

Opinion No. 67-44

March 14, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Raymond E. Keithly District Attorney Truth or Consequences, New Mexico

QUESTION

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1. Does the phrase "dealers in merchandise" as it is used in Section 60-1-1, N.M.S.A., 1953 Compilation, include wholesalers?
2. What is the procedure for collecting county occupation taxes from persons who have engaged in business subject to the tax without a license?
3. Is there a limitation on the period for which county occupation taxes can be collected?
4. Under Section 60-1-1, supra, are receipts derived from the sale of gasoline by service stations included in "annual sales"?

CONCLUSIONS

1. Yes.
2. See analysis.
3. No.
4. See analysis.

OPINION

{*57} ANALYSIS

In Opinion of the Attorney General No. 59-32, dated April 6, 1959, we concluded that wholesalers who sell and deliver merchandise within a county are subject to the county occupation tax levied under Section 60-1-1, N.M.S.A., 1953 Compilation.

Section 60-1-10, N.M.S.A., 1953 Compilation provides that delinquent county occupation taxes shall be collected as follows:

1. The county clerk must notify the person who is engaged in business that requires a license but who has not taken out such license that a license is required by law.

2. If the person so notified refuses or neglects to take out a license for thirty days after notice has been given and pay the penalty provided in Section 60-1-7, N.M.S.A., 1953 Compilation, the clerk must send a written notice to the district attorney of his district reciting the facts of failure to comply with the law.

3. The district attorney must prosecute the delinquent taxpayer under Section 60-1-7, N.M.S.A., 1953 Compilation.

4. Under Section 60-1-7, supra, the district attorney must indict the person for violation of Section 60-1-7, supra. The indictment under Section 60-1-7, supra, must charge that notice was received by the defendant and that he failed to make timely payment of the tax or take out a license. **Territory v. Turner**, 17 N.M. 267, 125 Pac. 603 (1912).

In Opinion of the Attorney General No. 65-152, dated August 12, 1965, we said that unless the county imposes a special limitation, there is no limitation on the period for which the county occupation tax can be collected. Section 60-1-7, supra, provides that the penalty for failure to pay occupation tax is computed from the time business began.

In Opinion of the Attorney General No. 64-136, dated November 9, 1964, we said that service stations are subject to the county occupation tax imposed under Section 60-1-1, supra. We also said that "annual sales" for the purposes of Section 60-1-1, supra, includes total annual receipts, without deduction {⁵⁸} for taxes included in the sale price, derived from the sale of gasoline. It should be noted, however, that if a municipality imposes a tax on gasoline under Section 14-38-2, N.M.S.A., 1953 Compilation (1965 P.S.), proceeds derived from gasoline sold within the municipality would not be subject to the county occupation tax. Section 14-38-2(B), N.M.S.A., 1953 Compilation (1965 P.S.); Opinion of the Attorney General No. 67-24, dated February 13, 1967.

By: Edward R. Pearson

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