Opinion No. 43-4416

November 30, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Benjamin D. Luchini, Chairman-Executive Director, Employment Security Commission of New Mexico, Albuquerque, New Mexico

We are in receipt of your letter of November 10, 1943, in which you ask our opinion as to the liability of an irrigation district created under Chapter 77, Article 21 of the N.M. 1941 Compilation for contributions imposed by the Unemployment Compensation Law of New Mexico.

If immune, such districts are immune under Section 57-822 (g) (7) (E) of the N.M. 1941 Compilation, which provides as follows:

"Service performed in the employ of this state, or of any other state, or of any political subdivision thereof * * * and any service performed in the employ of any instrumentality in this state * * * to the extent that the instrumentality is with respect to such service, immune under the Constitution of the United States from the tax imposed by Section 1600 of the Federal Internal Revenue Code."

The primary question involved in your request is one of statutory construction; that is, whether an irrigation district created under Chapter 77, Article 21, is a political subdivision of New Mexico within the contemplation of the above quoted section, or, in the alternative, is a state instrumentality immune from federal taxation under the Constitution of the United States.

The only decision by our Supreme court, to the knowledge of the writer, dealing with the nature of an irrigation district, is Davy v. McNeill, 31 N.M. 7, 240 P. 482. There the Court had before it the question of whether an irrigation district was a municipal corporation, within the meaning of Article 8, Section 3 of the New Mexico Constitution, so that an officer of an irrigation district would be a municipal officer within the meaning of Article 5, Section 13. The Court held, in that case, that an irrigation district was not a municipal corporation within the meaning of the Constitution, but only a public corporation for municipal purposes, citing Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72, Ann. Page 82.

It would appear to follow that since an irrigation district is not a municipal corporation in the broad sense, that it is not a political subdivision. Yet, since such districts have certain of the attributes of sovereignty, such as the right to levy and assess taxes, hold and conduct elections and issue bonds, Courts frequently refer to them as political subdivisions, although they do not fit conveniently into any of the historic categories, such as states, counties, cities or boroughs.

Thus, the Supreme Court of the United States, in Ashton v. Cameron County Water Improvement District, 298 U.S. 513, at Page 527, said:

"It is plain enough that Respondent (an irrigation district) is a political subdivision of the state, created for local exercise of her sovereign powers, and that the right to borrow money is essential to its operation."

However, it is not necessary to determine here whether an irrigation district is a political subdivision within the meaning of Section 57-822 (g) (7) (E), since it is an instrumentality of the state, exercising governmental functions, and, as such, would be immune from taxation by the Federal Government under the Constitution of the United States.

The writer has not been able to find any cases in which the question of federal taxation of an irrigation district was at issue. However, in Ashton v. Cameron County Water Improvement District, supra, the Court held that the bankruptcy statute could not be extended to a municipality, or other political subdivisions of the state, since this amounted to an encroachment upon the sovereignty of the state, just as federal taxation of such instrumentalities was unconstitutional as an encroachment upon the sovereignty of the state.

In in re Lindsay-Strathmore Irrigation District, 21 Federal Supplement 129, the Court had the same question before it under amended provisions of the Bankruptcy Act (11 U.S.C.A., Sections 401 to 404), but was confronted with Turlock Irrigation District v. White, supra, and other California cases, holding that irrigation districts were public corporations for municipal purposes, and not political subdivisions of the state. Yet, there the Court held that since California irrigation districts were imbued with attributes of sovereignty, such as the power to tax, that they were "public instrumentalities and agencies of the state, subservient to it," so that by attempting to include such districts in the Bankruptcy Act, Congress had invaded the sovereignty of the state to such an extent that the act was unconstitutional.

In view of the foregoing, it is my opinion that even though an irrigation district, created under Chapter 77, Article 21 of the N.M. 1941 Compilation, is not a political subdivision in the strict sense of the word, yet it is an instrumentality of the State of New Mexico, with sovereign powers in carrying on governmental functions, so that it would be immune from federal taxation, and so under Section 57-822 (g) (7) (E), it is immune from the provisions of the Unemployment Compensation Act.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Assistant Attorney General