

Opinion No. 59-32

April 6, 1959

BY: FRANK B. ZINN, Attorney General

TO: John Humphrey, Jr. Assistant District Attorney Fort Sumner, New Mexico

A county occupation tax may be levied on wholesalers who sell and deliver merchandise within a county, upon real estate brokers, also on sellers of minnows and other live bait.

OPINION

{*48} This is in answer to your opinion request in which the following questions were raised:

1. May the County levy license or occupation tax on wholesalers who sell and deliver merchandise to retailers located within the county?
2. May the County levy license or occupation tax on persons furnishing or supplying services, such as laundry, dry cleaning and real estate brokerage to persons living in the County?
3. May the County levy license or occupation tax on sellers of minnows and other live bait, caught or raised by them?

In my opinion, a County Occupation tax can be assessed against all businesses listed in your questions above with the exception of laundries and dry cleaners supplying services only who do not deal in or sell merchandise.

Section 60-1-1 N.M.S.A. 1953 Compilation, states that "a license tax . . . shall be imposed upon businesses or avocations mentioned in this chapter [Sec. 60-1-1 to 60-1-14, N.M.S.A. 1953 Comp.] carried on by any person within the State of New Mexico."

Specifically, the tax is assessed against "dealers in merchandise other than liquors," real estate {*49} agents and collectors, hotels, inns, restaurants, livery or feed stables, stagelines and amusement places, but in no place in the statute are wholesalers, persons furnishing or supplying services such as laundry and dry cleaning or sellers of minnows or live bait mentioned. Thus, it becomes necessary to legally define the term "dealer in merchandise."

A dealer is defined as one who deals, distributes, delivers, or does business, a trader, trafficker, middleman or a person making a business of buying and selling goods.

Charles E. Russell Co. vs. Carroll, 194 Va. 699, 74 S.E. 2d. 685.

"Merchandise" in Volume 27 of Words and Phrases, commencing at page 69, is defined in general terms as including all things merchants ordinarily sell at wholesale or retail.

Applying the foregoing statutory and case law to your questions, it would appear that the county can levy a license or occupation tax on wholesalers who sell and deliver merchandise to retailers located within the county. Persons selling minnows or other live bait which they have raised or caught also in my opinion, constitutes "merchandise." The licensing of bait sellers, under Section 53-3-20, N.M.S.A. 1953 Compilation, is not a preemption of the field so as to preclude licensing by the county or a municipality of the same business enterprise.

In your second question, you ask whether the county may levy license or occupation taxes on persons furnishing or supplying laundry or dry cleaning services. It is my view that a distinction must be made between one who deals in merchandise and one who supplies services. Under Sections 60-1-1 thru 60-1-14, as I have already pointed out, certain people who supply services are expressly covered by these sections, but not laundry and dry cleaning establishments. By the very nature of this type of business, a service is rendered as opposed to a sale of a commodity or goods. Therefore, unless the laundry or dry cleaning is engaged in the sale of a commodity or goods, it is my opinion that county occupation taxes do not apply to laundry or dry cleaning establishments. Real estate agents, on the other hand, who buy and sell real estate on commission under Section 60-1-2, N.M.S.A., 1953 Compilation, are specifically assessed the sum of \$ 10.00 per annum county occupation taxes.

By way of conclusion, I call to your attention, Attorney General's Opinion No. 3691, in which this office stated that dealers in merchandise may be required to pay occupation taxes to more than one branch of the state or local government. It was held in that opinion that individuals who do a statewide or countywide business may be required to have a state permit, a county occupation license, as well as paying a municipal occupation tax. The opinion concludes:

"Certain businesses situated within the corporate limits of cities, towns and villages may be required to pay two or more occupation taxes. This would not constitute double taxation in the objectionable sense because the taxes are paid to different branches of the state government."

I therefore see no reason why a county occupation tax may not be levied on wholesalers who sell and deliver merchandise within a county, upon real estate brokers and on the sellers of minnows and other live bait even if they are presently paying a state license fee or a municipal occupation tax as well.

Fred M. Calkins, Jr.

Assistant Attorney General