

Opinion No. 45-4670

March 5, 1945

BY: C. C. McCULLOH, Attorney General

TO: First Lieut. Frank Leavitt, MAC Hospital Adjutant Headquarters Deming Army Air Field Office of the Commanding Officer Station Hospital Deming, New Mexico

{*29} We have your letter of February 22, 1945 wherein you request an opinion on the following five questions:

- (1) Whose responsibility is it to affix the tax stamps to the packages of cigarettes?
- (2) May a retailer purchase cigarettes within the State on which no State tax stamps are affixed?
- (3) Is it a violation of any State statute for a retailer to have in his possession a quantity, approximately fifty cartons, of untaxed cigarettes?
- (4) Does the possession of a quantity of untaxed cigarettes referred to above raise any presumption as to the violation of any State Statute?
- (5) What are the penalties, if any, for violations of the statutes pertaining to the State cigarette tax law?

In answer to your first question, I call your attention to Section 76-1603 and 76-1606 of the Supplement to the New Mexico 1941 Compilation. I further call your attention to the fact that by regulation the director has required all wholesalers to affix stamps on any cigarettes sold for consumption in the State of New Mexico. However, if the cigarettes should be purchased from a wholesaler not affected by this regulation who maintains his place of business out of the State of New Mexico, the provisions of Section 76-1606 cited above would be applicable. This section provides in part as follows:

{*30} "Every retailer who purchases or acquires tobacco, cigarettes or cigars on which a tax is imposed by the provisions of this act shall, within forty-eight (48) hours after the receipt thereof, cause to be affixed such stamps in the amount of the tax imposed by this act on all such tobacco, cigarettes and cigars in his possession."

In answer to your second question,

I refer you to the regulation previously cited, made by the director of the Luxury Tax Division concerning the affixing of stamps by all wholesalers, and I further call your attention to the provisions of Section 76-1606 as above quoted concerning this question.

In answer to your third question, you are again referred to the provisions of Section 76-1606 and also to the provisions of Section 76-1607 (c) and Section 76-1608. Under the provisions of Section 76-1607 (c), when any unstamped cigarettes are found wherein a requirement is made that they be stamped as of such time, such cigarettes may be confiscated and the same are deemed forfeited to the state. Section 76-1608 provides specific penalties for the violations of the provisions of the Luxury Tax Act, Sub-sections (a) and (e) of such section specifically providing as follows:

"(a) Any retailer who has in his possession any package or other container containing cigarettes, tobacco or cigars not bearing the stamps by this act required to be affixed thereto, after the expiration of forty-eight (48) hours from the time of the receipt thereof, as provided in section 6 (Sec. 76-1606) of this act, shall be guilty of a misdemeanor, and upon conviction punished by a fine of not less than twenty-five (\$ 25.00) dollars nor more than two hundred (\$ 200.00) dollars for each offense."

"(e) Any person who sells any cigarettes, tobacco or cigars without the stamps required by this act being affixed thereto, except as otherwise herein provided, shall be guilty of a misdemeanor, and upon conviction punished by a fine of not less than one hundred (\$ 100.00) dollars nor more than five hundred (\$ 500.00) dollars, or imprisonment in the county jail not to exceed ninety (90) days, or both such fine and imprisonment for each offense."

The answer to the third question would appear to completely answer your fourth and fifth questions.

Hoping that the above information fully answers your inquiry, I remain

By HARRY L. BIGBEE,

Asst. Atty. General