

## Opinion No. 45-4702

April 27, 1945

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Earle Kerr, Director Income Tax Division Bureau of Revenue Santa Fe, New Mexico. Attention: J. Leon Miller, Chief Auditor

{\*56} I have your letter of April 12, 1945, wherein you request an opinion of this office concerning whether or not amounts contributed or paid by an employee as railroad retirement, social security and retirement annuities are allowable deductions in a state income tax return in determining net income.

The question is whether or not such items are an allowable deduction under the provisions of Section 76-1207, subsection (c) of the New Mexico 1941 Compilation which provides:

"Taxes paid within the taxable year, except taxes imposed by this Act, as hereinafter provided."

The question arises whether or not payments under the above act by employees are taxes within the contemplation of this allowable deduction. 48 American Jurisprudence, Social Security, Unemployment Insurance, etc., Section 32, Page 537, provides in part:

"The tax has been characterized as one upon the relation of employment and upon the right to employ and as a payroll tax. It is not -- as taxes on the privilege of selling, manufacturing or processing characteristically -- measured by the value of the privilege taxed or by either quantity or price. Nor is such a tax within the contemplation of a contract referring to taxes on materials, articles or supplies."

51 American Jurisprudence, Taxation, Section 528, Page 531, provides in part:

"The primary rule of construction of statutes -- to ascertain and declare the intention of the Legislature and carry such intention into effect -- applies to the construction of enactments granting exemptions from taxation. \* \* \* Language relating to exemption of property from taxation should be given a fair and reasonable interpretation, neither too broad nor too narrow, in order to ascertain the true intent as to its scope, and then should be strictly applied and enforced so that the limits thus defined shall not be unduly enlarged or extended."

Section 531 further concerns the strict construction to be given exemptions from taxation, and Section 527 further states:

"Tax exemptions in favor of private persons depend upon an express grant by constitutional provision or legislative enactment, and, when granted, are to be strictly

construed against one who asserts the claim of exemption; every reasonable doubt is resolved in favor of the taxing power and against exemption from taxation, \* \* \*

Section 3 of this same article on taxation in 51 American Jurisprudence states:

"A tax is a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction, to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses. \* \* \* 'Public taxes' have been defined as those which are levied and taken out of the property of the person assessed for some public {57} or general use or purpose in which he has **no direct, immediate, or pecuniary interest.**" (Emphasis ours).

It is noted that in all contributions made by employees in connection with the railroad retirement act, social security, and retirement annuities, the employee has a direct, immediate, and a pecuniary interest, which is clearly outside the scope of the above definition of a tax, and it is therefore my opinion that employees' payments are not taxes within the contemplation of Section 76-1207 (c) of the 1941 Compilation, and are now allowable deductions in computing state income tax.

By HARRY L. BIGBEE,

Asst. Atty. General