

Opinion No. 60-118

June 20, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Frank C. Boyce City Attorney 1200 New York Avenue Alamogordo, New Mexico

QUESTION

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In a municipality which levies a gasoline tax under the provisions and authority of §§ 14-43-1 to 8, N.M.S.A., 1953 Compilation, may an occupation tax or license be levied against wholesale distributors of gasoline, motor fuel and other petroleum products?

CONCLUSION

Yes.

OPINION

{*493} ANALYSIS

The most pertinent and critical portion of the statute authorizing municipal gasoline tax is § 14-43-7, N.M.S.A., 1953 Compilation which reads as follows:

"Where any municipality elects to assess the license tax herein provided for, the same shall be in lieu of any other license or occupation tax which said municipality may be authorized to assess and collect against **such dealers in gasoline and oils**".
(Emphasis added).

In order that a particular business be exempt from the payment of such other license or occupation tax, it must appear that such business is subject to the municipal gasoline tax. The obvious purpose of the above-quoted section is to prevent multiple taxation of a given class of businesses. It is our opinion that wholesale distributors cannot be brought within the class of businesses exempted from the payment of other taxes. The reasons for this conclusion are as follows:

First, the subject municipal gasoline tax is not assessed against or collected from the distributor. § 14-43-3 defines the "taxable sale," which has been interpreted by a previous Attorney General's Opinion (No. 959, 1935), to be the sale by the distributor to the retail dealer. The above section contains two exceptions to this rule of construction which are not pertinent to this discussion. The effect of said § 14-43-3 is to impose the tax upon the retail dealer and not upon the distributor. Therefore the distributor would not be excessively burdened by the imposition of other taxes.

Second, the very language of the exemption section (§ 14-43-7) makes it amply clear that wholesale distributors are not included within that class which is exempted from "other license and occupation tax." The words which exclude distributors from the class benefited by the section are the following:

". . . such **dealers** in gasoline and oils."

The terms "distributor of gasoline" and "retail dealer in gasoline" are both defined by § 14-43-2 of the statutes, and the words "such dealers" as used in § 14-43-7 must be construed as referring back to "retail dealers" as defined by the Act. Therefore it is clear that the exemption from other taxes provided by § 14-43-7 is available only to retail dealers in gasoline who pay a municipal gasoline tax of the type herein considered.

Since the wholesale distributor is not a "dealer" and is not assessed for the payment of the municipal gasoline tax, he is not entitled to be exempt from other license or occupation tax.

By: F. Harlan Flint

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