Opinion No. 82-09

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OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Leonard T. Valdez, Executive Secretary, Public Employees' Retirement, Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

TAXATION; PUBLIC OFFICERS AND EMPLOYEES; RETIREMENT

Under the clear language of Vaughn v. State of New Mexico Taxation & Revenue Dept. No. 5450 (N.M. Ct. App., July 13, 1982), the amounts deducted from the salaries of public employees for PERA contributions are not exempt from the state income tax.

QUESTIONS

May the Department of Taxation and Revenue continue to impose and collect state income tax on that portion of a public employees' salary which is deducted as a required contribution under the Public Employees' Retirement Act?

CONCLUSIONS

Yes.

ANALYSIS

As provided in the Public Employees' Retirement Act (PERA), Section 10-11-1, **et seq.,** NMSA 1978, every public employee in the state is required to become a member of the public employees' retirement association unless otherwise excluded by law. Each member is required to make contributions to the "employees' savings fund" in accordance with the prescribed rates. Section 10-11-18. Affiliated public employers make matching contributions to the "employers accumulation fund." Section 10-11-19. Upon attainment of sufficient years of service and the requisite age or disability, the association pays retirement benefits to its members. **See,** Sections 10-11-22, 10-11-31, 10-11-32.

OPINION

This statutory framework is similar to that defined by the Educational Retirement Act (ERA), Section 22-11-1, **et seq.,** NMSA 1978, under which the question of the taxability of members' contributions has already been determined. In **Vaughn v. State of New Mexico Taxation and Revenue Department,** No. 5450 (N.M. Ct. App., July 13, 1982), the Court held that the amount deducted from salaries for employee contributions under

Section 22-11-21 of the ERA were not subject to state income tax. The Court relied on Section 22-11-42 which provides that:

"Except as specifically provide in the Education Retirement Act [22-11-1 to 22-11-45, NMSA 1978], contributions or benefits mentioned in the Educational Retirement Act shall not be assignable either in law or in equity, or be subject to execution, levy, attachment, garnishment or any other legal process, and shall also be exempt from any state income tax."

The Court found that Section 22-11-42 was "clear and unambiguous on its face" Slip Op., at 5. It rejected the Department's arguments that, as used in Section 22-11-42, "contributions" does not mean the contributions deducted from an employee's salary.

In addition, the Court rejected the Department's argument by analogy to Section 10-11-36, a comparable provision of the PERA which states:

"None of the moneys, annuities or other benefits mentioned in this act [10-11-1 to 10-11-38 NMSA 1978] shall be assignable either in law or in equity or be subject to execution, levy, attachment, garnishment or other legal process, and shall be exempt from any state income tax."

*{*286}* The Court explained:

"There are several difficulties with the argument. Initially, the Department equates "moneys, annuities or other benefits" of the PERA statute [Section 10-11-36, NMSA 1978 (1980 Repl.Pamp.)] with "contributions and benefits" of the Educational Retirement Act, when no equation exists. There is nothing in the definition of terms in the statute that indicates "moneys" refers to "contributions". Furthermore, as plaintiffs' responsive memorandum indicates, had the legislature intended that moneys be equated with contributions, the legislature would not have used two different words. Additionally, the fact that the state taxes PERA employees does not make the taxation of the plaintiffs lawful."

Slip Op. at 5.

Thus, while the **Vaughn** case holds only that ERA contributions deducted from members' salaries are not subject to state income tax, the Court clearly assumed that PERA contributions were taxable and, indeed, specifically recognized that ERA contributions could be treated differently from PERA contributions.

Since the reference to PERA contributions in the **Vaughn** case were not necessary to the decision, the Court's statements, as "dictum" would not be binding as a rule of law. **See, Rocky Mountain Life Insurance Company v. Reidy,** 69 N.M. 36, 363 P.2d 1031 (1961). Nevertheless, the Court of Appeals has effectively foreclosed the question of the taxability of PERA contributions. In light of the clear language of the **Vaughn** opinion, this office is constrained to conclude that, until another court should rule otherwise the

amounts deducted from the salaries of public employees for PERA contributions are not exempt from the state income tax.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General