Opinion No. 57-247

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BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Representative Anderson Carter, Chairman, Legislative Finance Committee, Post Office Box 1651, Santa Fe, New Mexico

QUESTION

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"Are receipts from sales to or receipts for services performed under contract for the Federal Government, its agencies and instrumentalities to be included within the gross receipts of a business taxable under the provisions of the Emergency School Tax Act, as amended?"

CONCLUSION

Yes.

OPINION

ANALYSIS

The New Mexico Emergency School Tax Act, Laws 1935, Ch. 73, provided for the levy of an excise tax in the following form:

"There is 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 New Mexico in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: . . . ."

Section 72-16-4, N.M.S.A., 1953 Comp. P.P. Under the doctrine laid down in McCulloch v. Maryland, 4 Wheat 316, 4 L.E.d. 579, no state tax may stand which imposes a burden on the United States or any of its instrumentalities. Accordingly, as expressed in 47 Am. Jur. 224:

"Sales tax statutes commonly contain either an express exemption of sales to the United States or its instrumentalities or a general provision declaring that the tax shall not be applicable in a situation where it could not be constitutionally imposed."

Such a provision was enacted as a part of the New Mexico law, in its earlier form. Section 72-16-5 specifically provided 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, nor to sales to the state of New Mexico or any of its political subdivisions; Provided that deposits of gold and silver with the United States' mint shall not be considered as sales to the government of the United States and shall not be exempt hereunder; nor shall such taxes apply to any business or transactions exempted from taxation under the Constitution of the United States or the state of New Mexico, or to sales made to societies, hospitals, fraternal or religious organizations not organized for profit."

While the "doctrine of implied constitutional immunity," as uttered in McCulloch v. Maryland, supra, stands today as bulwark against the states' attempts to recoup their ratified delegation of sovereign power in certain areas, a number of distinguishing decisions have subsequently been handed down. Of prime importance to the question herein being considered in the case of Black Hawk Consol. Mines Co. v. Gallegos, 52 N.M. 74, 191 P.2d 996. Here the court was confronted with the application of Section 72-16-5, supra, to the mining of gold and its ultimate sale to a United States mint, a Federal instrumentality. In describing the school tax law the Court said:

" **The New Mexico Emergency School Tax is a tax upon the privilege of engaging or continuing in business in New Mexico.** It is not limited to taxing those whose gross receipts are derived from sales of property; but it covers the entire range of business activities, with a few specific exceptions. It is sometimes measured by gross sales, but often by gross receipts for professional services, and from other businesses or occupations which are in no sense "sales" as that word is ordinarily used. **It has been erroneously denominated a "sales tax" by this Court, more than once (Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416; Iden v. Bureau of Revenue, 43 N.M. 205, 89 P.2d 519), but as the Act provides, it is a privilege or excise tax; a tax upon the privilege of engaging in or continuing in business in this state."** (Emphasis supplied.)

The Court further removed the New Mexico tax law from the realm of the "immunities" doctrine by further holding in the Black Hawk case, that:

"It is said that under the doctrine of McCulloch v. Maryland, cit. supra, the tax is void because it is a tax upon the United States or its instrumentalities.

"There are several reasons why this is not correct, the principal one being that no tax is laid upon the gold, nor is the United States affected by it. The cost to the United states is fixed, and the price not varied by state taxes or by any other incident."

The question of immunity from local taxation was fully considered by the Oregon Supreme Court in General Construction Co. v. Fisher, 149 Or. 84, 39 P.2d 358, 97 A.L.R. 1252, wherein the court said, at page 1256:

"The principle of immunity from state or local taxation of the property and instrumentalities of the United States is generally based upon the direct ownership or use and control of the property by the United States. **Such immunity does not extend to the property of an independent contractor for gain, even should it be used in carrying out a contract with the United States.** The same principle obtains regarding taxation by the United States of incomes derived by persons and corporations from the state. Metcalf & Eddy v. Mitchell, supra." (Emphasis supplied.)

"Plaintiff also contends that the imposition of this tax on it tends to hamper and delay the Federal government in carrying out its contracts. The Federal government is not complaining. Neither has it commissioned the plaintiff to intervene in its behalf. Nor does plaintiff seek to recover the tax paid for the benefit of the United States. **Every tax levied has some remote tendency to interfere with the contractual relations between parties, but that is no reason why such parties should not contribute their just proportion to the expresses of maintaining the government from which they demand protection for their property and privileges. In the instant case, the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract or hindered the Federal government in its governmental functions.** Willcuts v. Bunn, 282 U.S. 216, 51 S. Ct. 125, 75 L. ed. 304, 71 A.L.R. 1260; Alward v. Johnson, 282 U.S. 509, 51 S. Ct. 273, 75 L. ed. 496, 75 A.L.R. 9; Indian Territory I. O. Company v. Board of Equalization, 288 U.S. 325, 53 S. Ct. 388, 77 L. ed. 812; McCallen Co. v. Com. of Massachusetts, 279 U.S. 620, 49 S. Ct. 432, 73 L.ed. 874, 65 A.L.R. 866; Jaybird Mining Company v. Weir, 271 U.S. 609, 46 S. Ct. 592, 70 L.ed. 1113; Solitt & Sons v. Commonwealth, 161 Va. 854, 172 S.E.290, 91 A.L.R. 774 and note." (Emphasis supplied.)

And, at 114 A.L.R. 318, we find a presentment of the James v. Dravo Contracting Co. case in the following language:

"An occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the Government of the work contracted to be done."

In Esso Standard Oil v. Evans, 345 U.S. 495, 97 L.ed. 1174, the latter reports by way of a summary of the decision, that;

"A state privilege tax on the business of storing gasoline, measured by the quantity of gasoline stored, was, upon demand, paid by the contractor. His suit for refund of the tax, in which the federal government intervened, was rested on the ground that the tax was barred by the constitutional doctrine of inter-governmental immunity. This claim was rejected by the state courts.

"On appeal, five members of the Supreme Court, in an opinion by Reed, J., affirmed the state court's action, taking the view that the tax was not one "on" government property,

and that the contractor was not immunized from the tax by virtue of the fact that the property stored was owned by the federal government."

In keeping with the stated nature of the New Mexico Emergency School Tax as being a privilege tax, where the incident or burden falls not upon the sale of property or services, but rather upon the privilege of conducting a business or profession in this state, it is our opinion that businesses, as described in the considered act are not exempt from the levy.

In 1957 the Legislature, being advised of the aforecited decisions, amended the school tax law, in part, to read as follows:

"None of the taxes levied by this act shall be construed to apply to sales made to the state of New Mexico or any of its political subdivisions; nor to sales made to societies, hospitals, fraternal or religious organizations not organized for profit."

By the amendment, the previously stated exemptions for the government of the United States, its agencies and instrumentalities, were removed. Accordingly, the fulfillment of terms of a contract entered into by any person making sales and rendering services to an agency or instrumentality of the Federal Government, is subject to the privilege tax herein considered as long as such sales or services are accomplished within the state.

It may be pointed out that the New Mexico School Tax Law is also not subject to the "immunity" doctrine, supra, by reason of the fact that there is no requirement that the licensee pass the tax on to the purchaser. Previous to 1939, Section 72-16-7(b) provided:

"It shall be unlawful for any person engaged in any business or profession subject to tax under the provisions of this act **not to collect** or by any character of public advertising to offer to absorb the tax levied by this act or to advertise directly or indirectly in any manner that any tax imposed by this act is not considered as an element of the price of property or service." (Emphasis supplied.)

The requirement "to collect" the tax was eliminated by Laws 1939, Ch. 94, § 2. Thus, today, while the licensee is not prohibited from passing on the amount of the tax to his customer, he is by the same manner of reasoning not required to do so. The ultimate price or cost to the customer is one based upon free competition and contract.