

## Opinion No. 50-5277

January 19, 1950

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Bernabe Romero, Secretary New Mexico State Board of Barbers Examiners Box 1685 Santa Fe, New Mexico

{\*123} This is in reply to your letter of December 9, 1949 requesting an opinion as to whether a barber who collects only the minimum price and absorbs the 2% school tax would be violating the minimum price law by charging less than the minimum fixed price.

As you are aware, Chapter 230 of the Session Laws of 1937 was amended by Chapter 56, Laws of 1943. This is the chapter that authorizes your board to approve minimum prices for barber work and as you, no doubt, have a copy of the law, you will find that there is nothing in the law that prevents a barber from absorbing the 2% tax.

Section 76-1406 of the 1941 Compilation reads as follows:

"A. In the case of charge and time sales, or transactions, the amount thereof may, at the taxpayers' option, be included in the gross proceeds of sales or gross receipts only as and when payments are received by the seller. Conditional sales and lease contracts shall be treated as time sales, and if the taxpayer so elects, the tax shall be paid only upon the amounts received under such contract; provided, that in the event the seller or leaser, who has so elected, transfers his interest in any such contract to some third person he shall pay the tax upon the full sale price of the commodity involved, unless a record is kept of payments thereafter {\*124} made on such contracts in such manner that the bureau of revenue can at all times ascertain from the records of the seller the amount paid thereon by the purchaser. The taxpayer shall indicate his election hereunder in such form as the bureau of revenue shall prescribe.

B. It shall be unlawful for any person engaged in any business or profession to directly advertise that any tax imposed by this act is not considered as an element of the price of property sold or service rendered."

Note: The 1937 amendment lettered the original section as subsection (a) and added a new subsection which read: "(b) It shall be unlawful for any person engaged in any business or profession subject to tax under the provisions of this act not to collect or by any character of public advertising to offer to absorb the tax levied by this act or to advertise directly or indirectly in any manner that any tax imposed by this act is not considered as an element of the price of property or service."

You will note that the only qualification under this statute is under subsection (b) which reads as follows:

"It shall be unlawful for any person engaged in any business or profession to directly advertise that any tax imposed by this act is not considered as an element of the price of property sold or service rendered."

It is, therefore, the opinion of this office that a barber can absorb the tax as long as he does not advertise the fact that he is absorbing it.

In this connection, I would like to call your attention to Chapter 4, Laws of 1949, subsection (d) of said chapter, which reads as follows:

"The term 'gross receipts' means the total sum, not including the taxes imposed by this Act, received as compensation for personal and professional services, for the exercise of which, a privilege tax is imposed by this Act, the total receipts of a taxpayer derived from trades, business, commerce, and the gross proceeds of sales as hereinafter defined, except when such taxes are not segregated from such sum, and without any deduction on account of losses or expenses of any kind; provided that, even though the amount of the tax imposed by this Act is segregated as set out above, if the taxpayer collects from the customer more than the amount of the tax imposed by this Act, then such amount collected in excess of the amount of such tax shall be considered as a part of the 'gross receipts' and subject to the tax imposed by this Act."

It is, therefore, by opinion that a barber who collects only the minimum price and absorbs the tax is not violating the barbers minimum price law by charging less than the minimum fixed price.