

Opinion No. 74-24

July 3, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Fred L. O'Cheskey Commissioner of Revenue Bataan Memorial Building Santa Fe, New Mexico 87501

QUESTIONS

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Are services incidental to the issuance of title insurance taxable under the Gross Receipts Tax, Sections 72-16A-4, 72-16A-12.12, NMSA, 1953 Comp. (1973 Supp.), or are such services taxable under laws relating to insurance, specifically Section 58-5-1C, NMSA, 1953 Comp. (1974 Interim Supp.)?

CONCLUSION

Services incidental to the issuance of title insurance are taxable under Section 58-5-1C, **supra**.

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{*47} ANALYSIS

Section 72-16A-4, **supra**, provides:

"A. For the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the 'gross receipts tax.'"

Section 72-16-A-12.12, **supra**, provides:

"Exempted from the gross receipts tax are the receipts of insurance companies or any agent thereof from **premiums**." (Emphasis added.)

The Bureau of Revenue contends that services incidental to the issuance of title insurance do not constitute "premiums" and that, therefore, such services are not exempted from the gross receipts tax.

Section 58-5-1C, **supra**, provides, in part:

"Every insurance company transacting an insurance business in New Mexico shall also pay annually on or before May 31 each year, two and one-half per cent [2 1/2%] of the **gross premiums**, membership and policy fees received by it . . ." (Emphasis added.)

Section 58-5-1E, **supra**, provides, in part:

"The payment of taxes, licenses and fees provided for in Chapter 58 NMSA, 1953 shall be in lieu of all other taxes, licenses and fees of every kind now or hereafter imposed by this state or any political subdivision thereof on any insurance company or agent thereof, excepting the regular state, county and city taxes on property located in New Mexico . . ."

The Department of Insurance contends that services incidental to the issuance of title insurance constitute "gross premiums" and that, therefore, such services are taxable under Section 58-5-1C, **supra**.

The Bureau of Revenue has, in the past, taxed services incidental to the issuance of title insurance under the Gross Receipts Tax. But now, however, the Department of Insurance has promulgated regulations relating to title insurance companies. Regulation 10-2-6 is entitled "Basis for Rates" and provides, in part:

"(a) Rates shall be filed on an 'all inclusive basis' and shall include all costs charged for the issuance of a title insurance policy for the following:

. . .

{*48} (2) **Services incidental to the issuance of title insurance**, including title searches, examinations of records by or on behalf of the agent which are **necessary to determine insurability of title**, preparation of binders and policies and supporting affidavits and documentation rendered by the agent to an insured or to an applicant for insurance for any policy or contract for the issuance of title insurance.

Exclusions. The all-inclusive rate shall not include charges for escrow, closings and other functions performed but not necessary to the issuance of a policy or binder. . ." (Emphasis added.)

The Department of Insurance intends to levy the tax imposed by Section 58-5-1C, **supra**, on the rate basis contained in Regulation 10-2-6, **supra**, which includes the "services incidental to the issuance of title insurance" clause.

In **Allstate Insurance Co. v. State Board of Equalization**, 169 C.A.2d 165, 336 P.2d 961 (1959), a California appellate court stated [p. 964]:

"The determination of whether a particular payment is 'premium' is a question of law. 'Premium' in the law of insurance means the amount paid to the company for insurance (citations omitted). It has been defined as 'the sum which insured is required to pay.' . . .

The gross premium, or the amount charged in a contract of insurance, ordinarily includes two elements, that is, the net premium and the loading. The loading, or the amount arbitrarily added to the net premium, is intended to cover the expenses of the company . . ."

In **Lawyers Title Insurance Corporation v. Board of Insurance Companies**, 207 S.W. 2d 972 (Tex. Civ. App. 1948), a tax was imposed on the gross premiums of title insurance companies. The court, approving language in an earlier Texas case, stated that [p. 977]:

". . . the basis upon which the tax is to be assessed is "the gross premium receipts," the whole amount received, without deduction or abatement . . ."

The court upheld a tax on gross premiums which included charges made by the title companies as a part of the business of insuring title insurance policies. The court stated [p. 977]:

". . . Being engaged in the business of insuring titles to land, as appellant [title insurance company] is, abstracts of titles to land, the examination of the titles and the issuance of the certificates to such titles, and the final closing of the deals are necessary steps to be taken by appellant in the safe conduct of its business, and is a reasonable way for determining whether or not to issue policies of title insurance to the applicants therefor. When these services to appellant are performed by its authorized agents and paid for by the insured, they are benefits accruing to appellant in the operation of its business and are costs of such operation, and must be included in the report of the total amount of gross premiums received."

In **Inter-County Title Guar. & M. Co. v. State Tax Comm'n**, 33 A.D.2d 251, 307 N.Y.S.2d 156 (1970), the New York Court held that [p. 161]:

" **The charge made for the title examination, when made for the purpose of a title insurance policy**, is an unavoidable cost of the insurer, and is no different from any of the other charges stated . . . as constituting premiums. The payment for the title search is a condition precedent to the incurring of the risk by the title company. Such charges are, therefore, properly includable in the amount of **premiums** earned, and subject to the franchise tax. However, the charges for guaranteed searches and abstracts, and charges for other miscellaneous searches do not fall within the category of premiums, and should be eliminated from the premium tax base." (Emphasis added.)

{*49} On the basis of the foregoing authority and reasoning, our opinion is that "services incidental to the issuance of title insurance" fall within the category of gross premiums and are taxable under Section 58-5-1C, **supra**. Since both the controlling statutes in this case deal with the same subject matter and are **in pari materia**, they should be read together and applied harmoniously and consistently. **Inter-County Title Guar. & M. Co. v. State Tax Comm'n, supra**. Accordingly this means that services incidental to the issuance of title insurance are exempt from the gross receipts tax under the exemption

contained in Section 72-16A-12.12, **supra**. This conclusion is consistent with the "in lieu of" provision contained in Section 58-5-1E, **supra**, and the reasoning of **Security Abstract and Title Co. v. Leonardson**, 74 Idaho 528, 264 P.2d 1027 (1953).

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