

Opinion No. 44-4453A

February 9, 1944

BY: EDWARD P. CHASE, Attorney General

TO: Col. D. C. Pearson, Superintendent, New Mexico Military Institute, Roswell, New Mexico

Your letter of January 22, 1944, to Mr. J. O. Gallegos, has been referred to this office, and we have been requested by Mr. Victor Salazar, director of the Luxury Tax Division of the Bureau of Revenue, to give an opinion on the questions raised by your letter.

Section 76-1602 of the 1943 supplement to the New Mexico 1941 Compilation, provides:

"In addition to any and all forms of tax upon the sale, gift or consumption of cigarettes and cigars taxed by this act within the state of New Mexico, on and after July 15, 1943, there is hereby levied upon the **sale, gift or consumption** of said articles a stamp excise tax at the following rates. * * *"

Section 76-1613 of the 1943 supplement of the 1941 Compilation provides:

"None of the taxes levied by this act shall be construed to apply to * * * sales to the State of New Mexico or any of its political subdivisions; nor shall such taxes apply to any businesses or transactions exempted from taxation under the Constitution of the United States or the state of New Mexico."

By referring to the above quoted portion of Section 76-1602 it is noted that the tax is levied upon the sale, gift or consumption of the articles taxed. It is clear that the words "sale" and "gift" would refer to the person or agency actually distributing the cigarettes or cigars; in other words, so far as these two words are concerned, the tobacco tax is definitely levied on the vendor.

The question arises concerning whether or not the additional words "or consumption" also make this a tax upon the consumer. Section 76-1601 of the 1943 supplement to the 1941 Compilation defines "consumption" as follows:

"The term 'consumption', except as herein otherwise provided, shall mean any use of cigarettes, tobacco or cigars in such a manner that the same shall never again enter trade channels as a commodity or article of merchandise."

It would appear, from the above definition of the word "consumption", that it was not intended to refer to the consumer in the sense that this word is generally considered as referring to the person who actually uses the product, but refers to the distribution to the consumer or other person. The evident intent of the word is to enlarge the meaning of

the words "sale" and "gift", and by using the well established rule of "ejusdem generis" the word "consumption" should be given a similar meaning to the other words in the phrase.

It is my opinion that the tax is not levied upon the consumer but, rather, upon the vendor, under the facts set out in your letter, and since the vendor in this instance is the New Mexico Military Institute, such sales are not subject to the tobacco tax.

Hoping that the above fully answers your questions, I am,

By HARRY L. BIGBEE,

Asst. Attorney General