

Opinion No. 66-11

January 28, 1966

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

TO: Antonio Gabaldon, Jr., Capt., FC, NMARNG, Comptroller, Office of the Adjutant General, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Are sales of tangible personal property to a United States Property and Fiscal Officer for use by the New Mexico National Guard subject to tax under an applicable municipal sales tax ordinance of a New Mexico municipality, assuming the ordinance, as provided in Section 14-39-3, N.M.S.A., 1953 Compilation (1965 Supp.), contains the same definitions and exemptions allowed by the Emergency School Tax Act?
2. Are sales of services to a United States Property and Fiscal Officer for the benefit of the New Mexico National Guard subject to tax under an applicable municipal sales tax ordinance of a New Mexico municipality, assuming the ordinance as provided in Section 14-39-3, N.M.S.A., 1953 Compilation (1965 Supp.), contains the same definitions and exemptions allowed by the Emergency School Tax Act?
3. If the conclusion to question 1 is "No", must the United States Property and Fiscal Officer deliver a resale certificate to the vendor of such property, assuming the ordinance contains a provision like Section 72-16-14, N.M.S.A., 1953 Compilation (1965 Supp.), of the Emergency School Tax Act?

CONCLUSIONS

1. No.
2. Yes.
3. No.

OPINION

{*14} ANALYSIS

As was held in Attorney General Opinions' No. 65-181 (Sept. 16, 1965) and No. 58-132 (June 20, 1958), a United States Property and Fiscal Officer is an agent of the government of the United States. Subsection A of Section 72-16-5, N.M.S.A., 1953

Compilation (1965 Supp.), exempts from all taxes levied by the Emergency School Tax Act:

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

We have assumed that the applicable municipal sales tax ordinance contains a similar exemption. Accordingly, since a United States Property and Fiscal Officer is an agent of the government of the United States, a sale of tangible personal property to him is the same as a sale to the government of the United States and such sales (to the extent they do not involve metalliferous ores) are not subject to tax under the municipal sales tax ordinance.

With respect to sales of services to a United States Property and Fiscal Officer, there is no exemption from tax of such sales in the Emergency School Tax Act and they are taxable thereunder. The Act does not levy an unconstitutional tax upon the United State. **Bradbury & Stamm Constr., Co. v. Bureau of Revenue**, 70 N.M. 226, 372 P.2d 808 (1962). If the state can tax the sale of services to a United States Property and Fiscal Officer, it follows that a municipality can do so. A municipality is a creature of the law of the state of which it is a part. **Munro v. City of Albuquerque**, 48 N.M. 306, 150 P.2d 733 {*15} (1943). Therefore, such sales of services are subject to tax under the municipal sales tax ordinance.

With respect to sales of tangible personal property which we have concluded are not taxable under the ordinance, the United States Property and Fiscal Officer is not required to deliver a resale certificate to the vendor. We have assumed the ordinance contains a provision like Section 72-16-14, **supra**, of the Emergency School Tax Act. That section deals only with sales of tangible personal property that are exempt from emergency school tax because they are sales for resale. For example, the third sentence thereof states:

A resale certificate shall be accepted by the sellers only from recognized retail dealers, restaurants, wholesalers, distributors, jobbers or manufacturers of tangible personal property including alcoholic liquors and beverages.

Since exemption of sales of tangible personal property to a United States Property and Fiscal Officer arises not because they are sales for resale but because of a specific statutory exemption, Section 72-16-5, **supra**, the municipal sales tax ordinance containing a section similar to Section 72-16-14, **supra**, does not require him to deliver a resale certificate to the vendor.