

Opinion No. 58-132

June 20, 1958

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

TO: Glen S. Albright, Brigadier General, NMARNG, Assistant Adjutant General, Santa Fe, New Mexico

QUESTION

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Are purchases made by the United States Property and Fiscal Officer, for use by and the benefit of the New Mexico National Guard, subject to taxation: (1) Under the provisions of the New Mexico Emergency School Tax; (2) Under the Gasoline Tax laws?

CONCLUSIONS

1. Yes.
2. No.

OPINION

ANALYSIS

As indicated in your letter of inquiry, a Property and Fiscal Officer is a national guard officer who is appointed by the governor of a state and who is ordered to federal active duty for the purpose of administering and accounting for all funds appropriated for and allotted by Congress to the several national guard commands. Such appointees become officers or agents of the United States when approved by the Secretary of the Army. **Woodford v. U.S.**, (CCA 8), 77 F.2d 861. Specific duties are imposed, in part, on these officers by Title 32, § 49, FCA:

". . . He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory. or District and shall make such returns and reports concerning the same as may be required by the Secretary of War (the Army). The Secretary of War (the Army) is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War (the Army), be necessary for the purposes enumerated therein. He shall render, through the War

Department (Department of the Army), such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department (General Accounting Office)"

The funds as are disbursed by the Property Officer are annually appropriated by Congress in keeping with Title 32, Secs. 21 and 22, FCA, and include no monies as may otherwise be appropriated by the several legislatures for use by state adjutant general's offices.

Turning now to the taxes above considered, Sec. 72-16-4 (PS) provides in part the following:

"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:

* * * *

D. At an amount equal to two per cent (2%) of the gross receipts of the business of every person engaging or continuing in the business of selling at retail of goods, wares, materials, equipment, machinery, and commodities, including alcohol and all alcoholic liquors and beverages, for consumption and not for resale, and including receipts from rentals or leasing of tangible personal property; . . ."

This is a true privilege tax, the incident thereof falling on the licensed privilege to conduct a business or to render services within the state. There is no requirement that the levy be passed on to the ultimate consumer, but also there is no prohibition against the licensee doing so. Attorney General Opinion No. 57-247, dated September 27, 1957.

Prior to enactments by the Twenty-third Legislature, there was specifically provided by Sec. 72-16-5 exemptions from taxation as would arise from ". . . sales made to the government of the United States or any agency or instrumentality, . . ." thereof. This exemption, however, was repealed in 1957, thus effectuating the statute 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."

The obvious intent of the Legislature, by this action, was to remove previously provided exemptions for the Government of the United States, its agencies and instrumentalities.

Accordingly, it is our opinion that purchases made by the U.S. Property and Fiscal Officer, for the use by the New Mexico National Guard, are not such as may be

considered by the retail or wholesale licensee as exempt in making tender of the tax imposed.

The second tax about which inquiry is made is provided for by Sec. 64-26-2:

"(a) There is hereby levied and imposed an excise tax of six cents (6c) per gallon upon the sale, use, or sale and use of all motor fuel sold or used in this state for any purpose; . . ."

Unlike the school tax, afore discussed, the incidence of the tax here considered falls on the sale and use of gasoline and is an excise to the price thereof. This tax must be collected from the consumer unless specifically exempt.

In connection with the levy of the gasoline tax, however, there was enacted an exemption for the benefit of the "United States of America or any of its agencies or instrumentalities which under the Constitution and laws of the United States is not subject to the taxes imposed by this act". Section 64-26-13 (PS). This exemption is in keeping with the early day opinion expressed in **McCulloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579, whereby the Federal Government was held "immune" from state taxation.

While the Federal Government has seen fit to relieve the state of the task of proving the unburdensome nature of many of their respective levies. Title 4, Secs. 104 105 and 106, FCA, still by Title 4, Sec. 107, FCA:

"(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser."

Accordingly, it is our opinion that gasoline purchased by the United States Property and Fiscal Officer as hereinbefore considered is exempt, under existing law, from the excise tax imposed there on by Sec. 64-26-2.