

Opinion No. 55-6162

May 18, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: John W. Gurley, Director, Division of Liquor Control, Bureau of Revenue, Santa Fe, New Mexico

On May 9, you requested an opinion of this office concerning whether the absorption of the State Sales Tax on products sold by liquor dealers, and which products are subject to the "Fair Trade Laws" (Sec. 46-9-1, et seq., 1953 Comp.), constitutes a violation of the Fair Trade Laws, supra.

The Fair Trade Laws provide that there shall be a minimum mark-up over and above the **cost** of the product to the retailer. The provisions of this mark-up are rather lengthy and this office can see no useful purpose in setting out, in full, those sections. The "sales tax" provided in Section 72-16-1 is a misnomer in the following respect. Section 72-16-4 provides, in part, as follows:

"Privilege taxes levied-Measured by amount of business. -- There is hereby levied, and shall be collected by the Bureau of Revenue, **privilege taxes**, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the state of New Mexico, * * * *." (Emphasis ours.)

This section does not levy a tax upon the sales but only upon the right to engage in business and measures the amount of the tax by the gross volume done. Thus the incidence of the tax is levied against the retailer, however that retailer is permitted to pass the tax on to the purchaser or consumer, if he sees fit. See Section 72-16-7. He is not required to do so as he is required to pass other excise taxes to the consumer. (Example: luxury taxes collected under the authority of the United States.)

Thus the assessment of the tax is merely an increased cost of doing business and is not materially different from the cost of lights, water, rent and state, county and local licenses. The only difference is that in the case of the privilege tax, the tax is easily prorated by reason of its being levied against the gross volume done, whereas the other overhead items mentioned above would be difficult of proration. It has been held that the giving of trading stamps is a violation of the Fair Trades Act and we believe that such holding is correct as those trading stamps are redeemable at a value. The tax concerned herein, however, is the obligation of the distributor or seller and is not redeemable by the consumer in any way.

The Fair Trades Act requires the base to be set on the cost of the liquor to the dealer, thus any tax paid by the wholesaler and passed on to the retailer would be an increased cost of the commodity to the retailer but if that retailer chooses not to pass the tax on to the ultimate consumer, it is clearly his privilege to do so and it is not a violation of the

Fair Trade Practices Act. If this sales tax provision were a true sales tax, that is to say, a tax levied upon the sale and a tax which requires the buyer to pay any absorption of that tax would be a violation of the Fair Trade Act by reason of the incidence of the tax being upon the purchaser. However, as stated above, this is not the case with our privilege tax and hence the reason for the confusion.

Therefore, it is the opinion of this office that a retail liquor dealer may pass on the tax levied under Section 72-16-1, et seq. or absorb it as he sees fit and in neither case would he be in violation of the Fair Trade Practices Act, as set out in Section 46-9-1, et seq., as the tax is levied for the privilege of doing business so it is merely an increased cost of doing business and is not a cost of the commodity sold.

We sincerely hope that this answers your inquiry.

By Fred M. Standley

Assistant Attorney General