Opinion No. 64-136

November 9, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Mr. Luis L. Fernandez, Chief, Local Government Division Department of Finance and Administration, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. What is the method which should be used to determine the correct fee to charge service stations for county occupation licenses?

2. Should barber shops, beauty shops, bookkeeping services, as well as a drag strip used two Sundays a month for drag racing for which an admission fee is charged, be required to obtain occupation licenses?

CONCLUSIONS

1. See analysis.

2. See analysis.

OPINION

ANALYSIS

Your first question above assumes that service stations are required to obtain county occupation licenses. We believe that this is a correct assumption inasmuch as there has not been an expressed intent (nor can such be implied) to exempt them from the same, and because by the very nature of at least a part of such business they would fall within the operation of Section 60-1-1, N.M.S.A., 1953 Compilation, quoted below. Many Attorney General Opinions have been issued from this Office concerning the subject involved herein, the latest of which are Nos. 63-22, Dated March 19, 1963; 63-10, dated February 28, 1963; and 59-32, dated April 1959. However, none of these has dealt with the precise questions posed herein.

Section 60-1-1, supra, is pertinent to our inquiry, thus we quote as follows:

" **Dealers in merchandise,** except liquor. -- A license tax or occupation tax, one-half to be paid into the general school fund, and one-half to the general current expense fund

of the respective counties, shall be imposed each year upon the business or avocations mentioned in this chapter, carried on by any person within the state of New Mexico:

First. **Dealers in merchandise** other than liquors, whose **annual sales** do not exceed three thousand dollars ($ 3,000.00) shall pay a license tax of five dollars ($ 5.00) per annum. Dealers in merchandise other than liquors, whose annual sales exceed three thousand dollars ($ 3,000.00) and do not exceed ten thousand dollars ($ 10,000.00) shall pay a license tax of ten dollars ($ 10.00) per annum.

Second. **Dealers in merchandise,** other than liquors, whose **annual sale** exceeds ten thousand dollars ($ 10,000.00) and do not exceed twenty thousand dollars ($ 20,000.00), shall pay a license tax of twenty dollars ($ 20.00) per annum.

Third. **Dealers in merchandise,** other than liquors, whose **annual sale** exceeds twenty thousand dollars ($ 20,000.00), and do not exceed fifty thousand dollars ($ 50,000.00), fifty dollars ($ 50.00).

Fourth. **Dealers in merchandise,** other than liquors, whose **annual sale** exceeds fifty thousand dollars ($ 50,000.00), but do not exceed seventy-five thousand dollars ($ 75,000.00), seventy-five dollars ($ 75.00).

Fifth. **Dealers in merchandise,** other than liquors, whose **annual sale** exceeds seventy-five thousand dollars ($ 75,000.00), and do not exceed one hundred thousand dollars $ 100,000.00), one hundred dollars ($ 100.00).

Sixth. **Dealers in merchandise,** other than liquors, whose **annual sale** exceeds one hundred thousand dollars ($ 100,000.00), one hundred and fifty dollars ($ 150.00)." (Emphasis supplied)

The "business or avocations" referred to above are: Real estate agents and collectors (§ 60-1-2); Hotels -- Inns -- Restaurants -- Livery or feed stables -- Stage lines (§ 60-1-3); and Amusement places (§ 60-1-4). The case of **Safeway Stores v. Vigil,** 40 N.M. 190, 57 P.2d 287, annotated under the above section is, we feel, inapplicable in the present situation. It may be noted that service stations are not specifically named in the entire Chapter 60, N.M.S.A., 1953 Compilation. Therefore, any imposition of the county occupation tax could only be effected through application of Section 60-1-1, supra, which covers the broad classification of "Dealers in Merchandise." That service stations fall within such classification is not reasonably open to doubt, under the definition previously adopted by this Office in Attorney General Opinion No. 59-32 as follows:

"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."

However, at least a part of the business generally conducted thereby is strictly of a service type, e.g., repairing punctured tires, greasing and washing automobiles, etc.

Therefore, necessarily, the extent to which a particular service station engages in or provides these services will be determinative of the amount of license tax which it will be required to pay, since it is our opinion that the income from services should not be included as a part of annual sale in determining the category for imposition of the tax pursuant to Section 60-1-1, supra. It is, we believe, a reasonable assumption that since such Section applies only to "Dealers in Merchandise" the words "annual sale" can refer only to **sale of merchandise,** which has been defined 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." **Peoples Gas Light and Coke Co. v. Ames,** 359 Ill. 152, 194 N.E. 260 (1935), cited in Attorney General Opinion No. 63-10, dated February 28, 1963.

Having disposed of the above, we can direct our attention to the method which must be used to determine the correct classification of service stations. By the word "method" is meant of course the manner of computation to arrive at the annual sale since this is the basis set forth in Section 60-1-1, supra. It is our understanding that the real problem concerning service stations is the question of whether or not to include as a part of sales the amount of tax included in each gallon of gasoline sold and which is ultimately passed on to the consumer. Nothing appears in the context of Section 60-1-1, supra, which would indicate that the word "sales" was to be attributed any other meaning than its ordinary and proper one. We think then that any of a number of commonly accepted accounting expressions might have been used in the place of "annual sales" and would have, if so employed, rendered the same effect. Some examples are: Gross annual proceeds, gross receipts, gross income from sales. It must be kept in mind too that no great significance can be attached to the employment of "annual sales" as a basis for determination of the classification, so long as there is equal application thereof. While an argument can be advanced that the legislature could have meant "net annual sales," we could not accept such argument since that would mean placing an improper qualification upon the express terms of Section 60-1-1, supra.

Based upon the above, it is our opinion that "annual sales" for purposes of Section 60-1-1, supra, is to be determined simply by taking the total annual proceeds paid to and received by the licensee upon the **sale of merchandise,** without any deduction for taxes included in the sale price. On the other hand proceeds derived from the furnishing of services are not to be so included.

In your question No. 2 you have set forth various types of business and ask whether they should be required to obtain county occupation licenses. We have said that one who merely performs a service is not a dealer in merchandise and is thus not subject to the county occupation license charge under Section 60-1-1, unless it is specifically named in Chapter 60, N.M.S.A., 1953 Compilation. It is our opinion that neither barber shops, beauty shops nor a business offering bookkeeping services are "dealers in merchandise," thus these should not be required to obtain county occupation licenses.

If, however, any of these businesses deal in merchandise, as that term has been defined heretofore, then unquestionably it would be subject to such license tax.

The imposition of a license tax upon the owners of a drag strip used two Sundays a month for drag racing would depend upon the nature of the enterprise. Section 60-1-4, N.M.S.A., 1953 Compilation reads as follows:

"Amusement places. -- All persons who are the owners or have under their control or management any building or premises used as a place of public amusement or entertainment and who shall rent or hire the same for theaters, public balls and public entertainments for hire, where such hall or building has a seating capacity of three hundred (300) persons, shall pay a license tax of ten dollars ($ 10.00) per annum, and where such hall or building has a seating capacity of more than three hundred (300) persons, shall pay a license tax of twenty-five dollars $ 25.00) per annum: Provided, this shall not apply to any building used in whole or in part as an educational institution."

Section 60-4-10, N.M.S.A., 1953 Compilation, also allows the county to assess a license tax upon amusement enterprises of every kind and character to which an admission fee is charged and which is given or exhibited within any county within the State of New Mexico and **outside the limits of any incorporated city, town or village.** See also Section 60-4-2, N.M.S.A., 1953 Compilation, which provides for a State privilege tax, upon "all persons engaging in or conducting the business of itinerant amusement enterprises in this state. . ."

A drag strip may then be subject to the tax under one of the foregoing three Sections depending upon what its make-up, location and operation are. It certainly could not be considered a "dealer in merchandise" under Section 60-1-1, supra.