

## **Opinion No. 57-114**

May 28, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,  
Assistant Attorney General

**TO:** Mr. Charles B. Barker, Attorney, Legal Division, Bureau of Revenue, Santa Fe,  
New Mexico

### **QUESTIONS**

#### QUESTIONS

Sections 72-16-33 and 72-17-20, N.M.S.A., 1953 Compilation, relate to preservation of records and require that the records be preserved and open to inspection by the Bureau of Revenue for a period of three years. May the Bureau of Revenue notwithstanding the above provisions, audit records which are more than three years old if such records have, in fact, been kept and preserved?

#### CONCLUSION

No, but they may be obtained by subpoena after the three years if they are in existence.

### **OPINION**

#### ANALYSIS

Section 72-16-33, supra, found in Article 16 of the Revenue Code and relating to New Mexico Sales Tax, states as follows:

"It shall be the duty of every person engaging or continuing, in New Mexico, in any business for which a tax is imposed by this act to keep and preserve suitable records of the gross receipts of such taxpayer, and such other books and accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this act; and it shall be the duty of every such person to keep and preserve; for a period of three years all production and sale records, all records of business and other charges for services rendered, and all invoices of goods and merchandise purchased for resale; and all such books, invoices and other records shall be open for examination at any time by the commissioner of revenue or its duly authorized agent."

Section 72-17-20, supra, is contained in Article 17 of the Revenue Code which is commonly cited as the Compensating Tax Act of 1939. It states:

"It shall be the duty of every person subject to the tax imposed by this act, to keep and preserve suitable records, and such other books and accounts as may be necessary to

determine the amount of tax for which he is liable under the provisions of this act; and it shall be the duty of every such person to keep and preserve for a period of three years such books and records, and all such books and other records shall be open for examination at any time by the commissioner of revenue or its duly authorized agent."

The Sections above require (1) that every person subject to the tax shall keep and preserve suitable records, (2) that it shall be the duty of every such person to keep the said records for a period of three years, and (3) that all such books and other records shall be open for examination at any time by the commissioner of revenue or his duly authorized agent. Neither Statute specifically authorizes the Commissioner or his agent to inspect other records, which the person subject to the tax may have in his possession.

Requirements such as the above are common in all states which have a sales, or compensating or use tax, in effect. We have not, however, found any case law construing the above section. In **Amarillo-Pecos Valley Truck Lines vs. Gallegos**, 44 N.M. 120, 99 P. 2d 447, the Supreme Court of New Mexico states:

"In construing tax statutes, the general rule is that tax statutes should be construed strictly insofar as they may operate to deprive a citizen of his property by summary proceedings or impose penalties or forfeitures on him, . . ."

And, our Supreme Court, in **Southern Pacific Railway Company vs. State**, 34 N.M. 479, 284 P.117, held:

"Statutes imposing taxes and providing means for the collection of the same should be construed strictly, insofar as they may operate to deprive the citizen of his property by summary proceeding or impose penalties or forfeitures upon him, but otherwise tax laws should be construed with fairness, if not liberality in order to carry out the intention of the legislature and further the important public interests which such statutes subserve."

It should be pointed out that both Acts provide for a summary proceeding in the collection of the tax, and both sections of the Acts specifically treated in this opinion allow inspections at any time by the commissioner of revenue, without the aid of subpoena, and with no rule of reasonableness stated.

It is the opinion of this office that a strict application of statutory construction would not allow us to read into the sections authority to inspect records not contained therein. We believe that the examiners of the Bureau of Revenue must necessarily limit their audits of records to such records which are to be kept for the three year period, as required by the Statutes, and that they have no authority conferred upon them by virtue of the above sections to check such other records which may have been kept and preserved.

By way of conclusion, we feel that should an action be instituted in the courts, any records that persons subject to the Act might have, could be subpoenaed into court if

the action were timely and in accordance with our taxing statutes. We do not feel, however, that any summary authority for the inspection and production of records exists except as indicated in this opinion.