



**Office of the Attorney General
State of Texas**

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ATTORNEY GENERAL

April 4, 1996

Mr. John R. Speed, P.E.
Executive Director
Texas State Board of Registration
for Professional Engineers
P.O. Drawer 18329
Austin, Texas 78760-8329

Letter Opinion No. 96-039

Re: Whether the \$200 fee increase imposed by section 13B of the Texas Engineering Practice Act, as applied to engineers working for the federal government, violates the doctrine of intergovernmental tax immunity (ID# 32394)

Dear Mr. Speed:

Your predecessor asked whether the \$200 fee increase imposed by section 13B of the Texas Engineering Practice Act (the "act"), V.T.C.S. art. 3271a, applies to engineers working for the federal government. Section 13B provides as follows:

Sec. 13B. (a) Each of the following fees imposed by or under another section of this Act is increased by \$200:

- (1) registration fee;**
- (2) annual renewal fee; and**
- (3) reciprocal registration fee.**

(b) Of each fee increase collected, \$50 shall be deposited to the credit of the foundation school fund and \$150 shall be deposited to the credit of the general revenue fund. This subsection applies to the disposition of each fee increase regardless of any other provision of law providing for a different disposition of funds.

(c) Subsection (a) does not apply to a registered professional engineer who meets the qualifications for an exemption from registration under Section 20(g) or (h) of this Act but who does not claim that exemption.

Your predecessor stated that Attorney General Opinion DM-237 (1993) answered a similar "question regarding the validity of the \$200 fee increase mandated by the Public Accountancy Act of 1991 for certified public accountants who are employed by the federal government." Because Attorney General Opinion DM-237 involved a question about the doctrine of intergovernmental tax immunity, we understand the issue to be whether the fee

increase provided in section 13B, as applied to federal employees, violates the same doctrine.

The fee increase applies by its terms to all registration fees, annual renewal fees, and reciprocal registration fees, except for fees paid by those registered professional engineers who are identified in subsection (c), which refers to section 20(g) and (h) of the act. Subsection (g) of section 20 describes one class of persons whose fees are exempted from the \$200 increase as including "[a]ny regular full time employee of a private corporation or other private business entity who is engaged solely and exclusively in performing services for such corporation and/or its affiliates" and whose services relate to products or interests of the person's employer, an affiliate of the employer, or another private business entity or to property in which the employer, affiliate, or other private business entity "has an interest, estate or possessory right." Subsection (h) describes the other class of persons as including "[a]ny regular full time employee of a privately owned public utility or cooperative utility and/or affiliates who is engaged solely and exclusively in performing services for such utility and/or its affiliates." Both subsections (g) and (h) provide two criteria that an engineer also must satisfy to be exempted: (1) the employee must "not have the final authority for the approval of, and the ultimate responsibility for, engineering designs, plans or specifications" and (2) the employee must not use any name, title, or words that "tend to convey the impression that an unlicensed person is offering engineering services to the public."

Your predecessor pointed out that section 20(d) exempts from the registration provisions of the act "[o]fficers and employees of the Government of the United States while engaged within this state in the practice of the profession of engineering for said Government," but subsection (c) of section 13B does not make a similar exemption applicable to the \$200 fee increase. The exemption from the registration provisions contains the proviso "that such persons are not directly or indirectly represented or held out to the public to be legally qualified to engage in the practice of engineering." V.T.C.S. art. 3271a, § 20. Therefore, the act does not require federal government engineers as described in section 20(d) to be registered so long as they are not so represented or held out; but those who do register must, according to the act, pay any applicable fees set forth in section 13B(a), *see id.* § 13(b), as well as the \$200 fee increase, even if they meet the two foregoing criteria that apply to exempt private-sector engineers. Your office has not suggested that registration is practically necessary for federal engineers to engage in their practices, so we assume that federal engineers who do register do so for reasons unrelated to their responsibilities as federal employees. State government engineers are not exempted from the registration provisions of the act or the fee increase.

In Attorney General Opinion DM-237, we summarized the development of the doctrine of intergovernmental tax immunity under the Supremacy Clause (article VI, clause 2) of the Constitution. We noted that the Supreme Court in *United States v. County of Fresno*, 429 U.S. 452 (1977), reaffirmed the central tenet of *McCulloch v.*

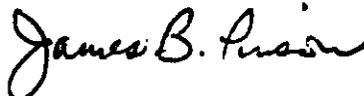
Maryland, 17 U.S. (4 Wheat.) 316 (1819), that a state may not levy a tax directly on the federal government, nor may it impose a tax whose "legal incidence . . . falls on the Federal Government." Attorney General Opinion DM-237 (1993) at 2 (quoting *County of Fresno*, 429 U.S. at 459). We also stated in that opinion that the modern doctrine, as summed up in *County of Fresno*, prohibits discriminatory state taxes on persons dealing with the federal government: "[T]he economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." *Id.* at 3-4 (quoting *County of Fresno*, 429 U.S. at 463-64). We noted there that if that statute contained "a blanket exemption of state-employed accountants" from the fee increase, the exemption "would, in all probability, be . . . an impermissible discrimination" against federal employees. *Id.* at 4 (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989)).

Thus, an analysis of United States immunity from state taxes requires consideration of two issues: first, whether the legal impact of the tax falls on the United States, and second, whether the tax discriminates against federal employees. *Id.* It is sufficient for the resolution of these issues that the act does not require registration for federal officers and employees, V.T.C.S. art. 3271a, § 20(d). The section 13B fee increase that is incidental to registration therefore neither has a legal impact on, nor discriminates against, federal engineers as such. We accordingly conclude that the fee increase does not violate the doctrine of intergovernmental tax immunity.

S U M M A R Y

The Texas Engineering Practice Act (the "act"), V.T.C.S. art. 3271a, does not require registration of engineers who are federal officers and employees, *id.* § 20(d). The \$200 fee increase provided in section 13B of the act therefore neither has a legal impact on, nor discriminates against, federal engineers as such and so does not violate the doctrine of intergovernmental tax immunity.

Yours very truly,



James B. Pinson
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Opinion Committee