

## **Opinion No. 75-43**

July 30, 1975

**BY:** OPINION OF TONEY ANAYA, Attorney General

**TO:** Jerry Manzagol Commissioner Motor Vehicle Department Bataan Memorial Building Santa Fe, New Mexico 87503

### **QUESTIONS**

#### **FACTS**

John and Mary Carlson, husband and wife, were both commissioned officers of the United States Air Force, and were non-residents of New Mexico, stationed at Cannon Air Force Base, New Mexico, solely by reason of military orders, and during this time they purchased several motor vehicles (trucks) and applied to the Motor Vehicle Department for title and registration of the vehicles. The trucks are used by the Carlsons in a trucking enterprise. The Carlsons claim they are exempt from the payment of the excise tax and the registration fees on the trucks by virtue of their non-resident military status. The Department contends the Carlsons are subject to the excise tax and the registration fees because the trucks are commercial vehicles and used by the Carlsons in a trade or business. The Department has withheld the issuance of titles and registrations for the vehicles pending determination of the applicability of the excise tax and registration fees on the vehicles owned by the Carlsons.

#### **QUESTIONS**

1. Are motor vehicles used in a trade or business and owned by non-resident military personnel subject to the 2% excise tax provided for in Section 64-11-15, NMSA, 1953 Comp.?
2. Are motor vehicles used in a trade or business and owned by non-resident military personnel subject to the full registration fee provided for in Section 64-11-1.3, NMSA, 1953 Comp.?

#### **CONCLUSIONS**

1. No.
2. Yes.

### **OPINION**

{\*120} **ANALYSIS**

At issue are the applicable federal and state statutes, and decisions thereunder, relating to the subject of taxation of the host state of motor vehicles used in a trade or business and owned by non-resident military personnel stationed in the host state. We will consider the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 App. U.S.C.A., Section 501 **et seq.**), and Sections 64-6-1, 64-6-3, 64-11-1.3, 64-11-12, and 64-11-15, NMSA, 1953 Comp. Our research has not disclosed a single applicable federal or state case which deals with the subject of taxation of motor vehicles used in a trade or business and owned by non-resident military personnel. (Compare **Christian v. Strange**, 96 Ariz. 106, 392 P.2d 575 (1964).

Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 App. U.S.C.A., Section 574) is entitled "Residence for Tax Purposes." Basically Section 514 states that a non-resident serviceman's personal property does not acquire a tax situs in the state in which the serviceman is stationed, i.e., the host state. There is an exception, however, regarding personal property used in a trade or business. Section 514 states, in part:

". . . **Provided**, that nothing contained in this section shall prevent taxation by any state . . . in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction . . ." (Emphasis added)

The only case which has considered personal property owned by non-resident military personnel and used in a trade or business (**Christian v. Strange, supra**) is not applicable to this situation because <sup>{\*121}</sup> it differs materially on the facts. In 1966, however, the United States Supreme Court decided the companion cases of **California v. Buzard**, 382 U.S. 386, 86 S. Ct. 478, 15 L. Ed. 2d 436 (1966 and **Snapp v. Neal**), 382 U.S. 397, 86 S. Ct. 485, 15 L. Ed. 2d 445 (1966). There flowed from these decisions Opinion of the Attorney General No. 66-83, dated June 28, 1966, and Opinion of the Attorney General No. 71-99, dated August 9, 1971. The net effect of the foregoing cases and the opinions referred to is that New Mexico may not assess the 2% excise tax to non-resident military personnel on their automobiles or house trailers because the entire revenues generated by the 2% excise tax go into the general revenue fund and are not essential to the functioning of the licensing and revenue laws (Section 64-11-15(H); Opinion of the Attorney General No. 71-99, **supra**). Further, the state may assess only that portion of the registration fee, regarding automobiles and house trailers owned by non-resident military personnel, which is essential to the functioning of the licensing and registration laws. That portion applicable to non-resident military personnel is presently six percent. Section 64-11-12, NMSA, 1953 Comp.; Opinion of the Attorney General No. 71-99, **supra**.

The foregoing analysis does not relate specifically to commercial vehicles. We express no opinion on the fundamental question whether, in the **absence** of state statutes, Section 514 and **California v. Buzard, supra**, would be decisive of the questions presented here, because we believe that specific answers to the questions presented are contained in New Mexico statutes.

Question No. 1.

New Mexico may not assess the 2% excise tax on the commercial vehicles owned by the Carlsons because New Mexico has explicitly exempted the 2% excise tax pertaining to all vehicles owned by non-resident military personnel stationed in New Mexico. No distinction is made between commercial and non-commercial vehicles, and we can only conclude the exemption pertains to vehicles which are used in a trade or business. The exemption was adopted in 1969 and is a legislative response to **California v. Buzard, supra**. Section 64-11-15(D) states: "Persons domiciled outside this state and on active duty in the military service in the United States . . . are exempt from the tax imposed by this section."

Since the Carlson were non-residents of New Mexico and were on active duty in the United States Air Force at the time of their title applications, they are exempt from the 2% excise tax imposed by Section 64-11-15, **supra**. This conclusion is warranted regardless of the fact the vehicles are used in a trade or business, and regardless of the fact the state is not prevented from taxing the vehicles because of the exception clause of Section 514 referred to above.

Question No. 2:

New Mexico may assess the full registration fee for commercial vehicles because of the language of Section 64-6-1(E), NMSA, 1953 Comp. The registration fees in question are provided for by Section 64-11-1.3, NMSA, 1953 Comp. This is a specific statute authorizing registration fees for trucks and the like. Section 54-11-12, **supra**, states that only six percent of the registration fees collected under Section 64-11-1.3, **supra**, and other sections, is transferred to the Department. Thus, in the ordinary case, a serviceman {\*122} who registers a truck used as a personal vehicle would pay only the six percent registration fee. **California v. Buzard, supra**; Opinion of the Attorney General No. 71-99, **supra**.

The legislature has adopted a specific provision, however, perhaps partly in response to Section 514, which requires non-residents who carry on a trade or business in New Mexico to pay the same registration fees as New Mexico residents. Section 64-6-1(E), NMSA, 1953 Comp. provides:

"Every non-resident . . . carrying on business within this state and owning and regularly operating in such business any motor vehicle, trailer, semitrailer, house trailer or poletrailer within the state shall register each vehicle and pay the same fees therefor as required with reference to like vehicles owned by residents of the state."

In our opinion, Section 64-6-1 (E), **supra**, is a legislative declaration that the Carlsons must pay the full registration fee because they operate their motor vehicles in a trade or business. The legislature has decided that there is a distinction between personal and commercial vehicles owned by non-residents, at least with respect to applicability of registration fees. Section 64-6-1(E), **supra**, would seem to be state taxation which is

permitted by the exception clause of Section 514 referred to above. However, this opinion does not alter Opinion of the Attorney General No. 71-99, **supra**, because that opinion did not consider the unique factual questions presented here.

Finally, with respect to Question No. 1, the Department contends that Section 64-6-1(E), **supra**, and 64-6-3, NMSA, 1953 Comp., require that non-resident military personnel be subject to the 2% excise tax of Section 64-11-15, **supra**. This contention is untenable for the following reasons:

- 1). Section 64-11-15(D), **supra**, contains a specific exemption of the **tax** imposed by Section 64-11-15, **supra**. This is an explicit and complete exemption for the excise tax which the Department is attempting to assert concerning the Carlson vehicles;
- 2). Section 64-6-1, is couched in terms of registration, and registration fees, and may not be interpreted to impose the **excise tax** of Section 64-11-15, **supra**, on the Carlson vehicles;
- 3). Section 64-6-3, NMSA, 1953 Comp., relates to "personal passenger vehicles" and has no application to vehicles used in a trade or business, which is the situation confronting the Department.

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