New Mexico Legislative Council, Room 201, State Capitol Building Santa Fe, New Mexico

### QUESTION

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1. Is a laboratory which constructs false teeth upon the prescription of a dentist who uses the teeth in performing a dental service for the dentist's patient subject to the New Mexico Emergency School Tax?
2. Must a private fish hatchery which buys fish eggs from another state, hatches the fish eggs and raises the fish within the state, and allows fishermen to fish in the hatchery's private lake for a fee measured by the fish caught subject to the New Mexico Emergency School Tax?

#### CONCLUSIONS

1. Yes.
2. See analysis.

### OPINION

#### {\*31} ANALYSIS

As you know, the tax liability of a given individual under the New Mexico Emergency School Tax Act depends upon how the persons business is characterized within the terms of the New Mexico Emergency School Tax Act. We have therefore taken the liberty of restating your question to characterize the question as the Bureau of Revenue has characterized it. See **Valley Country Club v. Mender**, 64 N.M. 59, 323 P.2d 1099.

On June 10, 1963 we advised the School Tax Division of the Bureau of Revenue that dental laboratories selling prosthetic devices to dentists who used the teeth prosthetic devices in the performance of their service were manufacturers selling their products at retail and were taxable under N.M.S.A. 72-16-12. One case holds that the sale of teeth by a dental laboratory is a wholesale transaction, and therefore not subject to tax. **Berry Kofron Dental Laboratory Co. v. Smith**, 137 S.W.2d 452. However, contrary to the Smith case, supra, most states either by the authority of case law or regulation hold that

the dentist does not sell dentures to the patient as tangible personal property, but rather that he sells his patients his professional services and that the dentures are an inseparable part of these services. Hence a sale to a dentist is a retail sale of the teeth or prosthetic device. See **Fritz v. Peck**, 160 Ohio St. 90, 113 N.E. 2d 626, **Commissioner of Revenue v. McCarty**, 152 So. 2d 141, **Commonwealth v. Miller**, 337 Pa. 246, 11A.2d 141. See also Regulation 2.17.2 Arizona Tax Commission; Ruling 1905 California Board of Equalization; Regulation Su-77, Kentucky Department of Revenue; Ruling No. 5 Nevada Tax Commission; Rule S-R-84 South Carolina Tax Commission; Rule 71 Colorado Department of Revenue; Regulation Article I (9) (C) Illinois Department of Revenue; Rule No. 131 Iowa Tax Commission; Regulation Article 2-52 Louisiana Collector of Revenue; Rule No. 32 Mississippi Tax Commission. Pursuant to the authority of the majority rule and under the New Mexico Emergency School tax Act dental laboratories are subject to the emergency school tax measured by the gross receipts which they derive from the sale of dentures and other prosthetic devices to dentists.

Your second question relates to the sale of fish. On July 30, 1963 we advised the Bureau of Revenue that a person selling the minnows to a person raising the fish was subject to the emergency school tax measured by the gross receipts which he derived from the sale. We also advised that the person raising the fish was subject to New Mexico emergency school tax measured by gross receipts which he derives from allowing persons to fish his ponds or streams.

Section 72-16-4.5, N.M.S.A., allows retailers to deduct from their gross receipts sales of "livestock". Section 72-16-15 (A) exempts the sale of unprocessed products of farm, ranch and grove. Section 72-17-4 (D), N.M.S.A., exempts from the operation of the compensating tax the products of New Mexico farms and livestock. None of these exemptions or deductions apply to trout and minnow farmers. Trout and minnows are not livestock, **In Re Dunkly**, 64 Fed. Supp. 10, **Dunkly v. Erich**, 158 F.2d 1, nor are trout and minnow farms, farms within the meaning of the School and Compensating Tax Acts, **In Re Dunkly**, supra, **Dunkly v. Erich**, supra.

Fish which are sold to restaurants or stores in this state for food either by an in-state or out-of-state fish farm must be considered a wholesale transaction and subject to neither the school {\*32} or compensating tax.

Every person who purchases fish to raise must be considered to be a consumer and the sale of fish to him must be considered a retail sale taxable under either the school or compensating tax. If the person who raises fish sells them to a restaurant or to a market which resells them he must be considered a wholesaler and not subject to the school tax. If, however, instead of selling the fish he sells the privilege of fishing from his pond, lake, or stream, he is selling a service and is subject to the New Mexico school tax at a rate of 3%.

A person selling minnows for bait is a retailer subject to the New Mexico school tax.

Section 53-3-20, N.M.S.A., provides that a person who wishes to engage in the business of selling minnows and non-game fish must pay a license fee of \$ 20.00 and post a \$ 1,000.00 bond. This fee, unlike the emergency school tax, is a regulatory measure rather than a revenue gathering device and does not prevent the levying of the emergency school tax.