

Opinion No. 57-148

June 20, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Mr. Charles A. Feezer, Assistant District Attorney, Carlsbad, New Mexico

QUESTIONS

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Are commercial photographers, whose principal plan of business is out of state but who come into this state and solicit business either by telephone or door to door solicitation and by contract take photographs of various individuals, performing the operation of taking the photograph in this state, and then transmit the plates to their principal place of business in another state for processing, itinerant vendors within the meaning of § 60-2-1 of the New Mexico Statutes Annotated, 1953 Compilation, and thus subject to regulation by the state under §§ 60-2-1 through 60-2-24, N.M.S.A., 19-53 Compilation?

CONCLUSION

Yes.

OPINION

ANALYSIS

An itinerant vendor is defined in § 60-2-1 as follows:

"The term 'itinerant vendor,' for the purpose of this Article (60-2-1 to 60-2-22) shall mean and include any person, either principal or agent, who engages in either a temporary or transient business in this state, either in one locality or in traveling about the country, or from place to place, selling manufactured goods, jewelry, wares or merchandise, and it shall include peddlers and hawkers, and also those who for the purpose of carrying on their temporary or transient business, hire, lease or occupy a building, structure, tent, car, vehicle, store room or place of any kind, for the exhibition and sale of any manufactured goods, jewelry, wares or merchandise."

In view of the above definition, if the sale of a photograph can be considered the sale of "manufactured goods" then the commercial photographers who are the subject of this opinion are itinerant vendors as defined by § 60-2-1, N.M.S.A., 1953 Compilation.

In *American Fruit Growers v. Brogdex Co.*, 283 U.S. 1, 75 L. Ed. 801, "manufacture" is defined as the production of articles for use from raw or prepared materials, by giving to

these matters new forms, qualities, properties, or combinations, whether by hand labor or by machinery; also anything made for use from raw or prepared materials. (See also *Com. v. Meyer*, 180 Va. 466, 23 S.E. 2d 353). And in *Commonwealth v. Peerless Paper Specialty*, 344 Pa. 283, 25 A. 2d 323, 324, the Pennsylvania Court held that the process of "manufacture", within the mercantile license tax act exempting manufacturers, brings about production of some new article by application of skill and labor to original substance or material out of which such new product emerges, and a thing is a "manufactured article" when the product is a new and different article with a distinctive name, character and use.

In view of the broad definition given the term "manufacture" by the courts, this office holds that the sale of a photograph is the sale of manufactured goods, and any person, either principal or agent, who engages in either a temporary or transient business in this state for the purpose of their sale is an "itinerant vendor" and subject to regulation by the state under §§ 60-2-1 through 60-2-24, N.M.S.A., 1953 Compilation.

No objection may be made that regulation by the state is an imposition on interstate commerce since it has been held that the fact that photographers who solicited orders, took photographs, and received payment in one state, and sent the negatives to the home office of the studio in another state for development and the making of prints therefrom, did not make the transaction one of interstate commerce. See *Lucas v. Charlotte*, 86 F.2d 394, 109 A.L.R. 297 (1936 C.A. 4th N.C.), wherein the court held that the actual work of the photographer was done in North Carolina and the mechanical finishing of the negatives in Minnesota did not change the fact that the photographer was carrying on his business in North Carolina.