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ARIZONA ATTORNEY GENERAL

June 14, 1954

Mr. Howard Tench, Comptroller
University of Arizona
Tucson, Arizona

Re: The liability of the State of Arizona,
its departments and agencies for city
privilege taxes (sales tax) in connec-
tion with the purchase of material or
services.

Dear Sir:

Enclosed please find Opinion No. 54-83 written at
your request, determining the University's liability
for Yuma City Privilege Taxes.

As you will note from the opinion, there is no
liability other than that arising by virtue of a con-
tract (written or implied in the sales transaction)
and as such, should not be characterized as a tax but
as part of the purchase price.

Further explanation or information in connection
with this problem will be furnished upon request.

Very truly yours,

ELDON R. CLAWSON
Assistant to The
Attorney General

ERC:bt
Enclosure

54-83

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ARIZONA ATTORNEY GENERAL

June 14, 1954
Opinion No. 54-83

TO: Mr. Howard Tench
Comptroller
University of Arizona
Tucson, Arizona

RE: The liability of the State of
Arizona, its departments and
agencies, for city privilege
taxes (sales tax) in connection
with the purchase of material
or services.

QUESTION: Is the State of Arizona, through
the University of Arizona Agri-
cultural Extension Service, liable
for the city privilege tax (sales
tax) imposed by the City of Yuma,
Ordinance No. 604, on purchases
of supplies from a licensee of
the city?

Your letter of May 24th, and the material enclosed, require an examination of the operation of city privilege taxes (sales) in order to determine the liability, if any, of the State of Arizona, its departments, and agencies for such taxes.

As the controlling principles are general in application, and as only the cities of Phoenix and Yuma have yet adopted privilege taxes (both patterned after the state Excise Revenue Act of 1935), no reference will be made to the particular controversy giving rise to the request.

The opinion assumes the validity of the city taxes for the legal considerations determining the liability of the State are separate to those governing a city's right to impose such taxes.

Cities are created by incorporation under "general laws" in Arizona. Constitution of Arizona, Article 13, Section 1. Incorporated cities "may be vested with authority to assess and collect taxes" (Constitution of Arizona, Article 13, Section 1),

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and "The law-making power (in this case of the city) shall have authority to provide for the levy and collection of * * * gross revenue, excise, (taxes)." (Parenthetical matter supplied.) Constitution of Arizona, Article 9, Section 12. See also Constitution of Arizona, Article 13, Section 2, and Section 16-301, A.C.A. 1939, wherein a city having a population in excess of 3,500 inhabitants may frame a charter "consistent with the constitution and laws of the State."

Cities have only such powers as are expressly granted to them or necessarily implied therefrom. WOODWARD v. FOX WEST COAST THEATRES, 36 Ariz. 251, 284 P. 350. McCLINTOCK v. CITY OF PHOENIX, 24 Ariz. 155, 207 P. 611. They are created by virtue of the sovereignty resting in the State for the sole purpose of exercising the limited part of that sovereignty delegated to them. CITY OF BISBEE v. COCHISE COUNTY, 52 Ariz. 1, 78 P. 982.

Authority granted to a city to impose the taxes enumerated in Article 9, Section 12, does not include authority to tax the State as, generally, such delegations of sovereign power in derogation of pre-existing rights or privileges do not apply to the sovereign unless expressly declared to do so. UNITED STATES v. UNITED MINE WORKERS OF AMERICA, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884, and cases cited therein. See also Constitution of Arizona, Article 9, Section 2, exempting State property from ad valorem taxation, and PACIFIC FRUIT EXPRESS COMPANY v. CITY OF YUMA, 32 Ariz. 601, 261 P. 49, wherein the court said in city charters "is the self-imposed limitation that the powers exercised by it (city) shall not contravene the provisions of the United States Constitution, or the State Constitution, or the laws of the State."

The relationship between State and City compels the recognition of an implied immunity from city taxation of the means and instrumentalities of the State used to carry on its proper functions just as the doctrine of an implied constitutional immunity from state taxation of the Federal government has been adopted and upheld by the United States Supreme Court since the case of M'CULLOCK v. MARYLAND, (1819) 4 Wheat 316, 4 L.Ed. 579, wherein Chief Justice Marshall stated: "The power to tax is the power to destroy."

Whether or not a city privilege tax offends this immunity must be determined by an analysis of the act.

The cities of Phoenix and Yuma having copied the state act must also have adopted the construction placed thereon by the Arizona Supreme Court. Therefore, the nature of the taxes are

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settled as being occupation taxes upon the privilege of engaging in business measured by or based on business activities or transactions, generally sales. This interpretation of the State act has been uniformly followed from the first case interpreting the act (WHITE v. MOORE, (1935) 46 Ariz. 48, 46 P. 2d 1077) to the last (ARIZONA STATE TAX COMMISSION v. ENSIGN, (1953) 75 Ariz. 220, 257 P. 2d 392).

The city privilege taxes are not, then, direct taxes on the state or its instrumentalities. Notwithstanding the legal incidence of the tax not being on the state, but on citizens of the state (and also city) with which the state deals, is the operation of the tax such as to overreach the immunity?

The question thus presented is an open one in Arizona, but very persuasive if not controlling authority exists in the United States Supreme Court cases determining similar questions relating to the Federal government's immunity from state taxation.

In a case construing a Mississippi privilege tax on the business of distributing gasoline where the only incidence of the tax upon the federal government was its economic burden, a divided United States Supreme Court first held such taxes void because of the immunity. The court said:

"* * *The right of the United States to make such purchases (of gasoline for the Coast Guard and a Veterans Hospital) is derived from the Constitution. * * *While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. WAGNER v. COVINGTON, 251 U.S. 95, 102, 64 L. ed 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount

of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. * * * (Parenthetical matter supplied.)

PANHANDLE OIL CO. v. MISSISSIPPI, 227 U. S. 218, 721 L. Ed. 857, 48 S. Ct. 451, 56 A.L.R. 583.

The court has now reversed itself and where the only connection or incidence of the state tax with the Federal government is its economic burden there is no immunity. In the case of ALABAMA v. KING, 341 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 43, 140 A.L.R. 615, the full court held that a state sales tax laid upon the seller but which he is to collect from the buyer does not infringe the constitutional immunity of the Federal government from state taxation because the economic burden of the tax is borne by the United States. This holding was based upon earlier cases wherein it was recognized that taxes upon the property or earnings of persons serving the Federal government did not in any substantial way interfere with the performance of Federal functions. See METCALF & EDDY v. MITCHELL, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172. TRINITY FARM CONSTRUCTION CO. v. GROSJEAN, 291 U. S. 466, 78 L. Ed. 918, 54 S. Ct. 469. JAMES v. DRAVO CONTRACTING CO., 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, 114 A.L.R. 318.

Writing for the court in the ALABAMA v. KING case, supra, Chief Justice Stone said:

"The Government, rightly, we think, disclaims any contention that the Constitution, unaided by congressional legislation, prohibits a tax enacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not

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spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi*, and *Graves v. Texas Co. supra*, we think it no longer tenable. * * *

Subsequent cases have adhered to the rule established where the tax did not discriminate against the Federal government and was not laid directly on its property or operations. See *MAYO v. U. S.*, 319 U. S. 441, 87 L. Ed. 1504, 63 S. Ct. 1137, 147 A.L.R. 761; *UNITED STATES v. COUNTY OF ALLEGHENY*, 322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908; *HOWARD v. COMMISSIONERS*, 344 U. S. 624, 9 L. Ed. 617, 73 S. Ct. 465.

The most recent expression of the rule by the court is found in the case of *ESSO STANDARD OIL CO. v. SZANS*, 345 U. S. 495, 97 L. Ed. 1174, 73 S. Ct. 800, as follows:

"* * *It (tax on contractor storing gasoline owned by U.S.) may generally, as it did here, burden the United States financially. But since *James v. Dravo Contracting Co.*, 302 US 134, 151, 82 L ed 155, 167, 58 S Ct 208, 114 ALR 318, this has been no fatal flaw. * * *

* * * The United States, today, is engaged in vast and complicated operations in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government. We hold, therefore, that sovereign immunity does not prohibit this tax." (Parenthetical matter supplied.)

Returning to the relationship of state and city, nothing appears to require a different view and, therefore, it is the opinion of this office that the state is not immune from the economic burden of such city taxation as it is required by contract or otherwise to assume where the tax is nondiscriminating and not directly on the property or operation of the state.

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This holding is not to be construed as limiting the state's rights to bargain for its services and supplies in the market place or otherwise escape the economic burden of a city tax imposed on persons subject thereto.

ROSS F. JONES
The Attorney General

ELDON R. CLAWSON
Assistant to The
Attorney General