Opinion No. 58-12

January 20, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker, Assistant Attorney General

TO: Mr. Ray Kersting, Local Government Division, Department of Finance and Administration, P. O. Box 1359, Santa Fe, New Mexico

QUESTION

QUESTION

May a municipality assess an occupation tax, or any kind of a tax, against a firm doing business in the municipality, but having its headquarters elsewhere?

CONCLUSION

No; see analysis.

OPINION

ANALYSIS

We understand that your inquiry arises upon facts represented by the following as illustrative thereof: A wholesale business, having headquarters in one municipality, has its salesman call upon merchants in a second municipality, and accepts orders from these merchants. Such orders are then forwarded to the first municipality, and merchandise then is shipped to the second municipality to meet the orders.

It is fundamental law that the powers of a municipal corporation are derived solely from the laws of the state by which they are created. See Munro v. City of Albuquerque, 48 N.M. 306, 150 P. 2d 733 (1943); Purcell v. City of Carlsbad, 126 F.2d 748 (C.A.10); and 62 C.J.S., Municipal Corporation, § 107, p. 235.

It follows that a municipal corporation generally cannot exercise its delegated powers beyond the territorial limits thereof in the absence of a clear manifestation of legislative intent to the contrary. 62 C.J.S., Municipal Corporations, § 141, p. 283.

An "occupation tax" generally is considered to be a tax levied on the privilege of carrying on particular businesses or occupations, specified in statute and ordinance, and is an example of a license fee or tax, the fee exacted for the privilege of carrying on a particular business or occupation. 53 C.J.S., Licenses, § 1, p. 445 et seq. In keeping with the general rule that a municipal corporation may lawfully exercise only those powers granted by statute, its power to impose license taxes is strictly construed. 53

C.J.S., Licenses, § 10 (d), p. 480. Accordingly, the rule is clear that a municipality has no power to exact a license tax where the business taxed is not carried on within the territorial limits of the municipal corporation's jurisdiction, apart from explicit statutory authorization to that effect. 53 C.J.S., Licenses, § 10 (d) (2) (b), p. 484.

The occupation tax referred to in your inquiry is authorized by Ch. 145, Laws of 1937, appearing as §§ 14-42-7 through 14-42-21, N.M.S.A., 1953, as amended. This office finds in the statute which authorizes imposition of the municipal occupation tax no warrant or authority whatever for implying any enlargement of the municipal corporation's territorial jurisdiction with respect to the imposition of such tax. To this effect, see Opinion No. 5587, issued September 4, 1952. The situation described in your inquiry is to be distinguished from that dealt with in Opinion No. 5701, issued March 13, 1953, holding that a wholesale or retail establishment located within a municipal corporation must pay the municipal occupation tax based upon the gross volume of business done, including the amount of sales made outside the corporate limits of the municipality.

For these reasons, this office is of the opinion that an occupation tax may not lawfully be assessed against a firm located outside the corporate limits by reason of sales or deliveries of goods to persons located within the municipality. It should be noted, however, that location of a branch office of the business within the municipality for example, might well require a different conclusion.

Although the general principles above stated should prove helpful in determining the validity of other types of municipal taxation also, it is not possible to state a conclusion applicable universally to other kinds of taxation which a municipality might seek to impose with respect to sales of goods by a business located elsewhere to persons residing within the corporate limits of a municipality. Accordingly, consideration of this aspect of your inquiry must be reserved at this time, since analysis of the particular type of tax in the context of the particular circumstances is required to provide a meaningful conclusion to this part of your inquiry. If you have in mind, for example, the question of the propriety of the imposition of a municipal sales tax in the circumstances described in the inquiry, § 14-42-25 (Laws 1955, Ch. 233, § 2, as amended, Laws 1957, Ch. 240, § 2) clearly authorizes a tax upon "the gross receipts of all retail businesses and services within the corporate limits of said municipality", and so clearly does not apply in the situation suggested. This reference is sufficient to indicate the impracticability of attempting to state a rule applicable to this portion of your inquiry without analysis of the specific tax and circumstances involved.