

Opinion No. 59-30

April 1, 1959

BY: FRANK B. ZINN, Attorney General

TO: Mr. Richard H. Robinson Attorney, Legal Division Bureau of Revenue Santa Fe, New Mexico

Airplane dealers whose annual gross receipts are less than \$ 500,000 are subject to the school tax levy; those whose gross receipts are more than \$ 500,000 are subject only to a \$ 1,000 annual tax. A question of constitutionality arises under Article II, Section 18, New Mexico Constitution, providing equal protection of the laws.

OPINION

{*44} This is written in reply to your recent request for an opinion on the following question:

Does the levy imposed by the New Mexico Emergency School Tax Act, as amended, apply to persons or firms engaged in the business of selling airplanes?

It is my opinion in view of the existing law that airplane dealers "whose annual gross receipts are five hundred thousand (\$ 500,000.00) dollars or less" are liable for the school tax levied. It is my further opinion, however, {*45} that airplane dealers whose annual gross receipts are greater than \$ 500,000 are exempt from school tax liability, but are in turn subject to an annual tax of \$ 1,000 payable to the State Corporation Commission.

A brief review of the controlling statutes reveals that by Section 72-16-4, N.M.S.A., 1953 Compilation (P.P.), "There is levied, and shall be collected by the Bureau of Revenue, privilege taxes, measured by the amount or volume of business done, . . . in the amounts determined . . . as follows:", and with particular attention directed by the considered business, Section 72-16-4 D, N.M.S.A., 1953 Compilation (P.P.), provides that taxes are levied,

"At an amount equal to two per cent of the gross receipts of the business . . . of selling at retail . . . equipment . . . and commodities . . . for consumption and not for resale, . . . Provided that a person engaged in selling at retail . . . new and secondhand vehicles not subject to registration shall pay a tax of one per cent upon the gross receipts of sales of such commodities; . . .".

At this point it must be concluded that airplane dealers are subject to the privilege tax. There is, however, another section, as pointed out in your request, which must be looked to and given serious consideration. Section 72-9-1, N.M.S.A., 1953 Compilation, specifically provides that:

"There hereby is levied against any person, firm or corporation operating in this state, the business of selling or leasing airplanes, including spare engines, spare propellers and other spare parts a license tax of one thousand (\$ 1,000.00) dollars, payable annually on or before the first day of July of each year commencing with the year one thousand nine hundred forty-nine, to the state corporation commission, **which tax shall be in lieu of all other taxes and assessments of whatsoever kind or nature, excepting ad valorem taxes.** Any ad valorem taxes on airplanes, spare engines, spare propellers and other spare parts, of such a person, firm or corporation which are physically located within this state during only a part of any tax year, shall be prorated on the basis of the portion of the full tax year that said property is physically located within this state. Provided that the tax collected under this act shall be distributed to the state general fund. Provided, that the provisions of this act shall not apply to any person, firm or corporation, whose annual gross receipts are five hundred thousand (\$ 500,000.00) dollars or less." (Emphasis supplied).

In view of the underlined language of this last quoted law, it is clear that the legislature intended persons who are engaged in the business of selling airplanes to be exempt from the excise tax provided by the Emergency School Tax Act if their gross receipts are five hundred thousand dollars or more. If, however, gross receipts total less than five hundred thousand dollars, then Section 72-9-1 has no applicability and the provisions of Section 72-16-1 and Section 72-16-4 D (the school tax law) must again be looked to. At this point a question of constitutionality arises, but is reserved for later discussion.

Returning once again to Section 72-16-4, N.M.S.A., 1953 Compilation (P.P.), it now becomes necessary to resolve the question of whether the business of selling airplanes is to be identified with the language of the statute which provides a one per centum tax on the business of selling "new and secondhand vehicles not subject to registration."

The word "vehicle" was defined to include airplanes as items of merchandise, **U.S. v. One Pitcairn {*46} Biplane**, 11 F. Supp. 24, 26, but an airplane was held not to be a vehicle within the meaning of a registration statute, **Di Giulio v. Rice**, 70 P. 2d 717, 719. In the instant case, I believe this question can be settled by looking a bit further in the statute where we find that "sales of new and secondhand vehicles" are of the type contemplated in Chapter 247, Laws 1955. This law is found compiled as Section 64-11-15, N.M.S.A., 1953 Compilation (P.P.), or as part of the Motor Vehicle Code. There follows from a search of this code that "vehicles" include motorcycles, trucks, buses, tractors, passenger automobiles and trailers. There is no definition found in the Motor Vehicle Code which suggests that airplanes would in the same sense also be considered vehicles.

From what has been said, it must be concluded that where the airplane sales business is subject to taxation under the School Tax Act, such levy must be imposed at the two per centum rate.

In addition to the conclusions stated, and in keeping with what was earlier stated, I feel that it is appropriate and necessary to point out a serious doubt as to the constitutionality of Section 72-9-1. It is to be noted that airplane dealers are by this statute specially taxed and thereby exempt from "all other taxes and assessment of whatever kind or nature, excepting ad valorem taxes". Such an exemption classification is certainly not uncommon nor is there a question raised by such classification. Question does arise, however, with reference to the more refined exemption classification found as the last provision of the statute which makes the law applicable only to airplane dealers having gross receipts of \$ 500,000 or more.

Our Supreme Court has given meaning to the subject of legislative classifications in **State v. Sunset Ditch Co.** 48 N.M. 17, 145 P. 2d 219, and in **State v. Pate**, 47 N.M. 182. In the **Sunset Ditch** case, the Supreme Court said:

"It was held in the Ten Eyck case, supra, that, in the absence of any showing of reasonable basis for the classification made by the statute the court has no right to conjure up possible situations which might justify the discrimination.

It is elementary that such classifications must be reasonable and not arbitrary, and that the classification attempted in order to avoid the constitutional prohibition must be founded upon pertinent and real differences as distinguished from artificial ones. Mere difference, of itself, is not enough. (Citing authorities)."

From a practical standpoint, administration of the existing law most certainly will reveal an unreasonable classification in that imposition of school taxes on dealers having gross receipts of less than five hundred thousand dollars will in many instances involve a tax obligation many times greater than the one thousand dollar annual tax imposed on those enjoying gross receipts of more than five hundred thousand dollars.

Of material importance to this opinion and as a matter for future reference, it is pointed out that the recently adjourned legislature passed two bills which, if signed by the Governor, will change greatly the law discussed.

First, by H.B. 263 there is an absolute repeal of Section 72-19-1, N.M.S.A. When and if this repealing action becomes effective, the question of constitutionality raised in this opinion will become moot.

Secondly, the legislature, by H.B. 216, amends Section 72-16-4 so as to provide for a two per centum levy on the business of selling or renting of new airplanes and a levy of one per centum in the case of secondhand airplanes.

Neither of the legislative measures just discussed is provided {^{*}47} with an emergency clause and at the time of this writing neither has been approved by the Governor.

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