

Opinion No. 58-33

February 17, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General

TO: Mr. Dallas Rierson, New Mexico College of Agriculture and Mechanic Arts *2*State College, New Mexico

QUESTION

QUESTION

Whether under Sections 47-18-4 and 47-18-12, the New Mexico College of Agriculture and Mechanic Arts may assess the tax on commercial feed stuffs sold on a reporting system or whether or not they must confine themselves to a take system.

CONCLUSION

Either system is authorized.

OPINION

ANALYSIS

The two sections of the statutes involved in regard to the above stated question are as follows: § 47-18-4, which reads as follows:

"Each and every manufacturer, importer, jobber, firm, association, corporation or person, manufacturing or selling any commercial feeding stuffs, as defined in section 1 of this act, shall, before selling, offering or exposing for sale any commercial feeding stuffs, pay to the regents of the Agricultural College of New Mexico an inspection tax or fee of twelve cents (12c) per ton, for each brand of commercial feeding stuffs sold, offered or exposed for sale or distributed in this state, and shall affix to or accompany each lot shipped in bulk, and to each parcel of such commercial feeding stuffs, tags or stamps to be furnished by the said regents, stating that all charges specified in this section have been paid."

The second statute which we believe is controlling is § 47-18-12.

The first question which we must answer is whether or not the words "shall before selling, offering or exposing for sale any commercial feeding stuffs, pay to the regents of the Agricultural College of New Mexico an inspection tax or fee of twelve (12c) cents per ton" are mandatory or directory. The use of the word "shall" usually indicates a mandatory statement. However, in Volume 51 of American Jurisprudence at page 359, we find the following:

"305. As Mandatory or Directory. - One of the commonest problems in connection with the construction of tax statutes is whether or not the provisions thereof are mandatory, defining that term to mean one the omission to follow which renders invalid the act or proceeding to which it relates, or directory, meaning one the omission to follow which does not involve such consequences. Speaking broadly, it may be said that provisions in tax laws intended to promote dispatch, method, system, and uniformity in modes of proceeding, or designed merely for the information of administrative officers, are usually deemed to be directory; but those intended for the protection of the taxpayer and to prevent a sacrifice of his property are mandatory, and they must be followed, or the acts done under them will be invalid. A taxing statute, even if not explicitly mandatory, is so regarded by the judiciary where literal observance of its terms affords substantial protection to a complaining taxpayer. * * *"

Also in **Faunce v. Carte** 173 P. 2d 526, there is the following language

"Whether the word 'shall' as contained in a particular statute is to be construed in an imperative sense or as merely directory depends upon the intent of the legislature in its use of that word, such intent to be derived from the general, as well as specific, legislation upon the subject, and to be determined by recourse to the ordinary rules of construction."

Hence, we can see that in a tax statute such as this that the liability only must accrue and it makes very little difference whether or not the tax is paid before or after the sale. Hence, we believe that the full import of the law and the statute and the reasons for the statute could just as easily be complied with if the conclusion were reached that the word 'shall' in the above quoted portion is directory. In Section 47-18-12, the statute provides for rules and regulations to be passed by the Board of Regents of New Mexico College of Agriculture and Mechanic Arts. This indicates that one administrative phase of the above taxing statute may be subject to regulation by the Board of Regents. We view the question of the method of collection of the tax as a regulatory and administrative arrangement hence we believe that the statute is directory, and the reporting system may be utilized in the event the Board of Regents so desires.