

## Opinion No. 59-72

July 15, 1959

**BY:** Hilton A. Dickson, Jr., Attorney General

**TO:** Ray Franz, Manager Santa Fe Chamber of Commerce P. O. Box 1078 Santa Fe, New Mexico

1. A retailer must pay the 2% privilege tax even when selling to a tourist or other person from out-of-state.
2. A retailer may absorb the 2% privilege tax or not as he pleases.

### OPINION

{\*115} This is written in reply to your recent request for an opinion on the following questions:

1. If a retailer receives an order from out-of-state, is the retailer obligated to assess the 2% "sales tax?" "If he is not obligated, is he required to absorb the 2% tax on such sales?"
2. If a tourist or visitor from out-of-state purchases items in Santa Fe, is the retailer required to assess the 2% tax or if he does not assess the 2% tax, is he required to absorb and record such a sale on his premises?

It is my opinion that the retailer in both instances must pay the 2% privilege tax and that he, of course, can either absorb it or pass it on to a customer. Your two questions will be discussed as one since the answer is applicable to both.

There appears to be much confusion in this area which stems principally from the fact that many people consider the tax authorized under Section 72-16-4, N.M.S.A., 1953 Compilation (P.S.) to be a sales tax. This is not true. That section reads in part as follows:

"There is levied, and shall be collected by the Bureau of Revenue, **privilege taxes**, measured by the amount or volume of business done, against the persons on account of their business activities, engaging or continuing, within New Mexico, in any business as herein defined, . . ." (Emphasis supplied)

It would seem therefore that this tax is a privilege tax levied upon the retailer for the privilege of doing business in this state rather than a sales tax imposed upon the sale of certain items. It does not make any difference who the purchaser is in the cases you put, since the tax is imposed upon the retailer.

The section of the statutes which provides for the tax on the type of business you have referred to is paragraph "D" of Section 72-16-4, N.M.S.A., 1953 Compilation (P.S.). It reads in part as follows:

"D. At an amount equal to two percent [2%] of the gross receipts of the business of every person engaging or continuing in the business of selling at retail of goods, wares, materials, equipment, machinery, and commodities, including alcohol and all alcoholic liquors and beverages, for consumption and not for resale, . . ."

The type of business referred to in your question is clearly made subject to this tax by the above quoted provision.

There is no provision which requires the retailer to absorb this tax. He may do as he pleases. The usual practice is to pass this tax on to the purchaser but he certainly is not required to do so.