

## Opinion No. 68-106

October 21, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. F. A. Vigil Commissioner Bureau of Revenue Santa Fe, New Mexico

### QUESTION

#### QUESTIONS

1. Under New Mexico Laws, 1968 Special Session, Senate Floor Substitute for Senate Bill No. 2, is the county income surtax measured by the state income tax due before or after the credits authorized in Sections 72-15A-11 and 72-15A-12 are taken?
2. Is the credit authorized in Section 72-15-59 to be applied against the amount of county income surtax imposed to determine the amount of tax to be remitted to the Bureau of Revenue?

#### CONCLUSIONS

1. See analysis.
2. Yes.

### OPINION

#### {\*168} ANALYSIS

The County Income Surtax Act (Senate Bill No. 2, 1968 Special Session) provides that a county income surtax up to a maximum of fifty percent of the income tax imposed by the Income Tax Act may be imposed upon all individual residents of a county when a majority of the qualified electors of the county voting on the question of a county surtax vote in favor of imposing the surtax.

Section 72-15A-3, N.M.S.A., 1953 Compilation of the Income {\*169} Tax Act provides for the imposition of an income tax in this State as follows:

A tax is hereby imposed at the rates specified in sections 5 and 6 [72-15A-5 and 72-15A-6] **upon the net income of every resident individual** and every domestic corporation and upon the net income of every foreign corporation and every nonresident individual employed or engaged in the transaction of business in, into or from this state, or deriving any income from any property or employment within this state. (Emphasis added)

Thus it is seen that the tax imposed by the County Income Surtax Act is a tax measured by the tax imposed upon the net income of every resident individual. We must therefore determine if the credit authorized by Section 72-15A-11, N.M.S.A., 1953 Compilation is to be taken before or after arriving at the net income of the taxpayers.

Section 72-15A-11, supra, provides that if a resident individual taxpayer of this State:

. . . has become liable for income tax to another state upon income derived from sources without this state **and included in net income subject to taxation under this Income Tax Act** [72-15A-1 to 72-15A-15], the amount of income tax payable by him under this act shall be, upon filing with the commissioner satisfactory evidence of the facts and of the payment of such tax to another state, credited on his return with the tax so paid by him to such other state, provided that in no case shall the credit so allowed exceed one and one-half per cent (1 1/2%) of the net income involved; . . . (Emphasis added).

It is clear from the above quoted language that the credit allowed for payment of income taxes imposed by another state is to be taken after computing the net income of the taxpayer. This conclusion is further reinforced by the definition of "net income" as used in the Income Tax Act.

The "net income" of a taxpayer is defined in Section 72-15A-2, N.M.S.A., 1953 Compilation, as amended, of the Income Tax Act as follows:

P. The "net income" of a taxpayer shall be the base income adjusted to provide that:

(1) amounts that have been taxed as income in a previous year by this state shall not be taxed again;

(2) amounts, including net operating losses, that have been deducted in a prior year's computation of state income tax liability shall not be deducted again;

(3) amounts included in base income from dividends paid by state and national banks upon their capital stock shall be deducted;

(4) amounts included in base income that the state is prohibited from taxing because of the provisions of the federal Constitution, the state Constitution or federal laws shall be deducted; and

(5) amounts included in base income paid by the armed services of the United States as compensation during any period of service in a zone under conditions for which compensation increments were received in the form of combat pay shall be deducted.

"Base income" is that part of the taxpayer's income which is generally defined as his federal taxable income and upon which the taxpayer has calculated his federal taxable income. Section 72-15A-2 (O), N.M.S.A., 1953 Compilation, as amended. The tax credit

authorized {\*170} by Section 72-15A-11, supra, is not included in the adjustment to base income used to determine net income. Thus, it is seen that the credit allowed certain taxpayers who have paid income taxes to other states is taken only after the taxpayer has calculated his net income. We have already pointed out that the tax imposed by the County Income Surtax Act is a tax measured by the tax imposed upon the net income of every resident individual of a county imposing the surtax. It is therefore our opinion that the credit authorized by Section 72-15A-11, supra, is to be taken after computing the amount of county income surtax owed by the taxpayer.

We have also been asked if the county income surtax is to be computed before or after taking the credit authorized by Section 72-15A-12, N.M.S.A., 1953 Compilation. Section 72-15A-12, supra, authorizes a tax credit for taxes paid other states by nonresident individuals. Because the County Income Surtax Act provides only for the imposition of the tax on individuals who are residents of the county on the last day of the taxable year those who are authorized to take the tax credit under Section 72-15A-12, supra, will not be liable for the surtax provided by the County Income Surtax Act.

Last of all, we are asked if the credit authorized by Section 72-15-59, N.M.S.A., 1953 Compilation is to be applied against the amount of county income surtax imposed to determine the amount of tax to be remitted to the Bureau of Revenue. Section 72-15-59, supra, provides as follows:

Withheld amounts credited against tax. -- the entire amount of income from wages upon which tax was deducted and withheld shall be included in the gross income of the employee for state income tax purposes. The amount of wages deducted and withheld under the provisions of the Withholding Tax Act [72-15-49 to 72-15-66] during the taxable year shall be credited against any state income tax liability for that taxable year.

The County Income Surtax Act provides that the commissioner of revenue shall have the county income surtax collected in the same manner and at the same time as the state income tax is collected. It is our opinion that the commissioner of revenue may in his discretion apply state income taxes withheld toward the payment of any surtax owed by a taxpayer under the County Income Surtax Act.

By: Gary O'Dowd

Assistant Attorney General