**Opinion No. 67-24**

February 13, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Jean W. Atwood County Clerk County Court House Reserve, New Mexico

## QUESTION

QUESTIONS

1. What businesses are classified as dealers in merchandise under Section 60-1-1, N.M.S.A., 1953 Compilation.$

2. What type of county occupational tax or merchandise license is to be issued to the applicant in the following fact situations:

A. The applicant owns a combination motel and cafe:

B. The man owns a motel only;

C. The man owns a cafe only;

D. The man owns a cafe and service station combination.

3. Who sets the rates which are payable under Section 60-1-1 through 60-1-3, N.M.S.A., 1953 Compilation?

4. Is the amount of money taken in by a service station through the sale of gasoline to be included in the figure submitted by the owner of the service station pertaining to annual sales or annual receipts?

CONCLUSIONS

1. See analysis.

2. (A) The license required under Section 60-1-3, N.M.S.A., 1953 Compilation.

(B) Same as A.

(C) Same as B.

(D) See analysis.

3. See analysis.

4. See analysis.

## OPINION

*{*29}* **ANALYSIS**

This office defined a dealer in merchandise prior to your request. In the Opinion of the Attorney General No. 63-86, dated February 9, 1956, this office stated that a dealer in merchandise "is one who deals, divides, distributes, delivers, or does business, a trader, trafficker, middle man or a person making a business of buying and selling goods. . . ."

That opinion held that the definition covers and includes manufacturers. The definition includes an owner of a ski lodge operating on national forest land (Opinion of the Attorney General No. 57-73, dated April 15, 1957), the operator of a trading post on an Indian Reservation (Opinion of the Attorney General 57-252, dated October 4, 1957), a contractor or trucker if he sells tangible personal property (Opinion of the Attorney General No. 58-156, dated July 24, 1958), and wholesalers and dealers in minerals (Opinion of the Attorney General No. 59-32, dated April 6, 1959). The section does not apply to those businessmen dealing only in personal services (Opinion of the Attorney General No. 58-156, supra; Opinion of the Attorney General No. 59-74, dated July 20, 1959). The definition of a dealer in merchandise, then, is quite broad. It is limited only by the statute and the holdings that a dealer in personal services may not be taxed under Section 60-1-1, N.M.S.A., 1953 Compilation.

The second question raises the issue of possible conflict between Section 60-1-1 and 60-1-3, N.M.S.A., 1953 Compilation. Your question pertaining to the individual owning a motel and a cafe combination pertains to Section 60-1-3. That Section reads in pertinent part:

"Hotels -- Inns -- Restaurants Livery or feed stables -- stage lines. -- Keepers of hotels, inns or restaurants, where food or lodging is provided, and whose annual receipts exceed one thousand dollars and do not exceed two thousand dollars shall pay a license tax of twenty dollars per annum; those whose annual receipts exceed two thousand dollars, and do not exceed five thousand dollars shall pay a license tax of forty dollars per annum, and all those whose annual receipts exceed five *{*30}* thousand dollars, shall pay a license tax of sixty dollars per annum."

It is our opinion that the owner of a combination cafe and hotel must pay an occupational tax under Section 60-1-3, supra. Although, Section 60-1-1, supra, arguably could apply, Section 60-1-3 is more specific. It is a general rule of statutory interpretation that where two statutes cover the same issue, the more specific shall be applied.

Your second question also calls for an application of Section 60-1-3. The keeper of a hotel providing lodging fails within the specific wording of Section 60-1-3.

It is our opinion that the owner of a cafe only must pay an occupational tax under Section 60-1-3. The statement made above as to statutory interpretation applies here. Further the New Mexico Bureau of Revenue has traditionally refused to treat a cafe or restaurant owner as a dealer in merchandise. That tradition may not be lightly overruled. Accordingly, the owner of a cafe must pay tax under only one Section in this Chapter.

It is our opinion that the individual owning a combination cafe and service station must pay a tax under Section 60-1-3 for the cafe. This is consistent with the answer to your question concerning cafe owners.

As to the service station, the owner must pay one of two taxes. The municipality may choose to tax the owner on the gasoline and oil sold under Section 14-38-2, N.M.S.A., 1953 Compilation (P.S.). If such a tax is levied, the owner need not pay an occupational tax based upon the sale of gasoline. (Opinion of the Attorney General 1935-35 p.66 and No. 5681, dated February 18, 1953).

However, the service station owner must still pay an occupational tax based upon sales of windshield wipers, tires and any other accessories if he sells such merchandise in his service station. This too would be collected under Section 60-1-1. Therefore, it is possible that the service station owner may have to pay two taxes.

The answer to your question (4) is included in the above analysis.

By: Donald W. Miller

Assistant Attorney General