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B-152325, Dec. 12, 1963

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B-152325, DEC. 12, 1963

TO MR. JAMES T. LEWIS, AUTHORIZED CERTIFYING OFFICER, BUREAU OF MINES:

WE REFER TO YOUR LETTER OF AUGUST 13, 1963, REQUESTING OUR DECISION ON THE PROPRIETY OF CERTIFYING FOR PAYMENT A VOUCHER FOR THE SUM OF $27.52 IN FAVOR OF THE PAN AMERICAN PETROLEUM CORPORATION OF FORT WORTH, TEXAS. THE VOUCHER, TYPICAL NO DOUBT OF OTHERS TO BE PRESENTED TO YOU FOR CERTIFICATION, WOULD REIMBURSE THE CORPORATION TO THE EXTENT OF FIFTY (50) PERCENT OF THE TAX IT PAID, UNDER THE NEW MEXICO OIL AND GAS EMERGENCY SCHOOL TAX ACT (NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION, SECTIONS 72-21-1 TO 72-21-25), ON NATURAL GAS DELIVERED DURING THE MONTH OF MAY 1963, TO THE NAVAJO HELIUM PLANT, BUREAU OF MINES, DEPARTMENT OF THE INTERIOR, LOCATED IN SAN JUAN COUNTY, NEW MEXICO.

UNDER A SALES AGREEMENT DATED JUNE 12, 1959, WITH THE UNITED STATES, THE CORPORATION, AN OIL AND GAS PRODUCER, DELIVERS TO THE NAVAJO HELIUM PLANT NATURAL GAS FROM ITS LOCAL NEW MEXICO WELLS. THE AGREEMENT PROVIDES THAT THE GAS SHALL BE DELIVERED AND SOLD AT A STIPULATED PRICE,SUBJECT TO STATED CONDITIONS. ON THE SUBJECT OF TAXES THE AGREEMENT PROVIDES:

"IT IS UNDERSTOOD AND AGREED THAT COMPANY SHALL BEAR AND PAY ALL PRESENT PRODUCTION, DELIVERY, SEVERANCE AND OTHER EXCISE TAXES NOW IMPOSED OR LEVIED BY THE STATE OR OTHER GOVERNMENTAL AGENCY UPON THE GAS PRODUCED BY COMPANY AND FOR WHICH COMPANY IS LIABLE; PROVIDED, THAT IN THE EVENT ANY NEW TAXES OF SIMILAR NATURE ARE LEVIED AGAINST COMPANY OR IF THE AMOUNT OF EXISTING TAXES SHOULD BE INCREASED UPON THE GAS SOLD HEREUNDER AFTER THE DATE OF THIS AGREEMENT, THEN UNITED STATES AGREES TO REIMBURSE COMPANY FOR FIFTY (50) PERCENT OF THE AMOUNT OF ANY SUCH NEW TAXES OR INCREASE IN EXISTING TAX ON THE GAS PRODUCED BY COMPANY AND SOLD TO UNITED STATES HEREUNDER.'

THE OIL AND GAS EMERGENCY SCHOOL TAX ACT OF NEW MEXICO, EFFECTIVE SEPTEMBER 1, 1959, AFTER THE AGREEMENT OF JUNE 12, 1959, LEVIES A TAX ON THE PRIVILEGE OF ENGAGING IN THE BUSINESS OF SEVERING OIL, NATURAL GAS OR LIQUID HYDROCARBON FROM THE SOIL OF THE STATE. THE TAX IS COMPUTED ON THE ,TAXABLE VALUE OF SUCH PRODUCTS.' PRIOR TO THAT ACT A BUSINESS PRIVILEGE TAX HAD BEEN IMPOSED BY THE EMERGENCY SCHOOL TAX ACT. SECTIONS 72-16-1 ET SEQ. BUT UNDER THE EARLIER ACT AND THE OIL AND GAS EMERGENCY SCHOOL TAX ACT, UNTIL THE LATTER WAS AMENDED EFFECTIVE APRIL 1, 1963, SALES TO THE NAVAJO HELIUM PLANT WERE BY VIRTUE OF STATUTORY PROVISIONS IN SUCH OF THE ACTS NOT SUBJECT TO THE BUSINESS PRIVILEGE TAX, AND THE GOVERNMENT WAS NOT CALLED UPON TO REIMBURSE THE CORPORATION. SEE SECTIONS 72-16-5, 72-21-4, AND 72-23 3. THE 1963 AMENDMENT WHICH DELETED THE EXEMPTIONS FROM THE OIL AND GAS EMERGENCY SCHOOL TAX ACT ALSO INCREASED THE TAX RATE FROM 2 PERCENT TO 2.55 PERCENT OF THE TAXABLE VALUE OF OIL AND GAS TAKEN FROM THE SOIL.

THE TAX HERE INVOLVED IS A BUSINESS PRIVILEGE TAX IMPOSED UPON THE CORPORATION. SEE STATE V. TITTMANN, 75 P.2D 701, 704; BRADBURY AND STAMM CONSTRUCTION CO. V. BUREAU OF REVENUE, 372 P.2D 808. THE FACT THAT THE ECONOMIC BURDEN OF THE TAX FALLS UPON THE UNITED STATES DOES NOT VEST THE CORPORATION WITH GOVERNMENTAL IMMUNITY TO STATE TAXATION. JAMES V. DRAVO CONTRACTING COMPANY, 302 U.S. 134; ALABAMA V. KING AND BOOZER, 314 U.S. 1; BRADBURY AND STAMM CONSTRUCTION CO. V. BUREAU OF REVENUE, SUPRA.

AS STATED IN YOUR SUBMISSION, THE CORPORATION TREATS THE REMOVAL OF THE EXEMPTION FROM THE OIL AND GAS EMERGENCY SCHOOL TAX AS AN INCREASE OF AN EXISTING TAX AND HAS BILLED THE GOVERNMENT FOR FIFTY (50) PERCENT OF THE TAX BASED ON THE 2.55 PERCENT RATE. THE CORPORATION'S POSITION THAT A TAX INCREASE HAS OCCURRED WITHIN THE CONTEMPLATION OF THE REIMBURSEMENT PROVISION OF THE AGREEMENT OF JUNE 12, 1959, APPEARS TO REFLECT THE FACT THAT THE NEW MEXICO LAW OF 1963 AMENDING THE OIL AND GAS EMERGENCY SCHOOL TAX ACT DECLARES IT TO BE THE LEGISLATIVE INTENT THAT THE AMENDMENT SHALL NOT CONSTITUTE A "NEW OR AN ADDITIONAL TAX" UPON THE PRODUCER OF OIL, NATURAL GAS OR LIQUID HYDROCARBON AS CONTEMPLATED IN GAS PURCHASE CONTRACTS COMMONLY USED IN THE GAS INDUSTRY. THE PHRASE "NEW OR AN ADDITIONAL TAX" CANNOT REASONABLY BE CONSIDERED TO INCLUDE AN INCREASE OF EXISTING TAXES. THE LEGISLATIVE ACT INVOLVED PRESCRIBES AN INCREASE IN THE TAX RATE. MOREOVER, WE CONSIDER THE CORPORATION'S POSITION TO BE WARRANTED, THAT FOR THE PURPOSE OF THE TAX REIMBURSEMENT PROVISION OF THE AGREEMENT THERE OCCURRED A TAX INCREASE TO THE EXTENT OF THE NOW APPLICABLE OIL AND GAS EMERGENCY SCHOOL TAX.

THE VOUCHER, WITH SUPPORTING PAPERS, IS RETURNED AND MAY BE CERTIFIED FOR PAYMENT IF THE AMOUNT THEREOF IS CORRECT.