

## Opinion No. 53-5666

February 10, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** F. S. Merriau City Attorney Raton, New Mexico

{\*57} In your letter dated January 30, 1953, and by letter from Mr. Kearns, Assistant District Attorney, dated February 4, 1953, an opinion of this office is requested concerning the applicability of the municipal gasoline tax against a certain wholesale and retail dealer in Raton.

As I understand the facts, the same man does a wholesale business and there is no question concerning the one cent city tax on the wholesale business on sales made to retail dealers in Raton. In addition, the same man acts in a dual capacity and also does a retail business himself. He has certain contracts with trucking companies whereby the retail deliveries are in amounts greater than 56 gallons in any one transaction. You are wondering whether the municipal tax applies against the retail business involving sales of more than 56 gallons in one transaction.

Section 14-3901, New Mexico Statutes Annotated, 1941 Compilation, gives municipalities the power to assess and collect a license tax upon gasoline sold within the municipal limits not to exceed one cent per gallon.

Section 14-3902, New Mexico Statutes Annotated, 1941 Compilation, defines distributor and defines a retail dealer. This definition, in our opinion, is primarily for the purpose of determining the person or agency which shall report the sales and collect and remit the tax to the city. This burden is placed upon the distributor. I do not believe the number of gallons sold by a retail dealer in a single transaction is material except in determining whether or not a person is a distributor or a retailer in the usual course of his business.

The Supreme Court, in *Continental Oil Company v. City of Santa Fe*, 36 N.M. 343, has adopted a rather liberal construction in connection with the act involved and even went so far as to construe the word "certain" to mean "cities" in one section of the act. It is also apparent from Section 7 of Chapter 159, Laws of 1931, that where a municipality elects to assess a gasoline tax under the act that the same is in lieu of any other license or occupation tax assessed against dealers in gasoline.

Under this provision, if the gasoline tax is not collectable in the transaction involved, it is doubtful whether any occupation tax could be collected against such transactions.

In view of the liberal construction of the act by the Court and the fact that exemptions from taxes against individuals are ordinarily strictly construed, it is our opinion that the transactions in question are taxable and that the distributor should be required to report and pay the tax regardless of the fact that he acts in a dual capacity and is sometimes a

wholesaler and sometimes a retailer and would be acting in his retail capacity in making the sales involved.

By: C. C. McCulloh

Assist. Attorney General