

Opinion No. 64-107

August 17, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Mrs. Betty Ensminger, Deputy Assessor, Office of County Assessor, County Court House, Estancia, New Mexico

QUESTION

QUESTIONS

1. May a veteran appoint an attorney in fact to present his tax exemption certificate to the county assessor?
2. Who determines whether a veteran is eligible for a veteran's exemption certificate?
3. What constitutes a non-resident veteran?
4. May license distributors allow a one-third soldier's license tax exemption to otherwise qualified veterans who have already claimed their entire \$ 2000 exemption on real or personal property?

CONCLUSIONS

1. Yes.
2. See analysis.
3. See analysis.
4. No.

OPINION

ANALYSIS

Section 72-1-20, N.M.S.A., 1953 Compilation provides that:

" No soldier's exemption shall be granted any soldier after January 1, 1959, without the presentment by the soldier or his widow of a certificate of eligibility, and the entry of the proper notation on it by the assessor or collector of taxes or licenses." (Emphasis added).

Section 72-1-14, N.M.S.A., 1953 Compilation specifies:

"No exemption shall be granted by the assessor to any soldier **unless at the time of the declaration of the property and assessment of the same the soldier submits to the assessor a certificate of eligibility**" (Emphasis added).

It appears to be the intent of Section 72-1-20, N.M.S.A., 1953 Compilation, that a veteran should have the benefit of the tax exemption during his lifetime and that after his death, his widow should receive the benefit. Your question now is whether or not anyone except the veteran may present the exemption certificate to the county assessor.

First, it is our opinion that the soldier's wife may present the certificate if the exemption is claimed on community property. This was not true prior to 1951 as the tax exemption only applied to the veteran's half of the community property as a result of the decision in **Dillard v. New Mexico Tax Commission**, 53, N.M. 12, 201 P.2d 345 (1948). In 1951 the legislature amended Section 72-1-13, N.M.S.A., 1953 Compilation so that the community or joint property of husband and wife was included within the provisions of this act. This amendment is thought to have overruled the **Dillard** decision. (Clark, **Community of Property and the Family** in New Mexico, 43 (1956). Since the wife has a present existing and vested interest in property which is benefited by the tax exemption, and since the tax on the community property is a community debt; **Baca v. Village of Belen**, 30 N.M. 541, 546, 204 Pac. 802 (1925), it would seem to follow that the wife has such an interest in the exemption that she ought to be able to present the exemption certificate on behalf of her qualified husband when the exemption is claimed on their community property.

Further, it is our opinion that the certificate can be presented by an attorney-in-fact exhibiting a valid written power of attorney to act in the place and stead of the veteran.

Statutes such as the one now under consideration are one reason why the power of attorney doctrine was created and we find no express or implied prohibition in the statutes itself against the use of the power. So long as the power of attorney clearly indicates the identity of the attorney-in-fact and clearly shows his authority to present the certificate we are of the opinion that the county assessor may accept the certificate when tendered by the attorney-in-fact.

Your second question is answered by Sections 72-1-14 and 72-1-20, N.M.S.A., 1953 Compilation. The following procedure is provided for in these two sections:

(1) The soldier or his widow appears before the county assessor to declare all of his property subject to taxation. (N.M.S.A., 1953 Comp. Secs. 7-2-3 and 7-1-14); (2) At this time a certificate of eligibility is submitted to the assessor. (N.M.S.A., 72-1-14). The certificate has been obtained by the veteran from the veteran's service commission and it includes "the name and current address of the veteran, the date residence was acquired in the state, the period of time during which the soldier served in the military

forces of the United States, and such other information as the veteran's service commission may deem necessary and proper for informing the county assessors of the soldier's eligibility to receive the tax exemption." (N.M.S.A., 72-1-20); (3) The assessor notes on the back of the certificate of eligibility the amount and character of exemption at the time the certificate is presented by the soldier. (N.M.S.A., 72-1-20); (4) The county assessor then prepares a list of those soldiers, resident in the county, who are entitled to the exemption. (N.M.S.A., 72-1-14). The original copy of this list must be sent to the veteran's service commission on or before July 1st of each year. (N.M.S.A., 72-1-20).

Therefore, in answer to your question, initially the veteran's service commission decides who is eligible for the Soldier's Tax Exemption. For full details of what information should be furnished by the applicant to the veteran's service commission you should contact the director of the veteran's service commission in Santa Fe. With the information supplied on the certificate of exemption by the commission, the county assessor should be able to make a final determination as to whether a particular veteran is entitled to receive the tax exemption. Section 72-1-11, N.M.S.A., 1953 Compilation sets forth the soldiers who are eligible for this tax exemption.

Your third question asks, "What constitutes a non-resident veteran?" Section 72-1-20, N.M.S.A., 1953 requires that a soldier or his unmarried widow be a resident before obtaining a certificate of eligibility from the veteran's service commission.

The question of whether a person is a resident or domiciliary of one place or another is largely a matter of intention. **Klutts v. Jones**, 21 N.M. 720, 158 Pac. 490 (1916). Absence from the state does not necessarily mean a change of residence, but long absence ordinarily is persuasive evidence of a change of residence. **Gallup American Coal Co. v. Lira**, 39 N.M. 496, 501, 50 P.2d 430 (1935). Since the burden is on the one claiming an exemption to prove he is eligible (**Flaska v. State**, 51 N.M. 13, 24, 177 P.2d 174 (1946)), the assessor should require an out-of-state veteran, claiming an exemption, to show that he intends to return to New Mexico at a definite future time.

The problem of determining the residence of an out-of-state claimant will be greatly reduced by following the statutory procedure of requiring presentment of the exemption certificate to the county assessor by the veteran, his unmarried widow, or in the case of community property, the veteran's wife.

An out-of-state veteran is not a resident of New Mexico if he has established residency in another state. (Attorney General's Opinion 271-57-405, 409). A veteran who has registered to vote in another state has lost his New Mexico residence. A letter to the county clerk of the county wherein the out-of-state veteran resides should establish whether the claimant is registered to vote in another state.

If the county assessor finds that a person has knowingly received the exemption when not entitled to it, the assessor may compel the fraudulent claimant "to pay triple the amount of taxes which would otherwise have been levied or collected against (the)

property, had the exemption not been claimed, together with interest of 12% compounded annually." (Section 72-1-17, N.M.S.A., 1953 Compilation).

Your last question involves Section 64-11-1.7 (A), N.M.S.A., 1953 Compilation which is almost identical to its predecessor, Section 68-226 (k), N.M.S.A., 1941 Compilation. In Attorney General's Opinion No. 5722, decided April 3, 1953, this office held that a person who has already claimed the full \$ 2000 tax exemption on real or personal property is not entitled to a one-third exemption on motor vehicle licenses. The only time a veteran is entitled to receive the benefits of Section 64-11-1.7, N.M.S.A., 1953 Compilation is when he has not claimed his exemption on his real or personal property for the current year.

If the veteran does claim his reduced motor vehicle registration fee, prior to claiming his exemption on real or personal property, and the benefit of this exemption results in a tax benefit which is less than what he would have received if he had claimed his \$ 2000 exemption on his real or personal property, he may have the tax liability for his real or personal property reduced by an amount equal to the difference between the amount of benefits he received as a result of his one-third tax exemption on motor vehicle registration fees and the amount of benefits he would have received if he had first claimed his \$ 2000 exemption on his real or personal property. In any event he may not receive benefits during any one year which are greater in amount than the tax which would be levied on \$ 2000 of his real or personal property.

In summary the motor vehicle license distributor should not grant a one-third exemption if the veteran has already received his \$ 2000 exemption on real or personal property. If the \$ 2000 exemption on real or personal property has not been taken, and the motor vehicle distributor grants the one-third exemption, he should enter the date, amount and character of the exemption claimed and granted on the reverse side of the certificate of exemption. (Section 72-1-20, N.M.S.A., 1953 Compilation). If such an entry has been made, the county assessor must apportion the tax exemption claimed on real or personal property as described above.