Opinion No. 60-201

October 27, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. John M. Lenko City Attorney Las Cruces, New Mexico

QUESTION

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May the City of Las Cruces assess a license tax against the holders of club liquor licenses within the municipality pursuant to existing Las Cruces city ordinances?

CONCLUSION

No. It is not possible under the particular ordinances now in effect.

OPINION

*{*610}* **ANALYSIS**

It is abundantly clear that municipalities have the power to impose a license tax against holders of club liquor licenses if the requirements of Section 46-4-2, N.M.S.A., 1953 Compilation have been complied with. That section provides in pertinent part as follows:

"Municipalities within or composing local option districts are hereby empowered, by **duly adopted ordinance,** to impose an annual nonprohibitive municipal license tax upon the privileges of persons holding state licenses under the provisions of this act to operate within such municipalities as **retailers, dispensers** or **clubs..** . ." (Emphasis added)

It should be noted in passing that the three types of licenses referred to above, represent categorization which recurs throughout the alcoholic beverages sections *{*611}* of the statutes. Since we recognize the power of municipalities to so tax pursuant to "duly adopted ordinances", it remains for us to ascertain whether the Las Cruces ordinances permit the tax which is the subject of this opinion.

In order to answer the instant question it is necessary that certain Las Cruces ordinances be set forth in full.

"8-122. ALCOHOLIC LIQUORS -- LICENSE. It shall be unlawful for any person on his own behalf or as agent for another person except a licensed New Mexico wholesaler, rectifier, or the agent of either, to sell or offer for sale any alcoholic liquors in the City of Las Cruces, New Mexico, until he shall have secured a license therefor and shall have paid to the City Clerk the license fee provided to be paid."

"8-123. AMOUNT OF FEE. Every applicant for a license, before receiving such license shall pay to the City Clerk the following designated license fee for each place of business in the City of Las Cruces:

(a) Licenses provided herein are, retailers and dispensers.

(b) Retailers' License $ 350.00

(c) Dispensers' License 700.00

"8-124. RETAILERS. The term "Retailer" shall mean any person selling, offering for sale, or having with intent to sell, alcoholic liquors for consumption off the premises of the licensee in unbroken packages containing less than five gallons."

"8-125. DISPENSER. The term "Dispenser" shall mean any person selling, offering for for sale, or having with intent to sell, alcoholic liquors by the drink, or in packages containing less than five gallons."

It will be noted that Ordinance 8-123 provides license fees of $ 350.00 for retailer's license and $ 700.00 for dispenser's license but does not specify a fee for club licenses. It might be argued that the language or Ordinance 8-122 is broad enough to make holders of club licenses liable for the payment of the dispensers' license. However, it is our conclusion that the definition of "dispenser" found in Ordinance 8-125 does not permit an interpretation which would include therein holders of club licenses. This is for the reason that the term "dispenser" includes only those selling "alcoholic liquors by the drink, **or in packages containing less than five gallons."** Sales by club licensees are governed by Section 46-5-11, N.M.S.A., 1953 Compilation (P.S.). That section restricts the owners of such licenses to selling "alcoholic liquor **by the drink** for immediate consumption on the premises of such club, . . ." We hold that since, by statute, holders of club licenses are prohibited from selling in packages and for use off the premises, they cannot properly be said to be included in either of the definitions of the city ordinances.

We feel that further credence is given to this view by the fact that the terms "retailer" and "dispenser" are defined by the ordinance in substantially the same language used by the statute. See Section 46-1-1, N.M.S.A., 1953 Compilation (P.S.). Furthermore, we are led to believe that while the subject ordinances have been in force for some time, holders of club licenses have not been considered as subject to the license tax. We urge that before seeking to tax such licensees. the ordinances must be amended to specifically subject club licensees to the tax and to specify the amount of such tax. The city should be aware of a further provision of Section 46-4-2, quoted in part above, to the effect that "the *{*612}* amount of such license tax and the dates and manner of the payment thereof shall be fixed on or before the first day of June of each year **by the ordinance imposing the same."** (Emphasis added) It is apparent from this last quoted language that considerable specificity is required in such ordinances.

By: F. Harlan Flint

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