

Opinion No. 65-134

July 20, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Tom Overstreet, Assistant Attorney General

TO: Honorable W. T. Scoggin, District Judge, Third Judicial District, Division I, Las Cruces, New Mexico

QUESTION

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Is it unconstitutional to collect a tax on the sale of cigarettes in addition to the cigarette tax already imposed under the Cigarette and Tobacco Tax Act?

CONCLUSION

No.

OPINION

{*224} ANALYSIS

In Attorney General's Opinion No. 198-58-805, the question was answered as to whether or not a school tax should be collected from the sale of cigarettes in view of the fact that a tax had already been levied on cigarettes under the Cigarette and Tobacco Tax Act. After citing the appropriate sections levying the taxes, we said:

. . . it is our opinion that the cigarette and tobacco tax is to be treated as a separate and additional tax to that imposed by the Emergency School Act.

Thus, under our statutes, two separate taxes are involved from the sale of cigarettes.

The remaining question is whether this is constitutional and that is answered in the case of **State v. Tittman**, 42 N.M. 76, 75 P.2d 701, (1938). This case at page 51 states:

"'Double taxation' means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid, without taxing all of it. If all the property in the territory on which the tax is imposed is taxed twice and for the same purpose and in the same year without discrimination or exemption, this is not double taxation in the sense that such taxation is objectionable because, within constitutional limits, if the tax is uniform, the amount of it is in the discretion of the taxing authorities {*225} and it may all be levied at one time, or it may be the subject of several levies." 26 R.C.L., title Taxation, Section 231.

Section 1 of article 3 of the New Mexico Constitution is "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class." There is no provision of the New Mexico Constitution which prohibits double taxation if the taxes are equal and uniform upon subjects of the same class; nor does the Federal Constitution afford protection against double taxation by the authorities of a state. **Baker v. Druesedow**, 263 U.S. 137, 44 S. Ct. 40, 68 L. Ed. 212; **Kidd v. Alabama**, 188 U.S. 730, 23 S. Ct. 402, 47 L. Ed. 699.

The levy of a tax upon persons engaged in the business of selling cigarettes under the Emergency School Tax Act and the levy of a tax upon the transfer of title to cigarettes is not double taxation as that term is defined in **State v. Tittmann**, supra. The incidence of the tax is different under the two acts. The revenue raised by the two taxes is used for different purposes. Both taxes are equal and uniform upon all subjects of the same class. It offends no constitutional provision to levy a tax upon the sale, gift, or consumption of cigarettes and to levy a tax upon one engaged in business in this state measured by the gross receipts which he receives from the sale of cigarettes. In our opinion the levy of the two taxes is constitutional.