

Opinion No. 62-91

July 19, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Lalo Garza, City Attorney, P. O. Box 307, Alamogordo, New Mexico

QUESTION

QUESTIONS

1. Is a municipal liquor license tax refundable in part if the licensee transferred his license outside the municipality?
2. Is a liquor licensee who transfers his license from a municipality to the county liable for the county liquor license tax for the portion of the remaining licensing period where payment for such period has been made previously to the municipality?

CONCLUSIONS

1. See analysis.
2. Yes.

OPINION

ANALYSIS

Under the factual situation given in your letter of inquiry, the questions posed above have arisen by reason of the transfer of a liquor license from a site within the municipality of Alamogordo to a location outside such municipality and within Otero County.

The licensee paid an installment of the city liquor license tax under protest on January 1, 1962, and subsequently effected the transfer of his license to a point outside the municipality on March 31, 1962.

Under Section 46-4-2 and Section 46-4-3, N.M.S.A., 1953 Compilation, municipalities and counties are authorized to impose liquor licensing taxes in addition to those liquor license fees chargeable by the State of New Mexico. Both municipalities and counties are empowered to specify by ordinance the amount of such licensing tax and the manner of payment of the tax. The statutes also provide that the tax period for such municipal and county taxes shall begin July first of each year and end June thirtieth of the following year.

An examination of the statutes authorizing municipalities and counties to impose a liquor license tax upon liquor establishments operated within their respective jurisdictions, indicates that such governmental authorities may provide in lieu of the payment of such license tax annually, that such taxes imposed be paid in designated installments during the licensing year.

Section 46-4-5, N.M.S.A., 1953 Compilation of the municipal and county liquor licensing act, states specifically that liquor taxes imposed by municipalities or counties may not be pro-rated except as provided under Section 46-5-17, N.M.S.A., 1953 Compilation of the state licensing act. Under the latter section, allowance is made for the pro-ration of license fees on a quarterly basis.

Sections 46-4-5 and 46-4-6, N.M.S.A., set out specific instances in which a licensee is precluded from recovering a refund of any portion of a municipal or county liquor license tax, and under such statutes a refund may not be obtained for any period for which a licensee has had his license suspended or revoked, or where such a license is transferred or assigned to another individual. Since the legislature has designated specifically the instances wherein a refund may not be secured by a licensee, it is apparent that under the well recognized statutory rule of construction that the express mention of the one implies an exclusion of the others, and in the absence of other prohibitory legislation a refund in other cases may be proper. **In re Attorney General, Territory v. Stokes, et al**, 2 N.M. 49; **Fancher et. al. v. Board of County Commissioners of Grant County**, 28 N.M. 179, 210 P. 237.

In **Bart v. Pierce County**, 60 Wash. 507, 11 P. 582, the Supreme Court of Washington dealt with a situation wherein a city incorporated into its jurisdiction an area where a liquor licensee was operating. The licensee had previously paid the county a liquor license tax, and by reason of his location in the city following annexation, the city imposed a municipal tax upon the owner for operation within its limits. The licensee sought a refund from the county for the portion of the unearned license fee remaining. The court held that in such instance a refund should be allowed under the principles of equity.

Under the above statutes and authorities, it is our opinion that the holder of a liquor license situated in a municipality, and having paid a liquor license fee in advance, and who subsequently relocates his business at a site outside such municipality, is entitled to recover a tax refund from the municipality of any monies paid by him and which cover any quarter period during which such licensee did not actually maintain his license within the municipality. If, however, as in this case, a licensee has conducted or maintained his business within the municipality during any portion of a stated quarterly period, such licensee is not entitled to a refund of monies paid as liquor taxes covering such quarterly period.

The answer to your second question is governed by the provisions of Sections 46-4-5 and 46-5-17, N.M.S.A., 1953 Compilation. Under authority of the above sections a county may impose a liquor license tax upon a licensee who transfers his location from

a municipality to a site within the jurisdiction of the county, and such licensee becomes responsible for the payment of such tax to the county at the time such license is transferred.

Section 46-5-17, N.M.S.A., 1953 Compilation, provides in applicable part as follows:

"The . . . license fees herein required of retailers, dispensers and clubs shall be prorated so that . . . licenses issued prior to the first day of October of any year shall be subject to the full amount of the annual license fee; licenses issued on or subsequent to the first day of October and prior to the first day of January, following, shall be subject to three-fourths of the annual fee; licenses issued on or subsequent to the first day of January and prior to the first day of April of a year shall be subject to one-half of the annual license fee; licenses issued on or subsequent to the first day of April shall be subject to one-fourth of the annual license fee . . ."

Under the provisions of Section 46-5-17, supra, a liquor licensee transferring his business to a county location would be subject to the payment of the county license tax for the applicable period during which the license was operated within the county.