Opinion No. 57-39

March 4, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. Charles B. Barker, Attorney for Bureau of Revenue, Santa Fe, New Mexico

QUESTIONS

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Are out-of-state vendors (wholesalers) required to pay the tax imposed by Section 72-16-4 (c) N.M.S.A., 1953 Compilation, as amended, on products shipped to New Mexico retailers for resale?

CONCLUSION

No.

OPINION

ANALYSIS

The hereinabove cited statute provides as follows: 72-16-4

"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,** in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

"c. At an amount equal to one-eighth of one percent of the gross receipts of the business of every person engaged in the **business of wholesale merchandising of any goods,** wares, materials and commodities, including the sale of alcohol and alcoholic liquors and beverages, and electricity, **to others for resale."** (Emphasis supplied.)

Restricting our discussion initially to the section quoted, that language fixing tax liability is definite and its meaning patent as stated:

"There is hereby levied . . . . privilege taxes, . . . against the persons, on account of their business activities, ... within the State of New Mexico . . . ."

In Albuquerque Broadcasting Company v. Bureau of Revenue, 51 NM 332, 184 P2d 416, the court giving consideration to the question of the prohibition against taxing incidents of interstate commerce concluded:

"The states cannot lay a direct tax on interstate commerce or gross receipts therefrom."

While the question is not directly asked, I believe some confusion may be eliminated by briefly comparing the limitations imposed by both the sales tax (emergency school tax) act § 72-16 and the compensating tax (use) act § 72-17.

In accordance with description stated, the sales tax, as provided, is a tax on the privilege or incident of doing or being in business, and not on the incident of sales. A paper dealing with the theory and enforcement aspects of taxes on out-of-state purchases is found at 65 Harv. L.R. 301 wherein is stated:

"The basic consumption tax is the sales tax, usually levied upon the vendor of the taxed commodity, but in theory and practice passed on to the actual consumer . . . . The efficiency of a sales tax, . . ., is substantially impaired by its impotence in reaching sales in interstate commerce, **exempted by the commerce clause** from direct taxation. . . .

"The wide gap thus cut into a tax system intended to be comprehensive is thoroughly closed by the addition of a supplementary levy on the **use** of the same types of goods covered by the sales tax. A credit is given against the use tax for sales taxes in the same state, but a similar audit for taxes paid in another state is apparently not constitutionally required. The use tax is imposed directly on the consumer, and has been upheld against constitutional attack when the goods typed were bought by the taxpayer in another state but came to rest' in the taxing state." (Emphasis supplied.)

Reviewing this presentation briefly, in view of the question put, we find the emergency school (sales) tax applies to those persons specified and doing business in this State. The tax as provided in Section 72-16-4, N.M.S.A., 1953 Compilation, is not applicable to out-of-state wholesalers sending their products to retailers doing business in the State. The stopgap provisions of Chapter 72, Article 17, are applicable to the same categories as provided in § 72-16-4, but only at the consumer level.

It is hoped that your question is fully and satisfactorily answered.