

Opinion No. 63-10

February 28, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Juan Archibeque County Clerk Sandoval County Bernalillo, New Mexico

QUESTION

QUESTIONS

1. Must a business pay all delinquent county occupation license taxes before it is eligible to renew its occupation license?
2. Must a current school tax registration number and a gross receipts statement be presented to the county clerk prior to the issuance of an occupation license?
3. Are public utilities, railroads and wholesalers distributing materials or food stuffs to retailers in the county subject to a county occupation license tax?
4. Can the school tax division aid in the collection of county occupation license taxes?

CONCLUSIONS

1. See Analysis.
2. See Analysis.
3. See Analysis.
4. See Analysis.

OPINION

{*25} ANALYSIS

(1). At the outset we must point out that there are two chapters of the New Mexico Statutes which are concerned with county occupation license taxes. Section 15-36-25, N.M.S.A. 1953 Compilation (P.S.) gives the board of county commissioners the power to license public dances, dance halls, clubs, fortune tellers, phrenologists, clairvoyants, palmists, carnivals, peddlers, circuses, and travelling shows which are within the county, but which operate outside the limits of an incorporated municipality.

This section also provides that the failure to obtain a license to conduct one of the above listed activities is a misdemeanor punishable by a fine of not more than \$ 100 or by imprisonment for not more than thirty days, or both.

Chapter 60 New Mexico Statutes Annotated provides that certain other occupations are subject to a county occupation tax.

Section 60-1-7, N.M.S.A., 1953 Compilation, provides that any person who conducts a business within the county for which an occupation license is required shall be required to pay double the amount of the tax for the period in which the business has been conducted without a license.

In Attorney General Opinion 5018, May, 1947, the question was asked whether the county clerk could refuse to issue a new license if the delinquent business had not paid its license tax for previous years. We said that when an applicant for a license under Sections 60-1-1 to 60-1-5, N.M.S.A., 1953 Compilation, was delinquent in paying the taxes of prior years, the penalty for such failure, the taxes due for prior years, and the current tax were all due at the same time. Accordingly, we held that the county clerk could properly refuse to grant a license until the total amount was paid.

There is no similar provision for the collection of the tax authorized under Section 15-36-25, N.M.S.A., 1953 Compilation, (P.S.). Therefore, it would appear that the county clerk cannot refuse {26} to license a business under the provisions of Section 15-36-25, supra, before that business has satisfied its obligation for the taxes of prior years. This, however, would not prevent the district attorney from instituting suit to collect the unpaid taxes.

(2). Chapter 144, Laws of 1961 (§ 14-42-8.1), N.M.S.A., 1953 Compilation (P.S.), requires an applicant for an occupation license under Section 15-36-25, supra, to produce a current school tax number or an application for a number, but there is no requirement that applicants for licenses under

§§ 60-1-1 to 60-1-5, supra, produce either current school tax numbers or applications therefor before being issued an occupation license.

Sub-section B of Chapter 144 Laws of 1961 (§ 14-42-8.1, supra) requires only applicants for municipal or H Class county occupation licenses to present a statement of their gross receipts which were reported to the school tax division before being issued a license.

Therefore, Sandoval County may require the production of current school tax numbers or applications therefor only when the applicant is one whose occupation is among those enumerated in Section 15-36-25, supra.

Sandoval County cannot require an applicant for an occupation license to submit a statement of the gross receipts which it reported to the school tax division. Sandoval

County may, however, require those applicants who apply for a license under §§ 60-1-1 to 60-1-5, supra, to state under oath the amount of business which they did in the preceding year or, if the business is new, the amount of business they estimate they will have for the coming year.

(3). In your question three you listed several types of businesses and asked if they were subject to the county occupation tax.

In Attorney General Opinion No. 59-32, April 1959, we said that under Section 60-1-1, supra, a dealer in merchandise is one who deals, distributes, delivers, a trader, trafficker, or middleman or person making a business of buying and selling goods which merchants normally sell at wholesale or retail. Under this definition, a wholesaler located in the county who sells and delivers merchandise to retailers doing business within the county is subject to the county occupation license tax.

In Opinion of the Attorney General 58-156, July 1958, we held that, if a truck company sold tangible personal property, as opposed to furnishing a service, it would be subject to the county occupation tax. If a business furnishes only a service it is not subject to the county occupation license tax under § 60-1-1, supra. See also Attorney General Opinion No. 59-32, April 1959. The same rule which applies to trucks would seem to apply to railroads.

You also ask: Are public utilities furnishing gas, electricity and telephone service "dealers in merchandise" within the meaning of § 60-1-1, supra? We think not.

In **People Gas Light and Coke Co. V. Ames**, 359 Ill. 152, 194 N.E. 260 (1935), the plaintiff contended that public utilities are not businesses of the class which are usually termed mercantile businesses. The court in agreeing with the plaintiff said that public utilities belong to a class of businesses which are separate from purely private mercantile businesses. A public utility unlike a private business has the duty to serve the public without discrimination and at a regulated price.

The Court then defines merchandise as:

". . . any movable object of trade or traffic; that which is passed from hand to hand by purchase or sale -- specifically the object of commerce; a commercial commodity or commercial commodities in general; the staple of a mercantile business; commodities, goods or wares bought and sold for gain."

The Court then said that public utilities were usually thought to provide a "service" and therefore sold no merchandise. Under the authority of the **Ames** case, supra, public utilities are not dealers in merchandise within the meaning of Section 60-1-1, supra, and are, therefore, not subject to the county occupation license tax.

(4). In answer to your fourth question, Section 60-1-10, N.M.S.A., 1953 Compilation, provides that the district attorney is responsible for the collection of county occupation

taxes under Article I of Chapter 60, N.M.S.A. Since the district attorney is the legal representative of the board of county commissioners, it would appear that he would also be responsible for the collection of county occupation taxes levied under § 15-36-25, supra.

By: Joel M. Carson

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