Opinion No. 46-4905

May 23, 1946

BY: C. C. McCULLOH, Attorney General

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

*{*232}* You recite the following facts:

The Zia Company has a contract with the United States Government to perform certain services at Los Alamos, New Mexico. The contract is a cost-plus fixed fee contract. Under this contract the Government will reimburse the Zia Company for its expenditures and pay the Zia Company a fee in the amount of $ 12,250.00 per month, which shall constitute complete compensation for the Zia Company's services, including profit and all general overhead expenses. From time to time the Zia Company finds it necessary to purchase supplies in the State of New Mexico as, for instance, lumber from the Santa Fe Builders Supply Company.

Under these circumstances, you ask whether the Santa Fe Builders Supply Company would be liable for the school tax on the sale of such lumber, in view of the fact that the Santa Fe Builders Supply Company would include the amount of school tax in the sales price to the Zia Company, so that the United States would ultimately pay this tax as a part of the cost of the lumber.

The Supreme Court of the United States has passed upon the payment of a sales tax by a firm performing similar work for the United States under the same form of contract in the case of State of Alabama v. King and Boozer, 314 U.S. 1, 62 S. Ct. 44, 86 L. Ed. 3. In that case it appears that Alabama has a statute laying a 2% tax on the gross retail sales price of building materials sold to contractors. While the Alabama tax is laid on the seller, who is denominated the taxpayer, it is made the duty of the seller "to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax."

The contention having been made that since the tax was passed on as part of the construction cost to the Government that it was unconstitutional, the Court said at page 45:

"So far as such a nondis-criminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity."

The Supreme Court found that under the Alabama statute the contractors were obliged to pay the tax, but that the sale was made to the contractor rather than to the Government. The contractor paid for the lumber purchased and was reimbursed by the Government. In view of this, the Court said at page 47:

"The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors."

In conclusion, the Court said:

"The added circumstance that they were bound by their contract to furnish the purchased *{*233}* material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in James v. Dravo Contracting Co., supra."

The King-Boozer case was based to a large extent on the case of James v. Dravo Contracting Co., 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 918. That case involved the constitutionality of the tax imposed by the State of West Virginia upon the gross receipts of a contractor under contract with the United States in the construction of locks and dams. At page 160 the Court said:

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work."

Turning now to the New Mexico School Tax, Sections 76-1401 to 76-1446, inclusive, it is seen that the New Mexico tax is a tax levied on the seller for the privilege of doing business in New Mexico, with the amount determined by the gross receipts of the seller. The applicable provision is 76-1404, which is in part as follows:

"There is hereby levied, and shall be collected by the bureau of revenue, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the state of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

"D. At an amount equal to two (2) per cent of the gross receipts of the business of every person engaging or continuing in the business of selling at retail of goods, wares, materials, equipment, machinery, and commodities, including alcohol and all alcoholic liquors and beverages, for consumption and not for resale."

The New Mexico tax is not passed on directly or collectible from the purchaser as was true of the Alabama tax. However, the seller cannot advertise that the tax is not considered a part of the price of the property sold, since Section 76-1406 provides, in part, as follows:

"B. It shall be unlawful for any person engaged in any business or profession to directly advertise that any tax imposed by this act is not considered as an element of the price of property sold or service rendered."

It is seen that this section does not require that the tax be passed on directly or as a part of the price of the property sold. It merely prohibits advertising, that it is not passed on as a part of the price of the article sold. Thus, it is seen that the New Mexico tax is not a tax on or paid by the purchaser as was true under the Alabama statute, so that the Santa Fe Builders Supply Company pays the tax rather than the Zia Company.

It would appear under the King-Boozer case that a privilege tax measured by the amount of the sales or amount of services could constitutionally be levied upon a contractor under contract with the United States. However, Section 76-1405 of the New Mexico act provides that "none of the taxes levied by this act shall be construed to apply to sales made to the Government of the United States or any agency or instrumentality thereof, except a corporate agency or corporate instrumentality." In view of the foregoing, it is my opinion that *{*234}* you should collect the school tax on sales made by a New Mexico company, such as the Santa Fe Builders Supply Company to the Zia Company for use by the Zia Company under its contract with the United States.

By ROBERT W. WARD,

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