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**March 11, 1999**  
**No. I99-007 (R99-003)**

**Question Presented**

Pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 26-177 ("[t]he attorney general shall, upon request of the adjutant general or the state judge advocate of the national guard, give opinions upon legal questions pertaining to military affairs of the state"), you have asked whether purchases by the Property and Fiscal Officer ("PFO") of the Arizona National Guard would qualify for the fifty percent reduction of the tax base from the gross proceeds or gross income on sales of tangible property, as provided in A.R.S. § 42-5061(L).

**Summary Answer**

If the PFO, or other federally warranted officers, use federal funds to purchase tangible personal property that directly becomes federal property, the sale should be considered made to the United States, and would thus qualify for the tax reduction authorized by A.R.S. § 42-5061(L).

**Background**

A. **The National Guard's Property and Fiscal Officer**

The National Guard is the modern militia reserved to the states by Article I, section 8, clauses 15 and 16 of the United States Constitution. *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159. In 1916, Congress materially altered the status of the militia by constituting them as the National Guard and providing that they be uniformed, equipped, and trained in much the same way as the regular army. *Id.* at 46-47. Congress also specifically authorized federal equipment to be allocated to the Guard. *Id.* at 47; 32 United States Code Annotated ("U.S.C.") §§ 701 to 714.

The Arizona National Guard is considered a state organization, except when the President of the United States activates it for service. *Williams v. Superior Court*, 108 Ariz. 154, 158, 494 P.2d 26, 30 (1972). This dual federal/state role creates multiple sources of funding. For example, the National Guard may receive an allocation of federal property, 32 U.S.C. § 702, or it may purchase or lease property with funds appropriated by the State. A.R.S. § 26-231. A National Guard member who by gross negligence or willfulness destroys, loses, or allows state or federal property to be lost or destroyed must reimburse the State or the federal government for the cost of the property. A.R.S. § 26-233.

Federal law provides that the governor of each state appoint a PFO for the National Guard. 32 U.S.C. § 708. Arizona law contains a complementary provision. *See* A.R.S. § 26-234 ("[t]he governor shall, subject to approval of the secretary of defense or a designated subordinate, recommend for appointment an officer of the state as acting property and disbursing officer of the United States"). The PFO is an active duty federal officer subject to federal

control, and does not fall within the State command. Pursuant to statute, the PFO must "receipt and account for all funds and property of the United States in the possession of the National Guard for which he is property and fiscal officer." 32 U.S.C. § 708(b)(1). You have advised us that the PFO, and other federally warranted officers acting under the authority of the PFO, use money appropriated directly from the federal government, employ federal procurement processes, and are responsible for overseeing federal assets located within Arizona.

#### B. State Taxation of Federal Activities

A state cannot impose a tax directly on the United States but, in the absence of express preemption by federal law, a state may tax persons doing business with the United States. *Arizona Dept. of Revenue v. Blaze Constr. Co.*, No. 97-1536, 1999 WL 100899 at \*3 (U.S. Mar. 2, 1999). The legal incidence of the Arizona transaction privilege tax is on the seller of tangible personal property or the person engaged in contracting, so the tax may be imposed on persons doing business with the United States. *Arizona State Tax Comm'n v. Garrett Corp.*, 79 Ariz. 389, 393, 291 P.2d 208, 210-11 (1955); *Tucson Mechanical Contracting, Inc. v. Arizona Dept. of Revenue*, 175 Ariz. 176, 179-80, 854 P.2d 1162, 1165-66 (App. 1992).

Arizona's transaction privilege tax includes several exemptions or deductions for transactions with the United States. *See* Arizona Transaction Privilege Tax Ruling TPR 95-16 (May 30, 1995). One of these is contained in A.R.S. § 42-5061(L) (formerly A.R.S. § 42-1310.01(L)), which allows a fifty percent reduction of the tax base for sales of tangible personal property directly to the government of the United States, or its departments or agencies.

#### Analysis

Determining whether a PFO's purchase falls within the tax base reduction authorized by A.R.S. § 42-5061(L) requires evaluation of whether the sale is made directly to the United States or to the Arizona National Guard, a state organization. The distinction is important because of the differing tax consequences. Sales to the State, its agencies, and political subdivisions are generally not exempt from taxation, A.A.C. R15-5-181(A), whereas Arizona law plainly allows a reduction in the tax base for sales of tangible personal property to the United States, or its departments or agencies. *See* A.R.S. § 42-5061(L) ("[t]here shall be deducted from the tax base fifty percent of the gross proceeds or gross income from any sale of tangible personal property made directly to the United States government, or its departments or agencies . . .").

Federal law provides for the appointment of a "federal" officer, the PFO, to be located at the National Guard with specific responsibilities to oversee "federal" property and funds. 32 U.S.C. § 708. To the extent the PFO, or other federally warranted officers, purchase property with federal funds that directly becomes federal property, the tax reduction in A.R.S. § 42-5061(L) would apply. *See Jenkins v. First Baptist Church*, 166 Ariz. 243, 245, 801 P.2d 478, 480 (App. 1990) (if statutory language is clear and unambiguous, it will determine the

statute's construction). While the National Guard itself is a state organization (and is therefore not entitled to any favorable tax treatment merely because of its close federal connection), sales of tangible personal property to the National Guard are not subject to the reduction in the tax base authorized by A.R.S. § 42-5061(L) because the sale would not be directly to the United States government, or its departments or agencies.

### Conclusion

When sales of tangible personal property are made directly to the United States government, or its departments or agencies, through the PFO or other federally warranted officers, those sales qualify for the fifty percent reduction of the tax base from the gross proceeds or gross income authorized in A.R.S. § 42-5061(L). Sales to the National Guard (a state organization) are not subject to the reduction in tax base authorized by A.R.S. § 42-5061(L) because the sale is not made directly to the United States government, or its departments or agencies.

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### Appendix A

#### **Sec. 708. Property and fiscal officers**

- (a) The Governor of each State or Territory and Puerto Rico, and the commanding general of the National Guard of the District of Columbia, shall appoint, designate or detail, subject to the approval of the Secretary of the Army and the Secretary of the Air Force, a qualified commissioned officer of the National Guard of that jurisdiction who is also a commissioned officer of the Army National Guard of the United States or the Air National Guard of the United States, as the case may be, to be the property and fiscal officer of that jurisdiction. If the officer is not on active duty, the President may order him to active duty, with his consent, to serve as a property and fiscal officer.
- (b) Each property and fiscal officer shall -
1. receipt and account for all funds and property of the United States in the possession of the National Guard for which he is property and fiscal officer; and
  2. make returns and reports concerning those funds and that property, as required by the Secretary concerned.
- (c) When he ceases to hold that assignment, a property and fiscal officer resumes his status as an officer of the National Guard.
- (d) The Secretaries shall prescribe a maximum grade, commensurate with the functions and responsibilities of the office, but not above colonel, for the property and fiscal officer of the United States for the National Guard of each State or Territory, Puerto Rico, and the District of Columbia.
- (e) The Secretary of the Army and the Secretary of the Air Force shall prescribe joint regulations necessary to carry out subsections (a)-(d).

- (f) A property and fiscal officer may intrust money to an officer of the National Guard to make disbursements as his agent. Both the officer to whom money is intrusted, and the property and disbursing officer intrusting the money to him, are pecuniarily responsible for that money to the United States. The agent officer is subject, for misconduct as an agent, to the liabilities and penalties prescribed by law in like cases for the property and fiscal officer for whom he is acting.

### **Appendix B**

#### **A.R.S. § 22-234 Property and disbursing officer; appointment;**

- (A) The governor shall, subject to approval of the secretary of defense or a designated subordinate, recommend for appointment an officer for the state as acting property and disbursing officer of the United States. The officer appointed shall have served in the armed forces of the United States or the national guard, and shall have knowledge of military supply, procurement and administration. He shall qualify by furnishing a bond in an amount and with sureties as required by the secretary of defense of the United States, conditioned upon faithful performance of his duties and safekeeping and proper disbursement of federal property and funds entrusted to his care.
- (B) The property and disbursing officer shall
1. Receive, store and account for all funds and property belonging to the United States in possession of the national guard.
  2. Make returns and reports concerning such funds and property as required by the secretary of defense.
  3. Render such accounting of federal funds entrusted to him for disbursement as required by the United States.

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