

## Opinion No. 65-181

September 16, 1965

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

**TO:** R. H. Moser, Lt. Col., N.G.B., United States Property and Fiscal Officer for New Mexico, Office of the Adjutant General, Santa Fe, New Mexico

### QUESTION

#### QUESTION

Are purchases made by the United States Property and Fiscal Officer for use by and the benefit of the New Mexico National Guard, subject to taxation:

- (1) Under the provisions of the New Mexico Emergency School Tax;
- (2) Under the gasoline tax laws?

#### CONCLUSIONS

1. No
2. No

### OPINION

#### {\*297} ANALYSIS

As you know from correspondence in your file with this office and opinion No. 58-132 of the Attorney General in 1958, which you also have, a property and Fiscal Officer is a National Guard Officer who is appointed by the Governor of a State and who is ordered to federal active duty for the purpose of administering and accounting for all funds appropriated for and allotted by Congress to the several National Guard Commands. Such appointees become officers or agents of the United States when approved by the Secretary of the Army. **Woodford v. U.S.**, (CCA 8), 77 F.2d 861. Specific duties are imposed in part, on these officers by Title 32, 49, FCA:

". . . He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of this State, Territory, or District and shall make such returns and reports concerning the same as may be required by the Secretary of War (the Army). The Secretary of War, (the Army) is authorized, on the requisition of the governor of a State or Territory of the commanding general of the National Guard of the District of Columbia, to pay to the Property and Disbursing Officer

thereof so much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War (the Army), be necessary for the purposes enumerated therein. He shall render, through the War Department (Department of the Army) such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department General Accounting Office) . . ."

The funds as are discharged by the Property Officer are annually appropriated by Congress in keeping with Title 32, Secs. 21 and 22, FCA, and include no monies as may otherwise be appropriated by the several legislatures for use by state adjutant general's office.

Section 72-16-4 N.M.S.A. 1953 Comp. has been repealed and 72-16-4.1 is now the controlling statute. It provides as follows:

"There is levied and shall be collected by the bureau of revenue privilege taxes measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing within New Mexico, in any business {\*298} as defined in the following twelve (12) sections (72-16-4.2 to 72-16-4.13) of this 1959 act. The amount of the tax shall be determined by the application of the rates provided in the following sections against gross receipts."

There is, however, an exemption provided in 72-16-5 N.M.S.A. 1953 Comp. which states:

None of the taxes levied by the Emergency School Tax Act, as amended (72-16-1 to 72-16-27), shall be construed to apply to:

A. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to the government of the United States, its department or agencies;"

Prior to enactments by the twenty-third legislature, there was specifically provided by Sec. 72-16-5 exemptions from taxation as would arise from ". . . sales made to the government of the United States or any agency or instrumentality." This exemption was repealed in 1957, but was reinstated in 1959, and added as exemptions "services made to the government of the United States, its departments or agencies;"

In 1961, 72-16-5 was amended to delete the words "or services" made to the government of the United States, its departments or agencies." The statute in its current form was enacted in 1961.

Accordingly, it is our opinion that sales of tangible personal property other than metalliferous mineral ores made to the United States, its departments or agencies, are exempt from the Emergency School Tax Act.

The gasoline tax levy is made by 64-26-2 N.M.S.A., 1953 Comp. as follows:

"Six cents (6 [cents] ) per gallon excise tax. (a) There is hereby levied and imposed an excise tax of six cents (6 [cents] ) per gallon upon the sale, use, or sale and use of all motor fuel sold or used in this state for any purpose; . . ."

With reference to the gasoline tax levy, Opinion No. 58-132 dated June 20, 1958, is still applicable. In that opinion, the Attorney General States:

"In connection with the levy of the gasoline tax, however, there was enacted an exemption for the benefit of the 'United States of America or any of its agencies or instrumentalities which under the Constitution and laws of the United States is not subject to the taxes imposed by this act.' Section 64-26-13 (PS). This exemption is in keeping with the early day opinion expressed in **McCulloch v. Maryland** 4 Wheat. 316, 4 L. Bd. 579, whereby the Federal Government was held 'immune' from state taxation.

While the Federal Government has seen fit to relieve the states of the task of providing the unburdensome nature of many of their respective levies; Title 4, Secs. 104, 105, and 106, FCA, still by Title 4, Sec. 107, FCA:

'(a) The provision of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.'"

Therefore, it is our opinion that gasoline purchased by the United States Property and Fiscal Officer {\*299} as herein before considered, is exempt, under existing law, from the excise tax imposed thereon by Sec. 64-26-2. To the extent that this opinion conflicts with Opinion of the Attorney General No. 58-132 that opinion is overruled.