Opinion No. 72-23

May 8, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General James H. Russell, Jr., Assistant Attorney General

TO: Mr. Richard Baumgartner, Attorney, Employment Security Commission, 505 Marquette, N.W., Albuquerque, New Mexico 87103

QUESTIONS

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1. Are Indian and non-Indian employers subject to taxation under the Unemployment Compensation Law of New Mexico (Section 59-9-7, N.M.S.A., 1953 Comp.) with respect to wages paid for services performed by their employees on pueblo and reservation land?

2. If so, do New Mexico courts have the same jurisdiction to enforce the law and impose sanctions on such employers as they do with other employers covered under Section 59-9-15(b), N.M.S.A., 1953 Comp.?

CONCLUSIONS

1. Yes, with the qualifications discussed below.

2. Yes.

OPINION

*{*41}* ANALYSIS

The historic view expressed in **Worcester v. Georgia,** 31 U.S. (6Pet.) 515, 8 L. Ed. 483 (1832), restricting the applicability of state jurisdiction to Indians on Indian reservations unless expressly allowed by Congress, is no longer controlling with respect to the questions here presented.

First, Congress has expressly granted to the states the power to enforce their unemployment compensation laws on land held by the federal government on the same basis and in the same manner such laws would be enforced on non-federal lands. See 26 U.S.C.A. § 3305(d). Assuming that Congress was aware that the federal government holds title, in trust or otherwise, to reservation lands and did not expressly except them from the operation of 26 U.S.C.A. § 3305(d), it is reasonable to assume that Congress intended the provisions of that section to include enterprises on Indian lands in order to

extend the remedial benefits of unemployment compensation to employees of such enterprises in a like manner with employees of other subject enterprises.

Second, the principle enunciated in **Worcester v. Georgia, supra,** has been substantially modified by subsequent court decisions. The United States Supreme Court has traced the erosion of this old view and established a much broader applicability of state law over Indians and their lands in **Village of Kake v. Egan,** 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962). In that case the Court said:

"Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall . . . These decisions indicate that even on reservations state laws may be applied to Indians **unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."** (Emphasis added.)

The Egan rule has been adopted in New Mexico and applied to diverse situations in **Montoya v. Bolack,** 70 N.M. 196, 372 P.2d 387 (1962); **Ghahate v. Bureau of Revenue,** 80 N.M. 98, 451 P.2d 1002 (1969); and **Mescalero Apache Tribe v. Jones,** 83 N.M. 158, 489 P. 2d 666, **cert. denied** 83 N.M. 151, 489 P.2d 659 (1971). These cases clearly establish that Indians on Indian lands can lawfully be subject to taxation by state authorities without necessarily interfering with any right of self-government or impairment of any rights granted or reserved to them by the federal government. Unemployment compensation contributions are payroll taxes imposed as an incidence of employment. They are paid by individual employers and in no way become an obligation of the tribe. They carry with them a correlative benefit to the employees of the subject employers which is widely recognized by the tribal governments through their voluntary election of coverage for tribal government employees.

Under the principles established in **Ghahate v. Bureau of Revenue, supra,** and **Mescalero Apache Tribe v. Jones, supra,** the state may require mandatory unemployment compensation contributions of Indian and non-Indian employers operating on Indian lands who are not engaged in a tribal governmental function. Only a direct tax on the tribe in its capacity as an employer, or the taxation of any employer which performs a tribal governmental function would constitute interference with tribal or reservation self-government and thus be prohibited under the **Egan** ruling. See **Employment Sec. Dep't v. Cheyenne River Sioux Tribe,** 80 S.D. *{*42}* 79, 119 N.W.2d 285 (1963). With these exceptions every Indian and non-Indian employer as defined in Section 59-9-22F, N.M.S.A., 1953 Comp., is subject to the tax imposed by Section 59-9-7, N.M.S.A., 1953 Comp., with respect to wages paid for services performed by its employees on pueblo or reservation land.

As discussed in the **Egan** case, the constitutional disclaimer in Article XXI, Section 2, of the New Mexico Constitution does not alter this result, and the result is also in conformity with the principle announced in **Graham v. Miera,** 59 N.M. 379, 285 P.2d 493 (1955), that exemptions from the tax imposed by Section 59-9-7 should be strictly construed against the party seeking immunity.

The second question is whether New Mexico state courts have territorial and subject matter jurisdiction to enforce the Unemployment Compensation Law against all liable employers on pueblo or reservation land to the same extent as they do against other covered employers under Section 59-9-15(b), N.M.S.A., 1953 Comp. 26 U.S.C.A. § 3305(d) clearly allows, if it doesn't require, such jurisdiction in the New Mexico courts to the same extent as they have with respect to land not held by the federal government.

Insofar as Opinion of the Attorney General No. 4961 dated October 30, 1946 is inconsistent with this opinion, it is hereby overruled.