

## **Opinion No. 66-33**

March 18, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General Joel M. Carson, Assistant Attorney General

**TO:** The Honorable R. C. Morgan, State Senator, 223 South Main, Portales, New Mexico

### **QUESTION**

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Are weedacides and herbacides purchased by crop dusters deductible for the purpose of computing emergency school tax by (a) the person performing the crop dusting (b) the person selling the weedacides and herbacides to the crop duster?

#### **CONCLUSION**

See Analysis.

### **OPINION**

#### **{\*41} ANALYSIS**

The business of crop dusting is considered to be the performance of a service taxable under N.M.S.A. 72-16-4.10. N.M.S.A. 72-16-4.5 provides that the gross receipts from the sale of all livestock, feed for livestock and feed for poultry or sales of seeds, roots, bulbs, plants, fertilizer, insecticides, fungicides and weedacides applied to land may be deducted for the purpose of reporting emergency school tax as a retailer of tangible personal property. N.M.S.A. 72-16-4.10 provides that persons performing a business service must report emergency school tax at the rate of 3 percent measured by the gross receipts which are derived from the services. Persons classified under Section 72-16-4.10 are considered to be the consumers of the tangible personal property which they use in the performance of their service. The questions presented here are answered by Regulation 4.5, example (D):

K is in the business of "dusting" cotton. He contracts with Y whereby he will spray Y's cotton crop from his plane with insecticides for \$ 500.00. K is to furnish the insecticide. He buys the insecticide from B. K is furnishing a service which is taxable under N.M.S.A. 72-16-4.10. He is considered to be the consumer of the insecticide in the furnishing of his service of dusting crops. B is the retailer of the insecticide. Since the sale of insecticide is exempt from the operation of N.M.S.A. 72-16-4.5, B does not have to include the sales price of the insecticide in his gross receipts. However, the price that K charges Y must necessarily reflect the cost of the insecticide to K. K must report

school tax on the basis of the whole \$ 500.00 that he receives, and may not deduct the cost of the insecticide. A common practice in the crop dusting business is for the crop duster to contract with the farmer to dust the farmer's crops with the farmer to furnish the insecticide. Under this set of facts the crop duster need include in his gross receipts only the price which he charges for dusting the cotton. He need not include the cost of the insecticide which is furnished by the farmer.

Example (D) would allow the retailer selling weedacides to the crop duster to deduct the gross receipts attributable to those sales. If the crop duster conducts his business as is outlined in Section (D), he would have to report school tax pursuant to this regulation.

We would, however, call your attention to Regulation 4.10-2 which provides:

For the purposes of these regulations and the administration of the Emergency School Tax Act the term "service" shall mean the utilization, for the benefit of the customer, of labor, or mechanical equipment, or time or effort, or a combination of all of the above, and may include expenditures, materials, and things furnished, necessary to produce the benefit sought or ordered by the recipient of the service.

Where the taxpayer must use tangible personal property in the {<sup>\*42</sup>} performance of his service, he must compute his school tax under Section 72-16-4.10 on the total receipts derived from the performance of the service and gross proceeds of sales of tangible personal property unless the industry of which he is a part has a common practice of billing material and labor separately. Where separate billing of material and labor is the trade practice, the taxpayer shall report gross receipts from labor under Section 72-16-4.10, N.M.S.A., 1953 Compilation, and gross receipts from materials under Section 72-16-4.5, N.M.S.A., 1953 Compilation. In the latter situation the taxpayer may execute a resale certificate under Section 72-16-4, N.M.S.A., 1953 Compilation, for the tangible personal property which he purchases and includes in the billing as materials.

If, as you can see, it is the custom in the crop dusting trade to separately bill dust and flying services, the crop duster will be in a position to treat the transaction as a sale of weedacides to the farmer under Section 72-16-4.5 and the sale of the crop dusting service which is taxed under 72-16-4.10. If this is the situation, the sale of the weedacides to the farmer would be one of those transactions which is in the purview of the deduction quoted above.

The question which you have asked pertains to both weedacids and herbicides. We presume that you intend to use the two terms as being synonyms, hence, it is not necessary to discuss the additional questions of the deductibility of chemicals used for defoliating crops rather than for killing weeds.