

Official Opinion No. 80-41, Application of Contractor's Excise Tax to Work Done by County Highway Department for Other Governmental Agencies

July 17, 1980

Mr. John R. Steele  
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Plankinton, South Dakota 57368

Official Opinion No. 80-41

**Application of Contractor's Excise Tax to Work Done by County Highway Department for Other Governmental Agencies**

Dear Mr. Steele:

You have requested an official opinion from this office in regard to the following factual situation:

**FACTS:**

Aurora County, through its Highway Department, performs, on a regular basis, certain services by way of repairing and maintaining roads, streets, and bridges, located within the county, but which are the primary responsibility of some other local government body (organized townships, chiefly). When such work is performed by the county, the township (or other body) pays the county for performing such work as is done, on a basis agreed to between the governing bodies of the county and township.

Based on the above facts, you have asked the following question:

**QUESTION:**

Does the South Dakota Contractor's Excise Tax, SDCL 10-46A, apply to the receipts of the county when it does maintenance or repair work for some other governmental subdivision?

SDCL 10-46A, the Contractor's Excise Tax, was enacted in 1979 to be a tax on all contractors who engage in realty improvement contracts. Realty improvement contracts are defined in SDCL 10-46A-2 as those which are found in the Standard Industrial Classification Manual of 1972, in Major Group 15, 16 and 17. Major Group 16 encompasses highway and

street construction in Industry #1611. The tax, therefore, is generally applicable to highway contractors. Your fact situation concludes that the work is done on an agreed basis between the governing bodies of the county and township. I would therefore conclude that the county is a contractor within the terms of the statute.

Since this is not a property tax, the county is not exempt under Article VI, Section 5 of the South Dakota Constitution. It seems clear that it is an excise tax and such taxes have been upheld against political subdivisions in this state for many years. See specifically the sales tax on liquor inventory of municipalities, Barnes v. Stout, 65 S.D. 592, 276 N.W. 920 (1937), and motor fuel tax on municipal vehicles, State v. City of Sioux Falls, 60 S.D. 330, 244 N.W. 365 (1932). Also in this connection, I direct your attention to Official Opinion 75-148, which concerns the purchase of gasoline by a school district for use in a contracting bus company's vehicles. The school district was not exempt from the tax. See also Official Opinion 75-161, determining that the South Dakota Mineral Tax was applicable to the net revenues of the State Cement Plant.

There is no question here that the county is performing work that in other circumstances is done by private contractors who are subject to the Contractor's Excise Tax for the work. The county, therefore, is engaged in proprietary activities rather than governmental functions. As the United States Supreme Court recently noted, with respect to the South Dakota Cement Plant, Reeves v. Stake, No. 79-677, issued June 19, 1980, 'Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants.' (Citing cases)

In answer to your question, therefore, it is my opinion that the contractual activities of Aurora County which are included in the Standard Industrial Classification Manual are subject to the State Contractor's Excise Tax.

Respectfully submitted,

Mark V. Meierhenry  
Attorney General