Opinion No. 61-82

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BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. M. W. Hamilton, Chief Counsel, New Mexico, State Highway Commission, P. O. Box 1641, Santa Fe, New Mexico

QUESTION

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Must the State Highway Commission pay to Mountain States Telephone and Telegraph Company the amount of "school taxes" imposed on that Company for services rendered to the Commission when such taxes are specifically segregated on the billing?

CONCLUSION

Yes.

OPINION

ANALYSIS

While the question posed, relating specifically to an instrumentality of the State, is new, the general issue involved is almost as old as the Emergency School Tax itself. The question presented is new because of change in the exemption provisions of the Act passed by the 1961 Legislature. These changes, in effect, placed the State and its political subdivisions on the same basis as other consumers of **services.**

The broader question then is whether a seller may pass the so-called school tax on to the buyer in the form of a tax. At the outset we wish to make it clear that the tax in question is not a true sales tax; it is a tax imposed on the seller for the privilege of doing business. **State v. Tittmann,** 42 N.M. 76, 75 P. 2d 701. Prior to 1939 when it was mandatory that the seller collect the tax from the buyer, the tax **may** have been a true sales tax. Such, however, is no longer the case and the legal incidence of the tax is on the seller. It is to him that the State looks for payment of the tax - not in a capacity as tax collector but as a taxpayer.

This determination, however, is not dispositive of the issue. Denomination of a tax as a particular type does not in and of itself resolve the question presented. **State of Wisconsin v. J. C. Penney Co.,** 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267.

The argument has been presented that since the tax is one imposed on the privilege of doing business, the seller is precluded from passing the tax on to the buyer **as a tax** by virtue of Section 72-16-7(B), N.M.S.A., 1953 Compilation. This section provides that

"It shall be unlawful for any person engaged in any business or profession to **directly advertise** that any tax imposed by this act is not considered as an element of the price of property sold or services rendered." (Emphasis added)

The proponents of this view-point contend that when the seller specifically includes the tax as a segregated item on the bill, i.e., $ 1.00 plus two per cent tax, he is in effect advertising that the tax is not an element of the price of the goods or services.

Even if we assume that such separate tax billing is direct advertising (which seems dubious), it seems to us that a contrary conclusion can just as reasonably be drawn. Certainly such a separate billing affirmatively establishes that the seller is including the tax as an element of the total price. At this point we think it appropriate to mention that the State of Arizona has an almost identical "no-advertising" provision in its privilege tax law. Yet the Arizona Supreme Court said that the seller may, if he wishes, pass on the privilege tax to the consumer showing it as a tax on a segregated billing. **State Tax Commission v. Quebedeaux Chevrolet,** 71 Ariz. 280, 226 P. 2d 549.

There are other provisions of the Act from which a manifest legislative intent appears to give a seller the option of segregating or not segregating the tax in billing the buyer.

Section 72-16-2 (D), N.M.S.A., 1953 Compilation (P.S.), provides as follows:

"'Gross receipts' means the total sum, **not including the taxes imposed by the Emergency School Tax Act,** as amended, for the exercise of which a privilege tax is imposed by the Emergency School Tax Act, as amended, the total receipts of a taxpayer derived from trades, business, commerce, and the gross proceeds of sales as hereinafter defined, **except when such taxes are not segregated from such sum,** and without any deduction on account of losses or expenses of any kind; Provided that, **even though the amount of the tax imposed by the Emergency School Tax Act, as amended, is segregated as set out above,** if the taxpayer collects from the customer more than the amount of the tax imposed by the Emergency School Tax Act, as amended, then such amount collected in excess shall be considered as a part of the gross receipts and subject to the tax imposed by the Emergency School Tax Act, as amended." (Emphasis added).

Section 72 - 16 - 2 (E), N.M.S.A., 1953 Compilation (P.S.), provides as follows:

"'Gross proceeds of sales' means the sum or value proceeding or accruing from the sale of tangible personal property, including the proceeds from the sale of any property handled on consignment by the taxpayer and including any services that are a part of such sales, but not including the taxes imposed by the Emergency School Tax Act, as amended, **unless such taxes are not segregated from sums** * * *" (Emphasis added).

The above-quoted provisions specifically authorize the seller to segregate the tax in billing the buyer. If the seller does not do so, the tax imposed on him becomes a part of the "gross receipts" and the amount that he must pay will exceed two per cent. For example, if he simply bills a buyer $ 1.02 for an item, the two cents being added for the tax but not segregated as such, the seller must pay two per cent of $ 1.02 in tax rather than two per cent of $ 1.00. See **State Tax Commission v. Quebedeaux Chevrolet,** supra. And the economic facts of life dictate that the seller will somehow include this tax in his selling price. Obviously taxes are a part of the cost of doing business, and the selling price of articles is determined by the costs of production and distribution. To hold then that the seller cannot segregate the tax in billing the buyer simply means, as a practical matter, that the buyer will ultimately pay a tax (even though it will not be denominated such) greater than the statutory two per cent. See **Vause & Striegel, Inc. v. McKibbin,** 379 Ill. 169, 39 N. E. 2d 1006.

This principle was aptly stated as follows by the California Court in **De Aryan v Akers,** 12 Cal. 2d 781, 87 P. 2d 695, 697:

"Any quibbling between the parties in an attempt to differentiate between the purchase price and the tax by reason of the separate statement of the amount intended as tax reimbursement, will not alter the fact that within the purview of the legislative enactment the aggregate of the list price and the amount of tax reimbursement constitutes the actual purchase price of the commodity."

The Legislature, and individual members thereof, are fully cognizant of the fact that pursuant to Section 72-16-2, supra, sellers have, even after removal of the compulsory collection feature in 1939, continued to pass on the tax to the buyer and, in the usual case, to so show on their billings. Had the legislative intention been to prohibit this procedure, it is reasonable to assume that it would have said so at one of the eleven regular sessions since 1939.

In this connection the case of **Arizona State Tax Commission v. Garrett Corporation,** 79 Ariz. 389, 291 P. 2d 208, is quite interesting. After certain amendments to the Excise Revenue Act, the legal incidence of which had always been held to be on the seller, it was argued that the tax had become a true consumers' sales tax. In the course of its opinion refuting this contention the court had this to say:

"The amendments contained in such section are no more than legislative recognition of the common practice which has grown up since the passage of the Act of separately stating the tax independent of the sales price. The section does not specifically authorize such practice; neither does it forbid it. It simply reflects the indifference of the legislature as to the business practices adopted by the taxpayer in conducting his affairs."

We have an even stronger case here since Section 72-16-2, supra, does authorize such a practice. Our conclusion is that the seller may pass on the school tax to the buyer, segregating it on the billing.