

Opinion No. 45-4745

July 5, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Earle Kerr, Director School Tax Division Bureau of Revenue Santa Fe, New Mexico

{*98} We are in receipt of your letter of July 1, 1945 in which you ask the following question:

"May a taxpayer, subject to manufacturers or processors tax under sub-section 201-B, Chapter 73, Laws of 1935, who is required to pay Federal Excise Tax on the product processed deduct the amount of Federal Taxes from his tax measure from each levy assessed against him?' (Sec. 76-1404 of the 1941 Compilation)

Section 201-B imposes a tax equal to one-fourth of one per cent of the gross receipts of the business of every person engaged in the business of manufacturing, processing or preparing for sale or commercial use. Section 76-1413 of the 1941 Compilation provides in part:

"In all computations of the tax levied by this act, there shall be excepted from the gross receipts or gross proceeds of sales of any business all sums paid by the taxpayer to the United States as taxes on the product produced or sold, or on such business; * * *"

In view of this later section, if the taxpayer has paid a tax to the United States on a product produced or sold, he may deduct such sum from the gross receipts or gross proceeds of his sales.

As I am informed, that the manufacturer or producer involved manufactures tires, your attention is directed to Title 26, Section 3400 of the U.S.C.A. which provides in part as follows:

"(a) Tax. There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 5 cents a pound on total weight."

Since this tax is imposed only if the seller is a producer or manufacturer, it is an excise tax upon the manufacturer, and not a sales tax. See *Con-Rod Exchange, Inc. v. Henrickson*, 28 Fed. Supp. 924, dealing with a tax imposed in identical language.

In view of the foregoing, if the manufacturer or processor involved pays the manufacturer's excise tax imposed by Title 26, Section 3400 of U.S.C.A., he may

deduct the amount of the taxes so paid to the Federal Government from his gross receipts or gross proceeds in computing the tax imposed by Section 76-1404 B.

In passing, your attention is directed to the case of *Skinner v. U.S.* 8 Fed. Supp. 999, which holds that the manufacturer's excise tax imposed by 26 U.S.C.A. 3400 applies only to newly manufactured tires and not to retreaded tires.

Trusting the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General