

Opinion No. 65-205

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

TO: Max M. Gonzales, Commissioner of Revenue, Bureau of Revenue, State of New Mexico, Santa Fe, New Mexico

QUESTION

FACTS

The taxpayer is a general contractor whose principal place of business is in the state of Texas. The taxpayer sells property to customers in New Mexico, to which the New Mexico Compensating Tax Act, Article 17 of Chapter 72 of the New Mexico Statutes, 1953 Compilation, is applicable. The prices charged and collected by the taxpayer on the property sold in New Mexico included freight charges. In computing the "sales price" referred to in Section 72-17-3 of the Compensating Tax Act for such property, the taxpayer has deducted the freight charges applicable to such property.

QUESTION

In computing "sales price" for property to which the New Mexico Compensating Tax Act is applicable, may the taxpayer deduct freight charged included in the prices charged and collected by the taxpayer for such property?

CONCLUSION

No.

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{*334} ANALYSIS

Section 72-17-2(d) of the New Mexico Compensating Tax Act defines "sales price" as follows:

"Sales price" means the total amount for which tangible personal property is sold, **including any services that are a part of the sale**, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expenses whatsoever, provided that cash discounts allowed and taken on sales shall not be included nor shall the sales price include the amount charged for labor or

service rendered in installing, applying, remodeling or repairing property sold.
(Emphasis added.)

The shipping of the property sold may reasonably be deemed a service that is "part of the sale" when freight charges are included in the price charged and collected by the seller. Nowhere in the Compensating Tax Act is there a specific deduction allowed for freight charges. Legislative history also indicates that freight charges may not be deducted in computing the "sales price".

The Compensating Tax Act was designed to complement the New Mexico Emergency School Tax Act, and to protect, so far as practicable, the merchants, dealers and manufacturers of New Mexico subject to New Mexico excise taxes. The definition of "gross receipts" in Section 72-16-2(d) of the Emergency School Tax Act contains all inclusive language analogous to that found in the definition of "sales price" in Section 72-17-2(d) of the Compensating Tax Act. At one time, however, Section 72-16-10 of the Emergency School Tax Act specifically authorized deduction of freight charges included in the price charged and collected by the seller in determining the gross receipts of the taxpayer. This Section was repealed by the New Mexico Legislature by Laws 1961, Ch. 190 § 3. The very existence in the Emergency School Tax Act of a specific deduction for freight charges and the subsequent repeal suggest that the legislature would have put into the Compensating Tax Act a specific deduction for freight charges if it had intended to allow such a deduction in computing "sales price."

Accordingly, freight charges included in the price charged and collected by the seller on property to which the Compensating Tax is applicable are part of the "sales price" and may not be deducted in computing it.