

## Opinion No. 72-28

June 8, 1972

**BY:** OPINION OF DAVID L. NORVELL, Attorney General Thomas Patrick Whelan, Jr.,  
Assistant Attorney General

**TO:** Mr. Bob White, Director, Aviation Department, P.E.R.A. Building, Santa Fe, New  
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### QUESTIONS

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Is the soldiers' exemption applicable to aircraft registration fee?

#### CONCLUSION

No.

### OPINION

#### {\*47} ANALYSIS

The Aircraft Registration Act, Sections 44-5-1 to 44-5-15, N.M.S.A., 1953 (P.S.), provides that all aircraft based or hangared within New Mexico must register annually with the State Aviation to a property tax based on a for-A registration fee is levied on each aircraft, the amount of the fee being determined by the aircraft's age and weight. See Section 44-5-11, **supra**. The soldiers' property tax exemption allows every honorably discharged veteran who served in the armed forces when they were engaged in armed conflict to exempt from taxation up to two thousand dollar's worth of his personal or real property. Sections 72-1-11 to 72-1-20.1, N.M.S.A., 1953 Comp. (1971 P.S.).

This legislative scheme poses several problems for a determination of whether the soldiers' exemption applies to aircraft registration fees. The threshold question concerns the exact nature of the charge assessed against the aircraft. The soldiers' exemption exempts property from taxation **only**. Section 72-1-13, **supra**. A fee is not a tax, and there is no exemption from fees. What is labeled a fee, however, may in reality be a tax. See Attorney General Opinion {\*48} No. 66-45, dated April 11, 1966. The threshold question, then, is whether aircraft registration fees are in reality a tax.

This office discussed the distinction between a fee and a tax in Attorney General Opinion No. 66-45. A fee is a charge to defray the expenses of providing registration; a tax is a charge designed to generate general revenues. Applying these definitions to the charges assessed under the old Aircraft Registration Act, Sections 44-5-1, et. seq.,

N.M.S.A., 1953, Attorney General Opinion No. 66-45 concluded that part of those charges were, in fact, a tax. The old Act remitted only \$ 5.00 of each charge to the Aviation Department to defray costs of administering the Act; the balance was remitted to the appropriate county treasurer. Section 44-5-14, **supra**. The opinion concluded that only that portion of the income devoted to defraying administrative expenses was a fee. The rest was a tax according to the common law, and the soldiers' exemption was applicable to it. See Attorney General Opinion No. 66-45, dated April 11, 1966.

The 1970 Amendments to the Aircraft Registration Act deleted the language of Section 44-5-17, **supra**, which allocated portions of the charges to the Aviation Department and to the county treasurers. All moneys collected are now remitted to the State Treasurer for credit to the state aviation fund. Section 44-5-14, N.M.S.A., 1953 (P.S.). Thus, the Act no longer specifies what portion of moneys collected is a fee and what portion is in reality a tax.

There remains statutory language which suggests that at least some portion of the charge is a tax. The stated purpose of the Act is "to provide for registration and **uniform taxation**." Section 44-5-2, N.M.S.A., 1953 (emphasis supplied). The schedule of fees is set according to indirect measures of value (age and weight), not according to the expenses of administering the Act. Section 44-5-11, N.M.S.A., 1953 (P.S.). The charges assessed are in lieu of all personal property taxes. Section 44-5-11, **supra**. We conclude, then, that some indeterminate portion of the charges assessed by the Act is a tax and is at least theoretically susceptible to the soldiers exemption.

This conclusion does not dispose of your question, however. The statutory scheme for assessing fees and applying the soldiers' exemption poses an insurmountable obstacle to the application of the exemption to aircraft registration fees. The soldiers' exemption is to be allowed against the assessed valuation of the property against which the exemption is claimed. Section 72-1-13, N.M.S.A., 1953 (P.S.). This is so because property taxes are based on the assessed value of property. N.M. Const., Art. VIII, § 7, (N.M.S.A., 1972 Interim Supp.) The aircraft registration fee, however, is not based on assessed valuation but on an age-weight formula. Section 44-5-11, **supra**. There is no general statutory provision for the application of the soldiers' exemption to a tax based on anything but assessed valuation.

The legislature has, in effect, realized that a special formula is necessary in order to apply the soldiers' exemption to a property tax based on a formula other than assessed valuation. Motor vehicle registration fees, which are assessed in lieu of property taxes, are calculated according to a variety of formulas based on such factors as number of wheels, axles, or seats, and weight. See Section 64-11-1 to 64-11-4, N.M.S.A., 1953 Comp.; and Section 64-11-14, N.M.S.A., 1953 Comp. The legislature expressly provided a special formula for the application of the soldiers' exemption to motor vehicle registration fees. Section 64-11-14, **supra**.

Thus, the Aviation Department and its director are confronted with a paradoxical situation: properly qualified veterans are theoretically entitled to apply the soldiers'

exemption to an undetermined portion of their registration fee, but the legislature has not provided the Department with any formula for the application of the exemption. In the absence of legislative guidance, the director of the Aviation Department has no authority to invent formulas for the application of the soldiers' exemption to aircraft registration fees. Nor does he have the power to determine what portion of the fee is actually a fee and what portion is a tax for purposes of allowing an exemption. The director does have the power to adopt "reasonable rules and regulations for the purpose of implementing the Aircraft Registration {<sup>\*</sup>49} Act." Section 44-5-8, N.M.S.A., 1953 (P.S.). This power includes any power which can fairly be inferred from it. **Brininstool v. N.M. State Bd. of Education**, 81 N.M. 319, 466 P.2d 885 (1970). The authority to promulgate rules to implement the Act does not, however, imply the authority to promulgate regulations providing for exemptions from the assessments imposed by the Act. Such exemptions must be provided by the legislature.

It is the conclusion of this office that although qualified veterans are theoretically entitled to the soldiers' exemption from some undetermined portion of the aircraft registration fee, the legislature has not provided a formula for the application of the exemption to the fee and the director of the Aviation Department has no power to invent a formula for the exemption's application. In effect, qualified veterans cannot apply the soldiers' exemption to aircraft registration fees until the legislature acts to provide for its application.