Opinion No. 58-131

June 20, 1958

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

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

QUESTION

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With reference to §§ 1 F, Chapter 177 and 227, Laws 1957, is it permissible for prime contractors as well as sub-contractors to deduct the cost of materials purchased and used by either of them in determining their individual school tax liability?

CONCLUSION

Yes.

OPINION

ANALYSIS

Prior to the 1957 enactments, above cited, § 72-16-4 provided, as is of importance here, the following:

"72-16-4, PRIVILEGE TAXES LEVIED - MEASURED BY AMOUNT OF BUSINESS. - 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:

F. At an amount equal to two percent of the gross receipts of the business **of every person engaging or continuing in the business of contracting for the construction, reconstruction, repair or improvement of any building, dwelling or edifice, as original contractor, sub-contractor, or independent contractor,** or engaging or continuing in the business of contracting for the construction, repair or improvement of highways, bridges, dams, canals, public or private, excavation for and laying of pipelines, erection and repair of oil storage tanks, water tanks, construction of railroads, railroad terminals, the drilling of wells, oil wells, sinking of shafts or driving of tunnels in mines, tanking, land-clearing, cutting timber, and general excavation dirt work, or any other similar work or performance in which each person, firm or corporation covenants, bargains or agrees to perform said work for a stipulated sum of money or

thing of value or at a cost plus a percentage or additional sum, provided, however, that a contractor cutting and sawing timber which will be further processed by a lumber or saw mill before use, the cutting and sawing thereof shall be considered as manufacturing and preparing for commercial use and shall be taxed under paragraph B of this section. The rental of contractor's teams, with or without drivers and of contractor's machinery and equipment, with or without operators, shall be considered a sale of service and the income therefrom shall be taxable at the rate of two percent without deduction. **There shall be duducted 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 of two per cent has been paid and which will not thereafter be a part of the capital assets of the contractor,.** . ." (Emphasis ours).

The language last before underlined was construed in A.G. Opn. No. 6328, dated November 29, 1955, to reflect a legislative intent which would have imposed upon the "ultimate purchaser . . . one tax upon materials becoming a part of the subject of a contract". There follows, however, in said Opinion an inconsistent conclusion, i.e.:

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

In an effort to clarify the misunderstanding arising from A.G. Opn. No. 6328, it is necessary to return to the statute, as above quoted. Here we find that the Bureau of Revenue is charged with the collection of a privilege tax, "measured by the amount of business done" from all individuals and firms as are engaging or continuing their business activities with New Mexico. Specifically subjected to the levy, along with others, are "original" contractors, "sub"-contractors and "independent" contractors. And with reference to **each** of stated classes of contractors, as well as all other persons or firms covered by the statute, "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 upon which the N.M. school or compensating tax of two percent has been paid . . ." This language is applicable to all who are covered by the act.

In the earlier opinion, it was stated that:

"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 sub-contractors and sub-sub-contractors."

Obviously no argument can be made in answer to this statement. By the same logic, however, it may not be concluded that the practice of present day contracting and subcontracting should suffer a multiple tax burden by reason of a failure to recognize an equal applicability of the provided deduction to each class of person or business specified. It has been argued that the allowance of a materials' deduction through sub and prime contractors from a lesser class of contractor effects a ridiculous result by

reason of a conclusion that a single contractor in performing along would pay a greater tax. It is our opinion that this conclusion is not founded upon premises appearing in the law.

The intent of the Legislature is apparent from the first paragraph of Sec. 72-16-4, as before paraphrased. And the provided deduction serves but one purpose; that of eliminating from consideration the cost of materials, upon which a tax has already been paid, in determining the tax for which each individual is liable by reason of his participation on the job. Recalling again, in part, the language of the first paragraph of Sec. 72-16-4:

"There . . . shall be collected . . . . privilege taxes, measured by the amount or volume of business done, . . ."

The business of contracting, in the sense herein contemplated, is not that of fabricating or producing building materials, but rather that of using such materials. The statute refers to these deductibles as that, ". . . which will not thereafter be a part of the capital assets of the contractor; . . ." The tax herein considered is levied upon one's licensed privilege to perform the services of his trade or profession but not upon the tools or materials required in this performance upon which the tax has been earlier paid.

Accordingly, it is our opinion that the cost of materials may be deducted by the lesser using contractors as well as prime contractors in determining the tax liability of each arising out of the amount or volume of business done.

Returning to the question above put, it should be noted two acts were signed into law during the 1957 Legislature which were of direct concern to the law here discussed. First, Senate Bill 209 was introduced and ultimately signed into law as Ch. 177, Laws 1957, an amendment to Sec. 72-16-4. The law, as approved March 28, 1957, provided in part 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 of two percent has been paid, and which will not thereafter be a part of the capital assets of the contractor **and each subcontractor shall deduct said gross receipts on such of said materials purchased by him;** provided, gasoline, motor fuel, grease and oil, freight or transportation charges. wages and salaries paid, small tools and accessories shall not be considered deductible items." (Emphasis ours).

By reference to the amendatory language underlined, it is apparent that the legislature intended that deductions were to be taken by contractors and subcontractors for materials purchased and used "in the physical operation on the particular job, . . .". The intended effect of Senate Bill 209 was undoubtedly that of clarifying the deduction provided for in § 72-16-4, supra.

Considering further, however, there was enacted into law on March 29, 1957, Ch. 227, Laws 1957, which enactment, with regard to § "F", supra, reinstated the provision exactly as it had existed prior to the signing of Senate Bill 209. By this action, it is our opinion that the earlier law (Ch. 177, Laws 1957) was effectively repealed by implication.

This office is not unaware that generally and particularly in this state, implied repeal of legislative acts is not favored. It is our opinion, however, that the instant situation in the law cannot be reconciled and that latest enactment operates to repeal the earlier statute.

While the recent legislative attempt to clarify the law was not effective, it is our opinion nevertheless that the existing statutory language does, without need for further clarification, express the legislative intent and provide an unmistakable guide to determining the tax liability imposed.

The conclusions and directions of Attorney General Opinion No. 6328 as they differ herewith are specifically overruled.