

Opinion No. 43-4412

November 18, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. H. B. Sellars, Chief Tax Commissioner, State Tax Commission, Santa Fe, New Mexico

In your letter dated November 15, 1943, you referred to Section 76-605 of the N.M. 1941 Compilation, and inquire whether this section is still in effect, and whether the penalty provided therein should be remitted to the State Tax Commission fund.

Section 76-605 provides as follows:

"Thirty (30) days after any succession or inheritance tax, franchise tax, or gross earnings, or private car tax shall have become delinquent, there shall be added thereto a penalty of 10% of the amount of such tax, in addition to all other penalties or interest as provided by law, which, when collected, shall be covered into the State Tax Commission fund to be expended by the State Tax Commission as provided by law.

In Opinion No. 1361, dated May 12, 1936, this office held this particular Act has not been repealed, with reference to the private car tax. In Opinion No. 3136, dated May 17, 1939, this office also held, with reference to the succession tax, that the law is still in effect insofar as the imposition of the penalty is concerned.

With these two opinions I am in agreement except insofar as this law may have been amended by implication. In other words, there seems to be no doubt that the 10% penalty may be added, but it is very questionable whether the penalty should be remitted to the State Tax Commission fund in every instance.

Section 34-112 of the N.M. 1941 Compilation, which is Section 11, Chapter 179 of the Laws of 1921, provides that all taxes levied and collected under the Succession Tax Act shall be paid to the State Treasurer for the benefit of the General Revenue fund.

Since Section 76-605 was passed as part of Chapter 27, Laws of 1927, in my opinion Section 76-605 would supersede the earlier Act insofar as the 10% penalty is concerned, and this penalty, when collected by the Succession Tax Department, should be paid into the State Tax Commission fund.

Section 34-122 of the N.M. 1941 Compilation transfers to the Bureau of Revenue the administration and enforcement of the Succession Tax Act. This Act may be administered without being repugnant to Section 76-605, requiring the collection of the 10% penalty on delinquent succession taxes, and the transfer thereof to the State Tax Commission fund. After the tax is collected, it is a part of State funds, and may be distributed in any manner the Legislature deems advisable.

Section 54-1212 of the N.M. 1941 Compilation, being Section 12, Chapter 116 of the Laws of 1935, provides that all amounts collected as franchise tax by the Corporation Commission shall be covered into the relief fund, except for the amount of taxes to administer the Act. Since this Act is subsequent to the Act in question, I am of the opinion that it supersedes the same, and that the penalty, when collected, should be paid into the relief fund, rather than the State Tax Commission fund.

It is doubtful whether we have a gross earnings tax in this State. However, the Emergency School Tax apparently comes nearer than any other tax to being a gross earnings tax. If it may be so considered, Section 76-1442 of the N.M. 1941 Compilation provides that all taxes, penalties and interest collected under the Act shall be placed in the Emergency School Tax fund. The succeeding section makes provision for administrative expenses.

In view of the fact that this section is a part of Chapter 73, Laws of 1935, I am of the opinion that the 10% penalty, if legally collectible and collected, should be paid into the Emergency School Tax fund, and not to the State Tax Commission fund.

Section 76-909 of the N.M. 1941 Compilation, in connection with the private car taxes, provides that taxes paid under the provisions of the Act shall be distributed to the different state funds in proportion to the respective levies for the several funds. In view of the fact that the State Tax Commission fund does not arise from a tax levy, I do not believe it would share in the distribution of these collections, and since this statute is a part of Chapter 136, Laws of 1929, the same would supersede the statute in question, and for that reason the State Tax Commission fund would not be entitled to the 10% penalty, if collected.

By C. C. McCULLOH,

First Asst. Atty. General