Opinion No. 61-32

April 26, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

TO: John W. Chapman, Chief Counsel, Bureau of Revenue, State Capitol Building, Santa Fe, New Mexico

QUESTION

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1. Is the additional 1/8 of 1 percent retail privilege tax imposed by Laws of 1961, Chapter 190, Section 1, sufficiently clear and unambiguous to be valid and enforceable?

CONCLUSION

1. No.

OPINION

ANALYSIS

There is a strong policy expressed by the courts of all jurisdictions against the determining of a legislative enactment unconstitutional if there is any way to construe it to be constitutional. This general policy is considered in the writing of this opinion, since it is clear that the New Mexico Supreme Court has aligned itself with the majority, if not universal, rule. **Fowler** v. **Corlett,** 56 N.M. 430, 244 P. 2d. 1122. Despite this prevailing policy, legislation sometimes fails because the legislative intent is not expressed or because the duties imposed by the act are incapable of performance. It is essential that the legislature express its own will and leave nothing to the will and caprice of the court.

We discuss the constitutional problem because of the fact that there is a serious question regarding the validity of the legislation now under consideration. In order to properly focus attention upon the problem we quote the last sentence of Section 1, Chapter 190, Laws of 1961, out of which the present problem arises:

"in addition to the 2 percent tax provided by this section there is imposed on each retailer a tax computed at the rate of 1/8 of 1 percent of the gross receipts attributable to sales of goods which were not purchased by him for resale from a wholesaler as defined in Section 72-16-2, N.M.S.A., 1953 Compilation."

It will be noted that this legislation amends the present Section 72-16-4.5, N.M.S.A., 1953 Compilation (being Laws 1959, Chap. 5, Section 5, as amended). The new

legislation does not change the 2 percent privilege tax on retailers which existed under prior law. The only significant change is the addition of the new 1/8 of 1 percent tax described in the above quoted portion of the Act.

We direct our attention to the question of whether the meaning of the above quoted portion of the statute is clear or ascertainable so that the statute may be immune from attack on the grounds that it is void for vagueness. The language which creates the problem is "gross receipts attributable to sales of goods which were not purchased by him for resale from a whole-saler". A New Mexico Supreme Court has defined the type of uncertainty which is objectionable in the following language:

"In the objectionable sense, uncertainty is inherent in the enactment itself, resulting from inconsistencies or ambiguities or indefiniteness in the language used so as to make it impossible to determine and effectuate the legislative intent." **Beatty** v. **City of Santa Fe,** 57 N.M. 759, 263 P.2d. 697.

It is our view that the statutory language now under consideration fails to meet the standard of certainty which is necessary to a valid statutory enactment. The statute purports to impose an additional privilege tax on retailers based upon the sale of certain goods by such a retailer. The problem is to determine which retail sales are subject to this tax. Effect must be given to the statutory definition to the term "wholesaler" which according to Section 72-16-2 (j) means "any person who sells taxable personal property for resale and not for consumption by the purchaser". By definition, any taxable personal property which has been **purchased** for resale must have been purchased from a wholesaler. It would therefore, appear that in order to give effect to the Act the additional tax can be imposed only upon the sale of goods which were not purchased by the retailer. In other words, it is our view that the additional 1/8 of 1 percent tax is imposed only upon the sale of goods which were acquired by some other means than purchase. Under the statutory definition of wholesaler, it would be possible for a farmer or other agricultural producer to be included within the definition, if he does not sell to the ultimate consumer. Therefore, it might appear that this new tax should be imposed upon the retailer who also produces the goods which he sells at retail. We seriously doubt that the legislature contemplated this application of the law. Furthermore, the grower or producer of agricultural products is generally exempted from the taxes imposed by the Emergency School Tax Act by Section 72-16-15, N.M.S.A., 1953 Compilation, as amended. Giving effect to that exemption, the only other persons who would appear to be subject to the tax would be retailers who manufacture the goods which they sell at retail. This interpretation if correct, would subject such persons to double taxation since manufacturers are made subject to a tax upon gross receipts at the rate of 1/4 of 1 percent by Section 72-16-4.3, N.M.S.A., 1953 Compilation (PS).

It is therefore, our view that a reasonable or rational construction cannot be placed upon the subject statutory language. In this regard we cite the case of **State ex rel Bliss,** 55 N.M. 12, 225 P.2d. 1007, wherein at page 29 of the New Mexico Report the following language is found:

"In the enactment of statutes reasonable precision is required. Legislative enactments may be declared void for uncertainty if their meaning is so uncertain that the court is unable by the application of known and accepted rules of construction, to determine what the legislature intended with any reasonable degree of certainty."

The New Mexico court has declared that statutes which impose taxes should be construed strictly only so far as they may operate to deprive the taxpayer of his property by way of summary proceedings or when they impose penalties or forfeitures. Otherwise, the tax statutes are to be given a reasonable construction without bias or prejudice against either the taxpayer or the state. **Beatty** v. **City of Santa Fe,** supra.

A statute may be void for vagueness where no ascertainable legislative intent is revealed. It may be equally void where there is more than one reasonable construction possible but there is no means of determining which construction was intended by the legislature. In **State** v. **Alexander,** 46 N.M., 156, 123 P.2d. 724, the following pertinent language is also found:

"It is not within the province of the courts to enact legislation or to add words of limitation, qualification, or explanation to a legislative act and thereby accomplish the same end . . ."

It is our view that the statute under consideration is so deficient that no reasonable meaning can be given to it. It appears to be impossible to give it any precise or intelligent application to the circumstances under which it is intended to operate. It is further our view that if the question were presented to the courts for determination that it would be held improper to attempt to correct the deficiencies by judicial act. We would therefore, advise that the subject language is void for vagueness and is therefor, a nullity and need not be given effect by the Bureau of Revenue.