**Opinion No. 59-104**

August 13, 1959

**BY:** HILTON A. DICKSON JR., Attorney General

**TO:** Mr. Albert O. Lebeck Jr., City Attorney P. O. Box 1111 Gallup, New Mexico

*{*163}* This is in answer to your recent inquiry as to whether, in the light of **Town of Farmington v. Miller,** 64 N.M. 330 (1958), our Attorney General's Opinion No. 58-12 still stands. Specifically, you ask whether an occupation tax is due from a company that sends agents into a town to solicit orders, which orders are returned to the company at either a location outside the town within the State of New Mexico, or outside the State of New Mexico, and such orders are shipped to the purchaser by such company.

In my opinion, since the holding in the **Miller** case, a town may legally impose an occupation tax upon intrastate sales of the kind you have described, provided sufficient incidents of the same amounting to the establishment of a place of business are conducted in the town, and may further legally impose an occupation tax upon interstate sales of the kind you have described provided the same requirement is met **and** the tax is not discriminatory and burdensome on interstate commerce. However, Attorney General's Opinion No. 58-12 remains the position of this office, as will be explained.

Opinion No. 58-12 held that since a municipal corporation could not exercise jurisdiction beyond its territorial limits (citing 53 C.J.S., Licenses, § 10 (d), p. 480), it could not levy an occupation tax upon business carried on within the territorial limits of the municipality unless the seller has established a place of business within such limits. However, as the opinion warned ". . . It could be noted, however, that location of branch *{*164}* office of the business within the municipality, for example, might well require a different conclusion."

The **Miller** decision did not turn on the power of the municipality to tax beyond its territorial limits. The opinion of Justice Lujan did not specifically so hold, but a careful reading of the opinion shows a clear implication that the Court felt that Mr. Miller, although an agent for an out-of-state firm, was actually conducting a place of business inside Farmington. You will note that he was in Farmington for the purpose of soliciting orders for six weeks in 1955 and eight weeks in 1956. Further, part of the purchase price was paid at the time the order was secured and that the purchaser held no option to return the goods once delivery had been made. Therefore, the Miller decision does not disagree with the theory of our 1958 opinion. We conclude therefore, that as to intrastate sales, a municipal corporation may impose an occupation tax if the seller has performed such incidents of the sale in the municipality so as to establish a place of business within its territorial limits.

It is axiomatic that the above conclusion is also applicable to interstate sales made by an agent of an out-of-state business firm wherein certain incidents of the transaction,

usually transmission of the order to the firm delivering the goods to the purchaser are carried on across state lines. However, in such cases, an additional question is raised as to whether the tax violates the commerce clause (Article I Section 8, Clause 3) of the United States Constitution which gives to the Congress of the United States, the power to regulate commerce between the several states. As was pointed out in the **Miller** decision, citing **Robbins v. Shelby County Taxing District,** 120 U.S. 489, 7 S. Ct. 592, 30 L. ed. 694; **Real Silk Hosiery Mills v. City of Portland,** 268 U.S. 325, 45 S. Ct. 525, 69 L. ed. 982 and several other cases decided by the Supreme Court of the United States, taxes imposed only on itinerant solicitors, or imposed on such solicitors in the form of license fees where local merchants were taxed on the basis of the proportionate amount of business done within the municipality, have been held to be burdensome and discriminatory against interstate commerce and therefore violative of the commerce clause. The **Miller** decision held that the occupation tax allowed by Sec. 14-42-7 N.M.S.A., 1953 Comp. (PS), was not discriminatory because the tax is levied on all occupations, professions, trades, etc, alike, and is **not** imposed on the business of soliciting orders as such. The Supreme Court of the United States said in **Nippert v. City of Richmond,** 327 U.S. 416, 66 S. Ct. 586, 90 L. ed. 760, also cited in the **Miller** decision:

"As has been so often stated but nevertheless seems to require constant repetition, **not all burdens upon commerce, but only undue and discriminatory ones, are forbidden . . ."** (Emphasis Supplied)

and

"There is no lack of power in the State or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field . . ."

We repeat the warning spelled out in our 1958 opinion that although the principles announced there, and those stated now, should prove helpful in determining the validity of other forms of municipal taxation, no conclusion can be stated which will apply universally to all forms of taxation which a municipality may desire to impose. Each fact situation must be scrutinized as it arises.

By: PHILLIP R. ASHBY,

Assistant Attorney General