

Opinion No. 53-5674

February 17, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Filo Sedillo Assistant District Attorney Second Judicial District Belen, New Mexico

{*67} This is in reply to your letter of February 9 in which you request an opinion as to whether or not the U. S. Gypsum Company, which is engaged in quarrying and grinding perlite rock for shipment to other plants of the Company, is subject to pay an occupation license under Chap. 62, N.M.S.A., 1941 Comp.

Section 62-101, N.M.S.A., 1941 Comp., provides that dealers in merchandise shall pay an occupational license. However, we fail to find any authority under which this company could be subject to an occupation license since they are not dealers in merchandise. A dealer in merchandise is defined, on p. 158, Vol. 11, Words and Phrases, as follows:

"A dealer, in the common acceptance, and therefore in the legal meaning, of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. One manufacturing ice and selling his product is not a dealer, within Vernon's Ann. Civ. St. art. 7047, subd. 20, imposing a tax on wholesale dealers in ice in cities of a certain population. Egan v. State, Tex., 68 S.W. 273."

This company takes natural products from the soil but does not sell the same as merchandise. As is gathered from your letter, they merely ship the product to other plants of the company, outside of the State of New Mexico, as raw ingredients.

In the case of *In re I. Rheinstrom and Sons, Co.*, D. C. Ky. 207 F. 119, 136, a 'dealer' is defined as one who buys to sell again. He stands intermediately between the producer and consumer, and depends for his profits upon the skill and foresight with which he watches the markets.

It is therefore the opinion of this office that the U. S. Gypsum Company is not a dealer in merchandise and is not subject to pay an occupation license in your county, in view of the above authority.

We trust that this answers your inquiry.

By: Hilario Rubio

Assist. Attorney General