Opinion No. 68-50

May 17, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Raymond E. Keithly District Attorney Seventh Judicial District County Courthouse Socorro, New Mexico

QUESTION

QUESTIONS

1. May a county levy a license or occupational tax on dealers in merchandise who do business within the county but who do not maintain a place of business within the county?

2. If a county may so levy a license or occupational tax on dealers in merchandise who do business within the county but who do not maintain a place of business within the county, is the amount of the tax based on the annual sales within the county?

3. If a county may so levy a license or occupational tax on dealers in merchandise who do business within the county but who do not maintain a place of business within the county, are the annual sales within the county to be included in determining the amount of the license or occupational tax in the county in which the dealer maintains his place of business?

4. If a county may so levy a license or occupational tax on dealers in merchandise who do business within the county but who do not maintain a place of business within the county, are sales made within the county by a dealer who maintains his place of business in an incorporated city located outside the county subject to this county license or occupational tax?

CONCLUSIONS:

1. Yes.

2. No.

3. Yes.

4. No.

OPINION

*{*84}* **ANALYSIS**

Before answering the questions asked, we believe a detailed discussion of the history of occupation license taxes in New Mexico is necessary. Section 60-1-1. N.M.S.A., 1953 Compilation imposes a license or occupation tax on all "dealers in merchandise" as follows:

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.

*{*85}* Second. Dealers in merchandise, other than liquors, whose anual sale exceed ten thousand dollars [$ 10,000], and do not exceed twenty thousand dollars [$ 20,000], 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], and do not exceed fifty thousand dollars [$ 50,000], fifty dollars [$ 50.00].

Fourth. Dealers in merchandise, other than liquors, whose annual sale exceeds fifty thousand dollars [$ 50,000], but do not exceed seventy-five thousand dollars [$ 75,000], seventy-five dollars [$ 75.00].

Fifth. Dealers in merchandise, other than liquors, whose annual sale exceeds seventy-five thousand dollars [$ 75,000], and do not exceed one hundred thousand dollars [$ 100,000], one hundred dollars [$ 100].

Sixth. Dealers in merchandise, other than liquors, whose annual sale exceeds one hundred thousand dollars [$ 100,000], one hundred and fifty dollars [$ 150].

The revenues from the above tax are to be divided equally between the general school fund and the general current expense fund of "the respective counties". Section 60-1-1, supra. This section of the New Mexico statutes was first enacted in 1897. It was insignificantly amended in 1901 and 1903. Then in 1933 what is now compiled as Section 60-1-1, supra, was significantly amended to impose the tax, not on "dealers in merchandise", but on "retail dealers in merchandise". A "retail dealer in merchandise" was defined as a person or business selling merchandise to the ultimate consumer in quantities smaller than purchased from his supplier and "who sells in small parcels, packages, bales, boxes or other containers of what-so ever kind and not in gross . . .". Section 1, Chapter 73, Laws of 1933.

In 1934, all of Chapter 73 of the Laws of 1933 was repealed and then almost identically reenacted as Chapter 33, Laws of 1934. See Section 16, Chapter 33, Laws of 1934 (S.S.). In 1936, the New Mexico Supreme Court in its decision in **Safeway Stores v. Vigil,** 40 N.M. 190, 57 P.2d 287 (1936) held that both the 1933 and 1934 enactments of the New Mexico Legislature were unconstitutional. We are unable to find where Section

60-1-1, supra, was ever reenacted by our legislature. The compiler, however, has retained this section in the New Mexico statutes as it was found prior to the 1933 and 1934 enactments of our legislature.

In 1937, the legislature repealed both the 1933 and 1934 enactments in Chapter 145, Laws of 1937. Chapter 145, Laws of 1937 granted municipalities the power to assess a second occupation license tax. This permissive authority to impose occupational license taxes was compiled as Sections 14-42-7 through 14-42-21, N.M.S.A., 1953 Compilation and was repealed by the Municipal Code in 1965. Municipalities may now impose an occupation tax pursuant to Sections 14-37-1 through 14-37-12, N.M.S.A., 1953 Compilation (P.S.). However, it appears that municipalities also still have a duty to collect occupation taxes pursuant to Sections 60-1-11 through 60-1-13, N.M.S.A., 1953 Compilation.

Section 60-1-11, supra, provides as follows:

Municipalities to collect the occupational tax. -- All occupation taxes heretofore authorized by law to be collected by the state of New Mexico and respective counties thereof, other than *{*86}* liquor licenses, shall be collected by the respective city treasurer of and for the incorporated city wherein such occupant maintains the business for which said occupation tax is collected. And said city shall be entitled to retain the said funds so collected for the general use of said city.

This section was first enacted in 1909 as Chapter 131, Section 1, Laws of 1909. The language of the 1909 enactment is essentially the same as Section 60-1-11, supra. In 1915, this section was amended by Section 1, Chapter 63, Laws of 1915 and then was subsequently continued by Section 3310 of the 1915 Code. See Repealing and Saving Clause of the 1915 Codification, p. 1665. We note that a footnote to Section 3310 of the 1915 Code indicates that Chapter 63 of the Laws of 1915 was repealed. The Repealing and Savings Clause of the 1915 Code, however, states that the enactment of the Code shall not be considered as enacting any footnote, reference or citation. Thus, it appears that Chapter 63, Laws of 1915 were merely continued in effect by the Code of 1915.

Nothing significant occurred to this municipal occupation license tax until 1933. In 1933, the legislature repealed Section 3310 of the 1915 Codification as amended by Section I of Chapter 63 of the Session Laws of 1915. See Section 16, Chapter 73, Laws of 1933 which was subsequently held unconstitutional by the New Mexico Supreme Court in **Safeway Stores v. Vigil,** supra. Again, we cannot find where Section 60-1-11, supra, was ever reenacted by our legislature. The compiler of our statutes notes that Section 60-1-11, supra, was repealed by Chapter 73. Laws of 1933 which has subsequently been held unconstitutional but the compiler has continued to publish Section 60-1-11, supra, as though it were still the law.

In summary, it has been seen that Section 60-1-1, supra, was amended in 1933 and then the 1933 amendment was repealed in 1934. After the Supreme Court held the 1933 and 1934 enactments unconstitutional, the legislature repealed both of the

unconstitutional 1933 and 1934 enactments by enacting Chapter 146, Laws of 1937. Section 60-1-11, supra, had a similar history except in 1933 this section was repealed and in 1934 the enactment repealing this section was repealed. The section which replaced Section 60-1-11, supra, was then held unconstitutional by the New Mexico Supreme Court and then both the 1933 and 1934 enactments were repealed. Neither Section 60-1-1, supra, nor 60-1-11, supra, were ever reenacted by our legislature. The question that must first be answered then, is whether the Supreme Court's determination that Chapter 73, Laws of 1933 and Chapter 33 of Laws of 1934 were invalid had the effect of reviving Sections 60-1-1, supra and Section 60-1-11, supra, as they are now found in the New Mexico statutes.

It appears to be the universal rule that a valid act is not affected by the enactment of a void amendment, even if there are words of express repeal unless it is clear that the Legislature intended such repeal. **Trustees of Phillips Exeter Academy v. Exeter,** 33 A.2d 665, 669 (N.H. 1943). If the new section is unconstitutional, the repealing clause is likewise invalid and the old section remains in force. **Williams Lumber & Mfg. Co. v. Ginsburg,** 146 S.W. 2d 604 (Mo. 1941). Applying this universally accepted rule to the facts presented above, it appears that both Section 60-1-1, supra and Section 60-1-11, supra are still effective. Now that we have established that Sections 60-1-1 and 60-1-11, supra are still effective, we turn to the questions asked.

First of all, we are asked if pursuant to Section 60-1-11, supra, a county may levy a license or occupation tax on dealers in merchandise who do business within the county but who do not maintain *{*87}* a place of business within the county. In Attorney General Opinion 63-10, issued February 28, 1963, this office said that wholesalers distributing materials to retailers in a county were subject to that county's occupation license tax. The tax imposed by Section 60-1-1, supra, is upon "dealers in merchandise" in the county and this office has consistently taken the position that a "dealer in merchandise" is one who deals, distributes, delivers, does business, a trader, a trafficker, middleman or a person making a business of buying and selling goods. It is clear that this includes one who does business in a county but who does not maintain a place of business within the county, and therefore the answer to your first question is yes.

In answer to your second question, we believe that Section 60-1-11, supra, clearly imposes an occupation tax on the gross annual sales of a "dealer in merchandise". See Attorney General Opinion 64-136, issued November 9, 1964. We find no apportionment provision as between counties. The answer to your second question is therefore no.

Since there is no apportionment provided for in the statutes for a dealer in merchandise selling in a number of counties in this state, the tax imposed by Section 60-1-1, supra in each county is on total gross annual sales of the merchant. The same occupation tax will therefore be paid in each county wherein the dealer in merchandise sells his goods. The answer to your third question is therefore yes.

Last of all, we are asked if a dealer in merchandise must pay a county occupation license tax in a county that he does not maintain a place of business when he maintains

a place of business in an incorporated city located in another county of this state. We pointed out above that the county occupation tax was first enacted in 1896. In 1909 the legislature enacted Chapter 131, Section 1, now Section 60-1-11, supra, which provides that:

All occupation taxes heretofore authorized by law **to be collected by** the state of New Mexico and respective **counties** thereof . . . **shall be collected by the respective city treasury of . . the incorporated city wherein such occupant maintains the business** for which said occupation tax is collected. (Emphasis added)

It is our opinion that under the above language, if a business is located in an incorporated city only one occupation tax may be collected and that is the one collected by the city in which the business is located. This section, however, applies only to "dealers in merchandise" who have a place of business located in an incorporated municipality of this state.

Section 60-1-13, N.M.S.A., 1953 Compilation provides that if a dealer in merchandise is located in more than one city, only one occupation tax may be imposed and this tax is then to be equitably adjusted between the cities in which the dealer in merchandise has business locations. Thus, when a business is located within the limits of any incorporated municipality only one occupation tax may be collected.

A different situation is presented if a dealer in merchandise is located outside the limits of an incorporated municipality, but does business within the incorporated municipality. In this case, the incorporated municipality is not entitled to an occupation tax under Section 60-1-11, supra. However, such a dealer in merchandise must pay an occupation tax on his gross annual sales in every county in which he sells his goods. To the extent that anything in this paragraph is in conflict with Attorney General Opinion 3691, issued January 15, 1941. Attorney General Opinion 3691 is hereby overruled.

We mentioned above that there *{*88}* are two municipal occupation license taxes, the one that must be imposed by Section 60-1-11, supra, and the one that a municipality may impose pursuant to Sections 14-37-1 through 14-37-12, supra. Section 60-1-13, N.M.S.A., 1953 Compilation prohibits "double taxation" by two or more cities in which a dealer in merchandise has places of business. This section, however, is limited to the tax imposed by Section 60-1-11, supra, and in no way affects the tax imposed by Sections 14-37-1 through 14-37-12, supra.

Since the question of "double taxation is raised by the use of that term in Section 60-1-13, supra, we believe it is necessary to further discuss that term as it is properly defined in order to eliminate any question of "double taxation" by a municipality imposing two municipal occupation taxes on one business.

In **Spencer v. Snedeker,** 361 Pa. 234, 64 A.2d 771 (1949), it is stated that a double tax is imposed where there is the imposition of the same tax by the same taxing power upon the same subject matter. However, it appears that the imposition of two or more

license or occupation taxes on the same person is not within the prohibition against "double taxation". See **Hertz Driverself Stations, Inc. v. City of Louisville,** 294 Ky. 568, 172 S.W. 2d 207 (1943), and **Falls City Brewing Co. v. Talbott,** 265 Ky. 541, 97 S.W.2d (1936).

The New Mexico Supreme Court has defined the term "double taxation" in a number of decisions. It appears that in New Mexico double taxation occurs only if the taxes are not equal and uniform upon subjects of the same class. See **State v. Tittman,** 42 N.M. 76, 81, 75 P.2d 701 (1938), and **Amarillo-Pecos Valley Truck Lines v. Gallegos,** 44 N.M. 120, 126, 99 P.2d 447 (1940). Clearly then in New Mexico the legislature may authorize a municipality to impose more than one occupation tax on a business if the taxes imposed by the municipality are equal and uniform on all subjects of the same class.

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