

## **Opinion No. 57-302**

November 25, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,  
Assistant Attorney General

**TO:** Mr. Eric L. Freelove, Sandoval County Senator, La Jara, New Mexico

### **QUESTION**

#### QUESTIONS

1. Are persons, corporations or businesses doing business with Rural Electric Cooperatives in the State of New Mexico subject to the payment of the 2% school tax on such business?
2. May such businesses pass such tax on to the Rural Electric Cooperatives as part of the purchase price of the goods or services sold?

#### CONCLUSIONS

1. Yes.
2. Yes.

### **OPINION**

#### ANALYSIS

It is settled law in the State of New Mexico that the emergency school tax imposed by Chapter 73 of the Laws of 1935, as amended (§ 72-16-1 through § 72-16-47, N.M.S.A., 1953), is a privilege tax or an excise tax which is levied upon the privilege of engaging in or continuing in business in this State. See *Black Hawk Consolidated Mines Co. v. Gallegos*, 52 N.M. 74 (1948), at page 79. Accordingly, the tax has its legal incidence directly upon the vendor of goods or services rendered subject to the tax by the statute, and the status of the purchaser is not material to determination of the question of liability for payment of the tax except in the cases specifically enumerated in § 72-16-5, N.M.S.A., 1953, as amended by Chapter 187, Laws of 1957. The tax upon the vendor is measured by the gross receipts of business done under § 72-16-4, and only sales made to the State of New Mexico, its subdivisions or to societies, hospitals, fraternal or religious organizations not organized for profit are to be excluded from the computation of gross receipts under § 72-16-5.

The only transactions involving the sale of goods or services to a Rural Electric Cooperative which are exempt from the emergency school tax are those which are

specifically enumerated in § 72-16-15. Thus, by way of illustration, sales made by a nonprofit corporation under the laws of the State of New Mexico to a Rural Electric Cooperative would not be subject to the tax by virtue of subsection (a) of the statute cited.

We recognize that § 45-4-28, N.M.S.A., 1953, (Laws 1939, Chapter 47, as amended), provides as follows:

"Cooperative and foreign corporations, transacting business in this state pursuant to the provisions of this act, shall pay annually, on or before the first day of July, to the state corporation commission, a tax of ten (\$ 10.00) dollars for each one hundred (100) persons or fraction thereof to whom electricity is supplied within this state, which tax shall be in lieu of all other taxes of whatsoever kind or nature."

It is true that this statutory provision, enacted subsequent to the emergency school tax act, must be considered to exempt from the school tax the sale of electricity by a Rural Electric Cooperative to its customers. Since the legal incidence of the emergency school tax is upon the vendor of the goods or services as a tax with respect to his privilege of doing business, it is clearly immaterial to the consideration of the first inquiry that the cooperative, the purchaser of the goods or services, may not itself be subject directly to the tax because of the statute cited.

The situation is somewhat analogous to that involved in *State of Alabama v. King and Boozer*, 314 U.S. 1, 140 A.L.R. 615 (1941), in which the United States Supreme Court, overruling previous decisions, upheld the imposition of a state sales tax upon one who acted as a contractor with the United States Government against the argument that the ultimate economic incidence of the tax upon the United States Government as purchaser from the contractor rendered the tax bad under the doctrine of constitutional immunity from state taxation.

Also illustrative of the reasoning which supports the conclusion above reached are the cases of *Federal Reserve Bank of Chicago v. Department of Revenue*, 64 N.W. 2d 639 (Mich. 1954), and *National Bank of Detroit v. Department of Revenue*, 66 N.W. 2d 237 (Mich. 1954), both of which uphold the levy of a state sales tax with respect to the proceeds of business done with banking institutions exempt from state taxation as instrumentalities of the United States, when the legal incidence of the sales tax was upon the vendor, who was not required to pass the tax on to the purchaser. See also Opinion No. 57-297 overruling Opinion No. 6027 to the extent inconsistent therewith.

With respect to the second question, it is clear that the vendor selling goods or services to an organization which is itself exempt from the school tax may nevertheless pass on to such customer the amount of the school tax. Although such vendor is liable for the tax, measured by the gross receipts of his business, including gross receipts of business done with a Rural Electric Cooperative, such person is free to pass the tax on to the consumer, as a matter of contract, as part of the sales price. In doing so, the vendor is not acting as an agent of the State for the purpose of collecting the tax, and

the purchaser has no liability to the vendor or to the State for the payment of the tax as such, apart from the contractual or quasi contractual arrangement with the vendor. See, e.g., *People's Drug Shop v. Moysey*, 45 N.E. 2d 978 (Ill. App. 1943).

Based upon the foregoing, it is our view that a business selling goods or services to a Rural Electric Cooperative is subject to the emergency school tax with respect to the proceeds of sales to such cooperative, and is permitted to pass the tax on to such cooperative as part of the sales price.