Opinion No. 59-117

August 21, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Earl E. Hartley State Senator Curry County P. O. Box 1064 Clovis, New Mexico

*{*181}* This is in reply to your recent inquiry in which you asked for our opinion on the following question:

May the Bureau of Revenue collect the 2% emergency school tax from insurance adjusters prior to the effective date of House Bill 39, now Chapter 290, 1959 Session Laws (§ 58-5-1, N.M.S.A., 1953 Compilation (P.S.))?

*{*182}* It is our opinion that the Bureau of Revenue may collect the 2% emergency school tax from independent insurance adjusters and adjustment firms prior to the effective date of said House Bill at least as far back as June 1956, the date the Bureau first attempted to collect such taxes, and may further collect such a tax from all adjusters, independent or otherwise, subsequent to the effective date of the bill.

The emergency school tax, labeled as a sales tax in the statutes, but in effect a business privilege tax, is imposed by §§ 72-16-1 through 72-16-47, N.M.S.A., 1953 Compilation. Section 72-16-4 H imposes a tax in an amount equal to 2% of the gross receipts of any person rendering professional, technical or scientific services. In our opinion, this clearly includes the business of insurance adjustment.

Therefore, unless the law otherwise provides an exemption, the adjusters must pay the emergency school tax. The only section of the statutes upon which such an exemption could possibly be found is § 58-5-1, supra. Prior to the effective date of House Bill 39, as enacted, this section read as follows:

"58-5-1. Insurance companies -- Taxes and fees. -- Every insurance company transacting or seeking admission to transact insurance business in the state of New Mexico shall pay the superintendent the following fees:

. . .

The payment of the aforesaid taxes, licenses and fees provided for in this act shall be in lieu of all other taxes, licenses, and fees of every kind, now or hereafter, imposed by this state or any political subdivision thereof, on any insurance company or agent thereof, excepting the regular state, county and city taxes on property located in the state of New Mexico."

House Bill 39, in addition to changing the format of the section, made the following additional proviso at the end thereof, the substance of the statute remaining the same in

all other respects excepting, however, that certain changes were made in the percentages of fees and licenses collected thereunder:

"Provided, however, the word 'agent' shall not be defined to include for the purposes of this exemption insurance adjusters or adjusting firms."

There can be no question but that § 58-5-1, as presently enacted, does not exempt adjusters, either independent or salaried employees of insurance companies doing a general insurance business. We reach this conclusion by interpreting the words "adjusters or adjusting firms" as inclusive of all persons or associations, incorporated, partnerships or otherwise as coming under the proviso. The statute is specific in listing these as not agents for the purpose of receiving an exemption from all taxes (less certain taxes not applicable here) except those taxes, fees and licenses mentioned therein.

Having reached the conclusion that all adjusters must now pay the emergency school tax (the tax, of course, would be paid by the company or firm or association for the business of all adjusters working for them), we turn to the question of whether any adjuster or adjustment firm was liable for the tax prior to the effective date of Chapter 290, Laws 1959.

It is our opinion that all adjusters not salaried employees of an insurance company doing a general insurance business, as distinguished from an adjusting firm, were liable under the statute as then in force for payment of the emergency school tax. The statute commenced by providing a schedule of fees, using the term "agent" several times. Continuing, a fee is then provided for the issuance of a license to a "nonresident broker". Finally, a fee is required *{*183}* for issuing licenses to "adjusters". Consequently, there was provided separate and distinct legislative treatment of agents and adjusters. In our opinion, the exemption from the emergency school tax provided by the last paragraph of § 58-5-1, supra, did not include adjusters under the term "agent" for the purpose of the exemption unless the adjuster was a salaried employee of an insurance company, which company is engaged in the business of selling insurance and settling claims thereon as distinguished from an organization whose sole business was the adjustment of claims. To isolate the term "agent" from the exemption and claim that adjusters are included therein is directly at variance with the well recognized rule of construction that all terms in a statute must be read together and that given language cannot be isolated and its tone made controlling. **Cox v. City of Albuquerque,** 53 N.M. 334, 207 P. 2d 1017. Therefore, when the Legislature used the term "agent" in the exemption provision, it must be taken to have used that term in the same sense it had previously in the statute; that is to say, separately and in addition to the term "adjusters".

Further support of our conclusion in this matter can be had from the rule of law which states that an exemption from taxation must be strictly construed against he who claims the exemption. **McKee v. Bureau of Revenue,** 63 N.M. 185, 315 P. 2d 832.

You state in your letter that in your opinion House Bill 39 as enacted took all adjusters out from under an exemption they previously had enjoyed. You support this opinion by reasoning that the Legislature, by passing the amendatory language, should not be held to do a useless act. We cannot agree with your opinion that the 1959 amendment, by adding the proviso above set forth, shows that adjusters were previously exempt. We think that only those adjusters who were salaried adjusters performing the services for their employer and for no other company, who were therefore "agents" of that insurance company, were exempted. The 1959 amendment includes all adjusters.

We recognize that there is a presumption that the Legislature intends to change the law when an existing statute is amended. 82 C.J.S., Statutes, § 384 (2). However, it has been held that this presumption does not prevail where the amendatory legislation merely expresses more clearly the legislative intent. **Magnolia Pipeline Co. v. Oklahoma Tax Commission,** 196 Okla. 633, 167 P. 2d 884; **State Tax Commission v. Associated Oil and Gas Co.,** 98 Utah 474, 100 P. 2d 966. In our opinion the 1959 amendment merely restated substantially what the law has been since the original enactment of § 58-5-1 by Chapter 135, § 27, Laws 1925. Our position is supported by the fact that the heading to the 1959 amendment was entitled:

"AN ACT RELATING TO THE LICENSING AND REGULATION OF INSURANCE COMPANIES AND AGENTS; **CLARIFYING THE PERSONS EXEMPT FROM THE APPLICATION OF OTHER TAXES, LICENSES AND FEES;** AND AMENDING SECTION 58-5-1 NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION (BEING LAWS 1925, CHAPTER 135, SECTION 27, AS AMENDED)." (Emphasis supplied).

This view is further substantiated by reference to the rule discussed above that a statute granting an exemption from a tax is to be strictly construed against he who claims the exemption.

It is our opinion, however, that the statute prior to the 1959 amendment did grant an exemption to adjusters employed and paid by salary by an insurance company doing a general insurance business whose activities were controlled by that company. We are of the opinion that prior to the clarifying language of the 1959 *{*184}* amendment, these individuals were agents for the purpose of the statute and therefore the 2% emergency school tax did not have to be paid on the basis of their adjustment activities.

This opinion is limited to the question of whether the emergency school tax may be collected subsequent to June 1956 when the Bureau of Revenue revised its previous stand and took the position that such taxes were due and owing from adjusters. We refrain from giving an opinion as to whether the Bureau of Revenue could legally collect such taxes prior to June 1956 in view of its previous stand since the Bureau has not attempted to make such collections.

We wish to make it clear that our conclusions herein are not in any way controlled by the decision of the New Mexico Supreme Court in the Lyle Adjustment case **(Lyle**

Adjustment Co. v. Luna, Commissioner of Revenue, et al., Sup. Ct. No. 6455, decided May 11, 1959).

By Philip R. Ashby

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