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B-134602, Dec. 26, 1957

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B-134602, DEC. 26, 1957

TO MR. DONALD J. CAMPBELL, AUTHORIZED CERTIFYING OFFICER, DEPARTMENT OF THE INTERIOR:

YOUR LETTER OF DECEMBER 4, 1957, WITH SUPPORTING PAPERS, REQUESTS OUR DECISION AS TO THE PROPRIETY OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, GALLUP, NEW MEXICO, THE EL PASO NATURAL GAS PRODUCTS COMPANY, EL PASO, TEXAS, AND THE SOUTHERN UNION GAS COMPANY, DALLAS, TEXAS, INCLUDING IN THEIR CHARGES FOR SERVICES AND UTILITIES RENDERED THE UNITED STATES GOVERNMENT THE TWO PERCENT SALES TAX IMPOSED BY THE EMERGENCY SCHOOL TAX ACT OF THE NEW MEXICO LEGISLATURE.

WHEN REQUEST IS MADE BY A CERTIFYING OFFICER UNDER SECTION 3 OF THE ACT OF DECEMBER 29, 1941, 55 STAT. 876, FOR A DECISION OF THE COMPTROLLER GENERAL ON ANY QUESTION OF LAW, THE VOUCHER SUBMITTED TO HIM FOR CERTIFICATION MUST ACCOMPANY THE REQUEST FOR DECISION. 21 COMP. GEN. 1128; 26 ID. 797; 31 ID. 314. IN THE PRESENT CASE YOU HAVE SUBMITTED NO VOUCHER AND THOSE DECISIONS ARE CALLED TO YOUR ATTENTION FOR OBSERVANCE IN THE FUTURE, BUT, SINCE THE QUESTION APPEARS TO HAVE ARISEN IN CONNECTION WITH VOUCHERS WHICH WERE PREPARED FOR YOUR CERTIFICATION, AND THE CLAIMANTS APPEAR PRESENTLY TO BE REQUESTING PAYMENTS OF THE AMOUNTS DEDUCTED, THOSE DECISIONS WILL NOT, IN THIS INSTANCE, BE CONSIDERED AS PRECLUDING A DECISION IN THE MATTER.

RECENT AMENDMENTS TO CHAPTER 72 OF THE NEW MEXICO STATUTES WHICH ELIMINATED THE PREVIOUS EXISTING TAX EXEMPTION ON SALES TO THE UNITED STATES GOVERNMENT GAVE RISE TO THE QUESTION PRESENTED. THE NEW MEXICO LAW AS IT NOW APPEARS IN THE NEW MEXICO STATUTES ANNOTATED, 1953 (SUPP. 1957), PROVIDES, INSOFAR AS HERE RELEVANT, AS FOLLOWS:

"72-16-4 * * * THERE IS LEVIED, AND SHALL BE COLLECTED BY THE BUREAU OF REVENUE, PRIVILEGE TAXES, MEASURED BY THE AMOUNT OR VOLUME OF BUSINESS DONE, AGAINST THE PERSONS, ON ACCOUNT OF THEIR BUSINESS ACTIVITIES, ENGAGED OR CONTINUING, WITHIN NEW MEXICO, IN ANY BUSINESS AS HEREIN DEFINED, AND IN THE AMOUNT DETERMINED BY THE APPLICATION OF RATES AGAINST GROSS RECEIPTS AS FOLLOWS:

"A. UPON OIL, NATURAL GAS, CARBON DIOXIDE GAS AND POTASH, AT THE RATE OF TWO PERCENT (2 PERCENT) OF THE GROSS RECEIPTS * * *

"E. AT AN AMOUNT EQUAL TO TWO PERCENT (2 PERCENT) OF THE GROSS RECEIPTS OF THE BUSINESS OF EVERY PERSON ENGAGING OR CONTINUING IN THE FOLLOWING BUSINESS: (2) TRANSMITTING MESSAGES OR CONVERSATION BY TELEGRAPH, TELEPHONE OR RADIO FROM ONE (1) POINT TO ANOTHER POINT IN THIS STATE, INCLUDING ALL TELEPHONE BUSINESS.

"72-16-5--- NONE OF THE TAXES LEVIED BY THIS ACT SHALL BE CONSTRUED TO APPLY TO SALES MADE TO THE STATE OF NEW MEXICO OR ANY OF ITS POLITICAL SUBDIVISIONS; NOR TO SALES MADE TO SOCIETIES, HOSPITALS, FRATERNAL OR RELIGIOUS ORGANIZATION NOT ORGANIZED FOR PROFIT.'

THE LAST QUOTED PROVISION IS THE ONE THAT ELIMINATED THE TAX EXEMPTION ON SALES TO THE UNITED STATES GOVERNMENT. THE PREVIOUS APPLICABLE LANGUAGE APPEARING AT SECTION 72-16-5 INCLUDED SALES TO THE UNITED STATES AND ITS AGENCIES AND INSTRUMENTALITIES IN THE GROUP THAT WERE EXCLUDED FROM THE TAXES LEVIED BY THE ACT.

THE TAX HERE INVOLVED IS ONE IMPOSED UPON THE VENDOR. WHERE THE INCIDENCE OF A STATE TAX IS UPON THE VENDOR OF GOODS OR SERVICES TO THE UNITED STATES GOVERNMENT, THE CONSTITUTIONAL PRINCIPLE UNDER WHICH THE FEDERAL GOVERNMENT IS IMMUNE TO STATE TAXATION IS NOT INVOLVED. SEE 33 COMP. GEN. 453; 32 ID. 423.

THUS, IN THE ABSENCE OF A CONTRACTUAL PROVISION REQUIRING THE GOVERNMENT TO REIMBURSE THE VENDOR, IT IS THE RESPONSIBILITY OF THE VENDOR TO PAY SUCH TAXES, AND THE GOVERNMENT IS IN NO WAY LIABLE. 31 COMP. GEN. 1. SHOULD THE VENDOR FAIL TO COLLECT THE TAX FROM THE GOVERNMENT, HIS LIABILITY THEREFOR IS IN NO WAY AFFECTED. IT IS THE VENDOR THAT IS RESPONSIBLE FOR PAYING THE TAX. ON THE OTHER HAND, WHERE THE GOVERNMENT HAS BY CONTRACT AGREED TO REIMBURSE THE VENDOR FOR TAXES PAID TO A STATE OR LOCAL GOVERNMENT, OUR DECISIONS HAVE CONSISTENTLY HELD THAT SUCH PAYMENTS ARE PROPER. SEE 33 COMP. GEN. 453; 32 ID. 423, 27 ID. 179.

SUCH A CONTRACTUAL RELATIONSHIP EXISTS BETWEEN THE GOVERNMENT AND THE EL PASO NATURAL GAS PRODUCTS COMPANY. SEE THE GENERAL PROVISION (STANDARD FORM 32, 1949 EDITION, SECTION 10 (E) (, INCORPORATED IN THE CONTRACT BETWEEN THE GOVERNMENT AND THE EL PASO NATURAL GAS COMPANY. ALSO, WHERE SUCH CONTRACT EXISTS, IT SEEMS IMMATERIAL WHETHER THE TAX ASSESSED IS ABSOLVED IN THE GENERAL CHARGE OR IS SPECIFICALLY ENUMERATED AS A STATE TAX. ACCORDINGLY, THE CHARGE BILLED BY THE EL PASO NATURAL GAS PRODUCTS COMPANY FOR THIS TAX MAY BE CERTIFIED FOR PAYMENT.

ARTICLE II OF THE CONTRACT BETWEEN THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY AND THE GOVERNMENT, PROVIDES:

"ARTICLE II. TYPE OF SERVICE AND COMPENSATION--- THE SERVICE SUPPLIED HEREUNDER AND THE CHARGES THEREFROM SHALL BE SET FORTH IN THE TARIFFS OF THE CONTRACTOR FROM TIME TO TIME LAWFULLY IN FORCE AND EFFECT. THE CONTRACTOR WILL KEEP THE GOVERNMENT INFORMED OF THE RATES AND CHARGES CURRENTLY, AND FROM TIME TO TIME APPLICABLE TO THE SERVICES TAKEN HEREUNDER.'

IN A SIMILAR CASE, B-123206, JUNE 30, 1955, INVOLVING THE ARIZONA SALES TAX CHARGE INCLUDED IN A BILL FROM THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY TO THE DEPARTMENT OF COMMERCE FOR TELEPHONE AND TOLL SERVICES AT THE WEATHER BUREAU AIRPORT STATION, PRESCOTT, ARIZONA, OUR OFFICE HELD THAT, IN VIEW OF THE FACT THAT THE TAX CHARGE WAS BASED UPON A LAWFULLY-IN-EFFECT TARIFF, IT WAS PAYABLE UNDER THE TERMS OF THE CONTRACT, AND INASMUCH AS THE ADDITION OF A CHARGE TO COVER THE TAX HAD BEEN APPROVED BY THE ARIZONA CORPORATION COMMISSION, THE BILL COULD BE CERTIFIED FOR PAYMENT. THIS CASE INVOKED THE WELL ESTABLISHED RULE, "THAT RATES FIXED BY A CONTRACT BETWEEN A PUBLIC UTILITY AND A PATRON ARE NEVERTHELESS SUBJECT TO LEGISLATIVE REGULATIONS AND ARE SUPERSEDED BY A SCHEDULE OF RATES PRESCRIBED BY THE LEGISLATURE OR A COMMISSION TO WHICH IT HAS DELEGATED ITS REGULATORY AUTHORITY.' SEE 32 COMP. GEN. 577. ACCORDINGLY, IF THE NEW MEXICO LEGISLATURE OR A COMMISSION ESTABLISHED BY THAT LEGISLATURE HAS APPROVED THE

ADDITION OF A CHARGE TO COVER THIS TAX, THE AMOUNT BILLED BY THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY ALSO MAY BE CERTIFIED FOR PAYMENT.

ON THE BASIS OF THE RECORD SUBMITTED, THE CONTRACT BETWEEN THE SOUTHERN UNION GAS COMPANY AND THE GOVERNMENT DOES NOT APPEAR TO PROVIDE ANY CONTRACTUAL PROVISION THAT WOULD NECESSITATE THE REIMBURSEMENT BY THE GOVERNMENT TO THE CONTRACTOR FOR THESE AND SIMILAR TAXES. CONSEQUENTLY, AS THE TAX IMPOSED IS A TAX ON THE VENDOR, AND THERE DOES NOT APPEAR TO BE IN EFFECT AN AGREEMENT REQUIRING THE GOVERNMENT TO REIMBURSE THE AMOUNT ASSESSED BY THE STATE, THE GOVERNMENT IS NOT LIABLE FOR THE ADDITIONAL TAX CHARGE AND THE AMOUNT MAY NOT BE CERTIFIED FOR PAYMENT. HOWEVER, IF THERE ARE ADDITIONAL CONTRACT PROVISIONS PROVIDING FOR AN INCREASE IN RATES BASED UPON THE NEW TAX CHARGE SIMILAR TO THE ONE INCORPORATED IN THE EL PASO NATURAL GAS PRODUCTS COMPANY CONTRACT, OR AN AGREEMENT SIMILAR TO THAT ONE APPEARING IN ARTICLE II OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY CONTRACT, COUPLED WITH AN APPROVAL BY THE NEW MEXICO REGULATORY AUTHORITY THAT THIS ADDITIONAL CHARGE MAY BE INCLUDED IN THE CONTRACT PRICE, THEN THE AMOUNT BILLED BY THE SOUTHERN UNION GAS COMPANY MAY BE CERTIFIED FOR PAYMENT.