

Opinion No. 43-4241

February 18, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. J. O. Gallegos, Commissioner of Revenue, New Mexico State Bureau of Revenue, Santa Fe, New Mexico. Attention: Mr. Victor Salazar, Director of School Tax Division

We have your letter of February 15, 1943, wherein you request an official opinion of this office concerning whether a public accountant comes under the provisions of the New Mexico School Tax Law.

You state that the case you have in mind involves a part time bookkeeper or accountant performing services for many clients and paid for on a fee basis. You further state that such person or persons hold themselves out to the public as accountants. Exemption is claimed by such persons because they hold a Social Security card and the various alleged employers pay Social Security taxes on the amount payable to them as if such amounts were ordinary wages.

It is necessary in determining whether or not such accountants must comply with our School Tax Law to consider what connection the payment of Social Security taxes would have in the matter. One is a Federal Act and the other a State Act and neither need be considered in relation to the other. There is no more reason why we should consider the Federal Act in determining the state question than there is for the Federal Officials to consider our Act in construing the Federal Social Security Act.

Section 76-1404, H, of the New Mexico 1941 Compilation provides:

"An amount equal to two (2) per cent of the gross receipts of any person engaging or continuing in the practice of any profession, or of any business in which the service rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by consideration in the nature of a retainer."

It is common knowledge that accountants consider themselves professional men, and the definition given to professionals in Webster's Dictionary is certainly broad enough to cover accountants.

I also point out that Section 51-1704 of the New Mexico 1941 Compilation provides:

"* * * which have been as an accountant in the employ of a public accountant of recognized standing **in the profession** or in the public practice on their own account * * *"
*" (emphasis ours).

Therefore, it is clear that our statutes consider a public accountant to be a professional man.

Section 76-1415 (d), provides an exemption from the Sales Tax Law in connection with income received in the form of ordinary wages or salaries.

The question is simply one whether or not such accountants receive wages or salaries, or whether they receive fees or a retainer. Under the circumstances that you set out it seems clear that they receive fees and are therefore subject to the New Mexico School Tax Law.

See *Blick v. Mercantile Trust and Deposit Co. of Baltimore*, 77 Atl. 844, 846, 113 Md., 487, where it was held that the word "salary" imports a specific contract for a specific sum for a specified period of time, while "fees" are compensation for particular acts, and "wages" are compensation for services by the day or week.

See also *Cochise County v. Wilcox, Ariz.*, 127 P. 758, wherein it was held that the words salaries and fees having their ordinary signification, the designation between which is that a salary is a fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods.

In view of the above it seems clear that the accountants you mention receive compensation for their services by way of fees and not salaries or wages within the meaning of our statute, and therefore, such accountants cannot claim exemption from the New Mexico School Tax provisions.

By HARRY L. BIGBEE,

Asst. Atty. General