

## **Opinion No. 69-102**

August 27, 1969 Reissued: October 31, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Oliver H. Miles, Assistant Attorney General

**TO:** Senator James L. Bruin, Chaves County /- 17, 2709 Gaye Drive, Roswell, New Mexico 88201, Mr. Haskel B. Smith, Chief Tax Commissioner, State Tax Commission, Santa Fe, New Mexico 87501

### **QUESTIONS**

#### QUESTIONS

1. Is the tax rate on banks and financial institutions imposed at 6% under Chapter 151, Laws of 1969, or at 5% under Chapter 152, Laws of 1969?
2. Does Chapter 151, Laws of 1969, prohibit county tax assessors from assessing personal property of banks and financial corporations?

#### CONCLUSIONS

1. The income tax imposed on banks and financial corporations is 6% under Chapter 151, Laws of 1969.
2. See Analysis:.

### **OPINION**

#### {\*162} ANALYSIS

This opinion was originally issued on August 27, 1969, and is now reissued in light of a recent Court of Appeals decision. We have taken the liberty of combining these two opinion requests since they concern related matters.

The first question concerns an interpretation of Section 72-15A-6, N.M.S.A., 1953 Compilation, as amended by Section 4 of Chapter 152, Laws of 1969, which provides:

"The tax imposed on corporation by Section 72-15A-3, N.M.S.A., 1953, shall be at the rate of five percent."

Section 72-15A-3, *supra*, provides for the imposition of a tax on net income. Section 2 of Chapter 152, *supra*, provides in pertinent part:

"No income tax shall be imposed upon: A . . . . banks, or financial institutions."

Section 5 of Chapter 151, Laws of 1969, provides in part: "The rate of tax on banks and financial corporations shall be six percent of net income." Therefore, it appears clear from the exclusionary language in Section 2 of Chapter 152, supra, and from the specific language of Section 5 of Chapter 151, supra, that the legislature intended that banks and financial corporations shall be taxed at the rate of 6% of net income.

Furthermore any conflict between two statutes is to be resolved by construing the specific statute as controlling over the more general statute. **Lopez v. Barreras**, 77 N.M. 52, 419 P. 2d 251 (1966). Application of this approach would reach the same result in construing the two statutes in question.

Your second question deals with Section 6 of Chapter 151, supra, which provides:

"TAX IN LIEU OF OTHER TAXES -- EXCEPTIONS. -- The taxes imposed by Sections 3 and 4 of the Banking and Financial Corporations Tax Act [Chapter 151, Laws of 1969] are **in lieu of all other taxes** imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, **except taxes upon their real property and taxes arising from activities which are not in the course of their regular banking and {\*163} financial corporation functions.**" (Emphasis added).

It appears clear from the above section that the legislature intended that banks and financial corporations shall be subject to the 6% income tax, to all real property taxes, and to all personal property taxes arising from activities which are not in the course of "regular banking and financial corporation functions." Taxation is the rule and exemptions therefrom are the exception, therefore statutes granting an exemption from taxation are to be strictly construed in favor of the taxing agency and against the taxpayer claiming the exemption. **Flaska v. State**, 51 N.M. 13, 177 P.2d 174 (1946).

Applying this strict construction to the statute, we conclude that banks and financial corporations are not exempt from all taxes on personal property but only from taxes on such personal property which arise from activities which are in the course of their regular banking and financial corporation functions In **First Nat'l Bank v. Commissioner of Revenue**, No. 288, (N.M. App., Sept. 5, 1969) cert. denied, No. 8920, (N.M.S. Ct., October 15, 1969), the New Mexico Court of Appeals held that a bank which performs data processing services for other financial institutions is not exempt from payment of gross receipts tax on the fees derived from such services.

The Court's reasoning is that: "The services here involved are not reasonably necessary or incident to the business of functions of a national bank, and therefore, are not immune from taxation . . ." We think that this decision supports our view that banks are subject to taxation on all activities except those arising from banking and financial corporation functions.

It is therefore our opinion that banks and financial corporations are subject to all personal property taxes which do not fall within the clear language of the statute. Thus,

they should not be removed from the personal property tax rolls. Instead, they should remain on the tax rolls and be assessed for real property and all personal property taxes arising from all activities other than regular banking and financial corporation functions.