

Opinion No. 88-13

February 12, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Lyn Hebert, Assistant Attorney General,

TO: Honorable Jack M. Morgan, New Mexico State Senate, State Capitol, Santa Fe, New Mexico

QUESTIONS

1. Does the "gross receipts tax" apply to revenues which are received or collected by a municipality or county under its taxing authority and which are distributed to a nonprofit corporation pursuant to a contract with the municipality or county under which the corporation provides a public service or achieves a public purpose which is authorized or required to be performed with said tax revenues?
2. Is a nonprofit corporation which performs, under a contract with a county or municipality, a public service that the county or municipality could itself perform, which corporation is funded by revenues collected by the city or municipality under its taxing authority, engaged in business for the purposes of gross receipts tax as defined in Section 7-9-3E, NMSA 1978?
3. Would the answer be the same if substantially all of the revenues of the nonprofit organization are derived under the contract with the municipality or county, and that organization would not exist but for the contract?

CONCLUSIONS

1. Yes.
2. Yes.
3. Yes.

ANALYSIS

Section 7-9-4 NMSA 1978 provides: "For the privilege of engaging in business, an excise tax ... of gross receipts is imposed on any person engaging in business in New Mexico..... The tax imposed by this section shall be referred to as the "gross receipts tax." Section 7-9-5 NMSA 1978 expresses the legislative intent that there be a presumption of taxability: "To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax."

There are specific statutory exemptions to the gross receipts tax. See Sections 7-9-13 through 7-9-41 NMSA 1978. The Court of Appeals in **Al Zuni Traders v. Bureau of Revenue**, 90 N.M. 258, 260, 561 P.2d 1351, 1353 (Ct.App. 1977), stated: "The burden, however, rests squarely on the taxpayer to prove entitlement to an exemption." Certain organizations have been exempted from the gross receipts tax because of their tax exempt status under the federal taxation scheme. See 26 U.S.C. § 501(c)(3); Section 7-9-29 NMSA 1978. There is no indication from the questions presented that the nonprofit corporation is a 501(c)(3) organization. Section 7-9-39 NMSA 1978 provides a specific exemption from the gross receipts tax for nonprofit social, fraternal, political, trade, labor, or professional organizations and business leagues. There is no indication that the nonprofit corporation in question comes within this exemption.

The first and third questions suggest that whether the nonprofit corporation is contracting with a municipality or county to perform a public service or achieve a public purpose is determinative whether the gross receipt tax is applicable. Pursuant to Section 7-9-13 NMSA 1978 "the receipts of the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof" are exempted from the gross receipts tax. In **United States v. New Mexico**, 581 F.2d 803 (10th Cir. 1978), the United States sought a declaratory judgment that the United States Constitution, laws of the United States, and the laws of New Mexico prohibit the application of the provisions of the New Mexico Gross Receipts and Compensating Tax Act to the receipts of federal contractors. The federal government argued that the gross receipts statute unconstitutionally places the incidence of the tax on the United States. The Court of Appeals rejected the federal government's argument and held that, because the legal incidence of the New Mexico gross receipt tax is upon the seller of services, the tax could be imposed upon independent contractors performing services for the United States in New Mexico. The court noted that the plain language of the act levies the tax upon the privilege of engaging in business within the state, and the tax is measured by a percentage of a business's gross receipts. The federal government argued that the economic burden of the tax was shifted to the United States. The court dismissed this argument and concluded that the fact that the gross receipts tax may increase the cost to the government would not invalidate the tax where its legal incidence falls elsewhere.

The nonprofit corporation at issue is not an agency of the state or a political subdivision of the state. The corporation is contracting with a municipality or county to provide a service. Following the analysis of the **United States v. New Mexico** case, the corporation's status as a contractor pursuant to a contract with an exempt governmental entity does not exempt the contractor from imposition of the gross receipt tax on its receipts from the municipality or county.

The second question asks whether the nonprofit corporation in performing a public service under contract with a county or municipality is engaged in business as defined in Section 7-9-3E NMSA 1978. Section 7-9-3C NMSA 1978 defines "engaging in business" as the "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." The New Mexico Court of Appeals considered this phrase in

Twining Cooperative Assn. v. Bureau of Revenue, 89 N.M. 345, 552 P.2d 476 (Ct.App. 1976), and declared: "To engage in business, taxpayer must engage in services 'for other persons' with the purpose of direct or indirect benefit to itself, for which activity it receives money for the performance of its services." 89 N.M. at 346, 552 P.2d at 477. "Person" as used in the Gross Receipts and Compensating Tax Act includes the state of New Mexico or any political subdivision thereof. See Section 7-9-3(H) NMSA 1978. The nonprofit corporation contracts with the county or municipality to perform services for the county or municipality in exchange for money. The nonprofit corporation, therefore, is "engaged in business" for the purposes of imposition of the gross receipts tax.

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