

Opinion No. 67-97

August 3, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. William C. Gallagher, Jr. Industrial Research Analyst Department of Development 302 Galisteo Santa Fe, New Mexico

QUESTION

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Are gross receipts derived from the following activities subject to gross receipts tax:

1. Modifying a privately owned aircraft? This activity consists of making structural changes in the airframe, relocating seats, windows, instruments, etc., to order and installing different or improved equipment at the request of the owner.
2. Assembling or modifying an aircraft under contract to the builder prior to delivery to a purchaser?
3. Replacing or maintaining aircraft engines, equipment or other structural features?
4. Modifying an aircraft under contract to the builder in accordance with FAA specifications?

CONCLUSIONS

1. Yes.
2. See analysis.
3. Yes.
4. See analysis.

OPINION

{*141} ANALYSIS

{*142} Section 72-16A-4(A), N.M.S.A., 1953 Compilation (1966 Interim Supp.) imposes an excise tax equal to three percent of gross receipts on any person engaging in business in New Mexico. Gross receipts include consideration received from performing services. Section 72-16A-3E, N.M.S.A., 1953 Compilation (1966 Interim Supp.).

The gross receipts tax is not imposed on receipts derived from manufacturing because the term "gross receipts", as defined in Section 72-16A-3(E), supra, does not include such receipts. As it is used in the Gross Receipts and Compensating Tax Act, the term "manufacturing" has a specific meaning. Section 72-16A-3F, N.M.S.A., 1953 Compilation (1966 Interim Supp.) provides that:

"Manufacturing" means combining or processing components or materials to increase their value **for sale in the ordinary course of business** * * * *. (Emphasis added]

To constitute manufacturing, the activity must be carried on for the purpose of deriving receipts from the **sale** of a final product rather than from combining or processing components or materials to produce a final product. The second activity in question is distinguishable from and does not constitute manufacturing because the purpose of this activity is to derive receipts from assembling or modifying an aircraft for the seller of the finished aircraft rather than from the sale of the finished aircraft.

Section 72-16A-3J, N.M.S.A., 1953 Compilation (1966 Interim Supp.) provides in part that:

"Service" means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property.

It is our opinion that in the four activities in question, the taxpayer is engaged in performing a service.

Section 72-16A-12, N.M.S.A., 1953 Compilation (1966 Interim Supp.), as amended, N.M. Laws 1967, Ch. 298, Sec. 1 contains exemptions from the gross receipts tax. None of the exemptions listed in Section 72-16A-12, supra, apply to the four activities in question.

Section 72-16A-14, N.M.S.A., 1953 Compilation (1966 Interim Supp.), as amended, N.M. Laws 1967, Ch. 307, Sec. 1 lists receipts which may be deducted computing the gross receipts tax due. None of the deductions allowed by Section 72-16A-14, supra, apply to the first and third activities where the service is performed for the owner of the aircraft.

Section 72-16A-14D, N.M.S.A., 1953 Compilation (1966 Interim Supp.) provides that:

Receipts from selling a service for resale may be deducted from gross receipts if:

1. the sale is made to a person who delivers a nontaxable transaction certificate to the seller.
2. the value of the particular service is stated separately in the buyer's charge for the subsequent sale of the service.

3. the subsequent sale of the service is a transaction taxable under the gross receipts tax, and

4. the subsequent sale is in the ordinary course of business.

The taxpayer would be entitled to deduct receipts derived from the second and fourth activities, where the service is performed for the seller of the aircraft, in computing the gross receipts tax if the four requirements of Section 72-16A-14(D), *supra*, are met.

By: Edward R. Pearson

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