Attorney General of New Mexico

P.O. Drawer 1508 Santa Fe, New Mexico 87504

505-827-6000
Fax 505-827-5826

TOM UDALL
Attorney General

December 19, 1991

OPINION
OF
TOM UDALL
Attorney General

Opinion No. 91-14

BY: Elizabeth A. Glenn
Assistant Attorney General

TO: Honorable Manny M. Aragon
State Senator
Drawer Z
Albuquerque, New Mexico 87103

QUESTION:

Does the antidonation clause of Article IX, Section 14 of the New Mexico Constitution prohibit the legislature from enacting tax exemptions and deductions from the state gross receipts tax?

CONCLUSION:

Gross receipts tax exemptions and deductions do not violate the antidonation clause unless they are applied retroactively to taxes due and payable.[1]

ANALYSIS:

The Gross Receipts and Compensating Tax Act, NMSA 1978, §§ 7-9-1 to -82 (Repl. Pamp. 1990), establishes a presumption "that all receipts of a person engaging in business are subject to the gross receipts tax." Id. § 7-9-5. At the same time, the statute also provides that certain receipts are exempted from the gross receipts

---

[1]Although the legislature's decision to grant a prospective tax exemption or deduction only to certain citizens does not implicate the antidonation clause, the choice of groups freed from paying tax must have a rational basis and conform to principles of equal protection. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18; Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 763 P.2d 1153 (1988).

tax or may be deducted from gross receipts subject to the tax.[2] Arguably, by allowing an exemption or deduction, the legislature is donating to a taxpayer the amount the taxpayer would otherwise have to pay, in violation of the state constitution's prohibition against donations to or in aid of any person, association or corporation. N.M. Const. art. IX, § 14.

However, from the moment the legislature enacts an exemption or a deduction for certain business receipts, the taxpayer does not owe taxes on those receipts, and the existence of a valid exemption or deduction rebuts the presumption of taxability under NMSA 1978, Section 7-9-5. There is no donation because the obligation to pay a tax is solely a function of the statutory taxing scheme in effect at any point in time, and the state is not excusing taxpayers from paying amounts they otherwise are required to pay at that time.[3]

This point was made long ago by the Wyoming Supreme Court:

> [T]he statute in question ... was clearly intended to apply only to future taxes; and therefore it did not in any sense relinquish any obligation to the state or any political subdivision thereof....[I]t may be seriously doubted, we think, whether the provision declaring the exemptions can be considered as in any sense a provision for donations to the individuals whose property may become exempt. No money or property is donated or granted. The exemption is an immunity or privilege,

---

[2]Although tax exemptions are different from deductions--an exemption frees taxpayers "from the burden of enforced contribution to the expenses and maintenance of government," Asplund v. Alarid, 29 N.M. 129, 133, 219 P. 786 (1923), i.e, from the duty of reporting certain income at all, while a deduction subtracts certain receipts from total gross receipts subject to taxation--they both reduce tax obligations by removing receipts from taxation and so are interchangeable for purposes of this letter.

[3]A recent Arizona Attorney General Opinion explained this concept somewhat differently when it concluded that a $1,000 income tax deduction was not an unconstitutional gift of public funds:

> In providing for a $1,000 subtraction from gross income, the statute merely prescribes a method for calculating taxable income for certain taxpayers. Thus, the subtraction or deduction is not a grant of the state's property because no monies are due the state until the calculation is complete.

Ariz. Att'y Gen. Op. No. I90-049 (1990) (on WESTLAW).

> rather than a gift or donation. No tax is to be assessed or levied upon the exempted property, and therefore, to the extent of the exemption, no obligation is to be assumed by or imposed upon the owner.

State ex rel. Board of Comm'rs v. Snyder, 212 P. 771, 778 (Wyo. 1923). See also In re Voorhees' Estate, 196 A. 365, 369 (N.J. Perog. Ct. 1938) (exemption from future taxation was lawful but retroactive exemption was an unconstitutional gift), aff'd, 3 A.2d 891 (N.J. Sup. Ct. 1939), aff'd, 10 A.2d 650 (N.J. 1940). This position is consistent with the New Mexico courts' general tolerance of tax exemptions and their rulings striking down retroactive tax exemptions.

New Mexico courts have generally upheld tax exemptions. According to one early case, "[i]n the exercise of the power of taxation the state is free to select its subjects, and also to grant exemptions. There is no rule under any provision of the Constitution of the state or national government that requires a precise equality in taxation." Lougee v. New Mexico Bureau of Revenue Comm'r, 42 N.M. 115, 134, 76 P.2d 6 (1937). See also Dikewood Corp. v. Bureau of Revenue, 74 N.M. 75, 80, 390 P.2d 661 (1964) (upholding tax act exempting sellers of personal property to federal government but not vendors of services to government). In most cases concerning exemptions or deductions, the issue is whether they apply in a particular situation rather than their constitutionality. See, e.g., Security Escrow Corp. v. State Taxation and Revenue Dep't, 107 N.M. 540, 760 P.2d 1306 (Ct. App. 1988); Chavez v. Commissioner of Revenue, 82 N.M. 97, 476 P.2d 67 (Ct. App. 1970).

In contrast with their treatment of tax exemptions and deductions applied prospectively, New Mexico courts have repeatedly struck down retroactive tax relief as violating Article IV, Section 32 of the New Mexico Constitution which prohibits the cancellation of debts owed the state.[4] For example, the Court held that the legislature could not apply a statute exempting veterans from a per

---

[4]Article IV, Section 32 of the New Mexico Constitution provides, in pertinent part:

> No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court.

capita road tax to taxes owed before the statute's effective date. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923). According to the Court, the tax became a liability once it was assessed. Id. at 138. See also State v. Montoya, 32 N.M. 314, 255 P. 634 (1927) (statutory presumption that accrued taxes had been paid was invalid to the extent it prevented the state from recovering taxes previously assessed); Board of Educ. v. McRae, 29 N.M. 85, 218 P. 346 (1923) (repeal of poll tax could not be construed to remit or postpone taxes already levied without violating Art. IV, § 32).[5]

Courts from other states have used similar reasoning to find retroactive tax exemptions and deductions unconstitutional under those states' antidonation provisions. For example, the California Supreme Court reviewed whether, in fixing the inheritance tax due after a decedent's death, the deduction allowed for statutory commissions paid the executrix and her attorney should be calculated according to the rates in effect on the date of the decedent's death or the higher rates enacted and effective after the decedent's death. In re Skinker's Estate, 303 P.2d 745 (Cal. 1956). The court held that because inheritance taxes were fixed and determined on the date of death, application of the new rates would be an unconstitutional gift of public funds:

> Where a tax has become due, a subsequent act of the Legislature reducing the tax by reason of the change in the exemptions, tax rates, or for that matter in any way, is held to be a gift of state monies and is prohibited by the...California Constitution.
>
> Retroactive effect of such legislation is therefore prohibited.

---

[5]Only one New Mexico case has examined the application of the antidonation clause in the area of state taxation. In Chronis v. State ex rel. Rodriguez, 100 N.M. 342, 670 P.2d 953 (1983), the Court found unconstitutional a tax credit granted for a limited time to certain licensed liquor retailers and dispensers against the licensees' liability to the state for gross receipts taxes up to a specified amount. The Supreme Court based its conclusion on Article IX, Section 14, stating "the reduction in payments of gross receipts taxes in this case constitutes an unconstitutional subsidy to the liquor industry." Id. at 348. Although the Court did not clearly explain its decision, it appears that it found the credit objectionable because the credit amounted to compensation for other changes in the liquor license laws which the legislature viewed as altering the property status of licenses. See dissent, id. at 350-51. Because the Court determined that licensees possessed no property rights in their licenses as against the state, id. at 345, there was no basis for the credit.

Id. at 748 (citations and footnote omitted). This reasoning implies that tax exemptions and deductions are not unconstitutional if they are applied prospectively.[6]

Based on the above discussion, we do not think that a prospectively-applied tax exemption or deduction violates the antidonation clause.

TOM UDALL
Attorney General

ELIZABETH A. GLENN
Assistant Attorney General

[6]Other states' courts similarly have held that a tax exemption cannot be applied retroactively to tax liabilities arising before the exemption's effective date and apparently assume that, if applied prospectively, tax deductions or exemptions are constitutional. See, e.g., In re Voorhees' Estate, 196 A. 365 (N.J. Perog. Ct. 1938) (retroactive application of tax exemption to taxpayer whose tax liability and obligation had already become fixed would violate New Jersey constitution's prohibition against donations to associations and corporations), aff'd, 3 A.2d 891 (N.J. Sup. Ct. 1939), aff'd, 10 A.2d 650 (N.J. 1940); In re Guiteras' Estate, 204 N.Y.S. 267 (N.Y. Surr. Ct. 1924) (amendment directing the cancellation or refund of taxes previously assessed was invalid under constitutional provision prohibiting the state from giving money to associations and corporations); Morris v. Calvert, 329 S.W.2d 117 (Tex. Ct. Civ. App. 1959) (retroactive application of tax exemption would raise serious question under constitutional provision prohibiting the state from releasing liabilities and granting public funds). But see Seattle-King County Council of Camp Fire v. State Dep't of Revenue, 711 P.2d 300 (Wash. 1985) (tax may be constitutionally repealed retroactively as long as the state is not required to actually return money to taxpayers).