

## Opinion No. 55-6328

November 29, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Louis C. Lujan, Attorney, Bureau of Revenue, Santa Fe, New Mexico

In your letter of November 7, 1955, you ask our opinion as to whether a prime contractor may make the deductions provided for in Sub-section F of § 72-16-4, N.M.S.A., 1953 Compilation on all materials purchased under contract, i.e., those which he purchases himself and those purchased by his sub-contractors, or whether the prime contractor is limited in his deductions to the cost of those materials which he purchases himself.

You next ask whether, if we hold that the contractor may deduct the cost of all materials, the sub-contractor may deduct the cost of materials purchased by them.

The portion of the above mentioned statute applicable reads as follows:

"Section 72-16-4 F, N.M.S.A., 1953 Compilation provides among other things, as follows: 'There shall be deducted from the gross receipts of the business of contracting, the cost of all materials used and expended in the physical operation on the particular job, and becoming a part of the structure or subject of the contract, and upon which the New Mexico school or compensating tax or two (2) percent has been paid, and which will not thereafter be a part of the capital assets of the contractor; . . . '."

The intent of the above deduction is obvious, we believe. It was the feeling of the Legislature that the ultimate purchaser should not be required to pay more than the amount of one tax upon materials becoming a part of the subject of a contract. It was not the intent of the Legislature that such materials were to be used as a "gimmick" in order to reduce the amount of school tax payable by a contractor operating through subcontractors and sub sub-contractors. To hold that the cost of materials may be deducted more than once clearly reaches a ridiculous result. In cases where there are several grades of sub-contractors, the cost of materials purchased by a sub-contractor could be deducted from gross receipts of three different contractors, although only one contractor purchased the materials, thus reducing the school tax to a figure far below that which would have been payable had the job been let and handled as one contract by a prime contractor.

It is our opinion, therefore, that the cost of materials may be deducted only once.

A more difficult question of statutory construction arises, however, when the situation of "who may deduct the cost of what materials" is considered. Two possibilities arise; either the prime contractor may deduct the cost of all materials going into the entire job, and the sub-contractors may deduct none, or each sub-contractor may deduct the cost

of materials purchased by him and which become a part of the physical structure, and the prime contractor only those materials actually purchased by him. We feel the latter interpretation to be the more reasonable and equitable. Inasmuch, however, as the statute is not completely clear, we suggest that a regulation to this effect be promulgated by the Commissioner of Revenue.

By: Walter R. Kegel

Assistant Attorney General