

Opinion No. 63-43

April 23, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Charles C. Brunacini Commissioner of Revenue State Capitol Santa Fe, New Mexico

QUESTION

QUESTIONS

1. What is the effective date of Chapter 106, Laws 1963?
2. What is the meaning of the term "licensed distributors" for purposes of determining who is entitled to the 4% discount on the purchase of the first \$ 24,000 of cigarette tax stamps?
3. When a purchaser has bought the first \$ 24,000 worth of stamps, and received 4% discount, should the gross amount or the net amount be considered in determining when to apply the 3% discount allowed on the purchase of the second \$ 24,000 worth of stamps?
4. What is the meaning of the phrase "in any month?"
5. What date of the month and hour of the day marks the beginning and ending of a month?
6. How should the Luxury Tax Division treat post-dated checks?

CONCLUSIONS

1. June 7, 1963.
2. See Analysis.
3. Gross amount.
4. See Analysis.
5. See Analysis.
6. See Analysis.

OPINION

{*87} ANALYSIS

Chapter 106, Laws 1963, did not carry the emergency clause and will become effective on June 7, 1963, 90 days after the date of adjournment of the legislature.

Chapter 106, Laws 1963, provides for the sale of cigarette tax stamps to "licensed distributors and direct buying retailers" at a discount of 4% for the first \$ 24,000 worth of stamps purchased in any month, 3% of the second \$ 24,000 worth of stamps purchased in any month and 2% on all stamps purchased in excess of these amounts during any month. Your letter states that some companies hold two or more distributor permits, which distributors are located in different parts of the State. Obviously, if each separate distributor can claim the discount, a greater discount will be available than if the parent company itself is treated as the only distributor.

Section 72-14-1 (G), N.M.S.A., 1953 Compilation provides:

"the term distributor means and includes any person, wherever resident or located, {*88} who brings or causes to be brought into this state unstamped cigarettes **purchased directly from the manufacturers thereof** and also any person who manufactures or produces or causes to be manufactured or produced cigarettes, and sells, uses or distributes the same within this state." (emphasis added).

By definition, therefore, a distributor is one who buys directly from the manufacturer, or who manufactures his own cigarettes. Only those who do business in this manner should be licensed as distributors. It follows then that only those persons who purchase directly from manufacturers or are themselves manufacturers, should be treated as distributors for the purpose of computing the discount. If they do not deal directly with the manufacturer, they really occupy the status of a wholesaler and should not be treated as distributors.

Turning to your third question we find that the 4% discount is allowed on the first \$ 24,00 worth of stamps purchased during any month. Although, after allowing the discount, it is clear that less than \$ 24,000 in cash will change hands, still the statute does not predicate the discount upon money, but rather upon the worth of the stamps, or their face value. Therefore, when a distributor has purchased cigarette tax stamps worth a face value of \$ 24,000, all further purchases in the same month are allowed a discount of only 3% until \$ 48,000 worth of the stamps have been purchased, at which time the 2% discount becomes effective.

Your fourth question asks for the meaning of the phrase "in any month", referring to purchase of stamps in any month. The term "month", whether employed in statutes or contracts, and not appearing to have been used in a different sense, is a period terminating with the date of the succeeding month numerically corresponding to the date of its beginning, less one day. If there be no corresponding date of the succeeding month, the month terminates with the last day thereof. See the cases collected at 27 **Words and Phrases**, page 521 et seq. Therefore, the term "in any month" does not

refer to a month by name, such as January, February or March, nor does it indicate a thirty day period. Let us take an example to demonstrate its meaning. If a purchase of stamps was made on April 9, 1963, the month would end on the same date in May, less one day, which would be May 8, 1963. However, in computing time, Section 1-2-2, N.M.S.A., 1953 Compilation, requires the first day to be excluded and the last day included, so that in the case of a purchase on April 9, 1963 the month would begin on April 10, 1963, and would end on the same date of the next succeeding month, less one day, or May 9, 1963. It is apparent from this example that the period of time contemplated by the term "any month" terminates on the same date of the next succeeding month. If the ending date is a Sunday or a holiday the time is extended by one day.

Some months will have less than thirty days, and in some cases the final day of the calendar month will be the same for purchases made on any of several dates. For example, if a purchase were made on January 30th or 31st, it is clear that there is no numerically corresponding date in the month of February. If there is no numerically corresponding date in the succeeding month then the calendar month ends on the last day of the next succeeding month. Therefore, the calendar month for purchases made on either January 28th, 29th, 30th or 31st would end on February 28th, except in those years when February has 29 days. An analogous situation is presented where a purchase is made on the 31st day of any month that is succeeded by a month having only 30 days.

In answer to your fifth question, the first second of the first minute of the day following the day of a purchase marks the beginning of the month, and midnight of the date numerically corresponding to the date of purchase in the next succeeding month marks the end of the month. This rule is modified by the rule that, if there is no numerically corresponding date in the next succeeding month, then the last day of the next succeeding month is the end of the month, and midnight of that last day is the end of the month.

Your last question asks how the Luxury Tax Division should treat post-dated checks. Generally speaking a check is only a conditional payment, and does not become final payment until it is honored and paid at the bank on which it is drawn. The lapse of time between the date of the check and the date that it is finally paid will generally depend on a number of factors, such as the day of the week that it is presented for payment, the location of the forwarding bank, and the location of the bank on which the check is drawn. For example if the State Treasurer presents a check to a Santa Fe bank for collection, and the Santa Fe bank has to forward the check to Roswell, Las Cruces or Farmington for payment, several days may elapse between the date of the check and the date of final payment. To require the Luxury Tax Division to use the date of final payment to determine the date of beginning of a calendar month for the purpose of computing discounts would impose a totally unrealistic administrative burden. In our opinion, the Luxury Tax Division should, for the purpose of computing the discount, treat the purchase as having been made on the date written on a postdated check.

By: Norman S. Thayer

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