

Opinion No. 69-72

July 7, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Ethan K Stevens, Assistant Attorney General

TO: Mr. Mel A. Hagman, City Building Inspector, City of Santa Fe, P.O. Box 909, Santa Fe, New Mexico 87501

QUESTIONS

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Is a resident contractor holding an occupation license in any city in New Mexico required by law to obtain additional occupation licenses in each of the individual municipalities where he does business?

CONCLUSION

No, insofar as Section 14-37-1 as amended, N.M.S.A., 1953 Compilation, is concerned; but such contractor is taxable in other municipalities as to business done therein, under Section 14-37-3, as amended.

OPINION

{*109} ANALYSIS

Although the answer to the question does, to some extent, involve Section 14-37-1, N.M.S.A., 1953 Compilation as amended by Chapter 300, N.M. Laws 1965, (1967 P.P.) it should be noted that the Construction Industries Act (Sections 67-35-1 to 67-35-63, N.M.S.A., 1953 Compilation, as amended by Chapter 199, Sections 1-63, N.M. Laws 1967 and by Chapter 224, N.M. Laws 1969) covers practically the entire field of the construction industry and that municipalities are left, under Section 67-35-53C of the Act, **only** the right to make "**inspections in accordance with the Construction Industries Licensing Act, or rules {*110} and regulations pursuant thereto, or from establishing a schedule of fees** to be paid by an applicant for a **permit**." Presumably "permit" as used here, refers to a "building permit" or "installation permit." This is a comprehensive statute giving a broad definition to the word "contractor", creating a "Construction Industries Commission" to oversee all forms of road, highway, bridge, "parking area or related project", building, stadium or other structure, airport, "subway or similar facility," and at least twenty-four other types of construction. This Act provides for issuance of a contractor's license which supplants all prior contractors', plumbers' and electricians' licenses. Separate trade boards are provided for electricians, mechanical work, including plumbers, gas fitters, and pipe fitters, and a general construction board. The Act provides for annual permits to licensees, and that the trade boards may require

a permit to be secured for **each construction installation or alteration**; the Act contains certain exemptions from its operation noted in Section 67-35-53 thereof, which are not material here.

As was said in **Agnew v. City of Los Angeles**, 10 Cal. App. 2d 612, 243 P.2d 73, holding void the provisions of a Los Angeles ordinance imposing additional requirements upon contractors holding valid state licenses:

"It was clearly the intention of the Legislature to declare that the licensing and regulation of contractors by the State shall be the only licensing and regulation in the State. This does not limit the right of a city or county to protect life and property by the enforcement of local regulations as to character and quality of electrical installations."

To the same effect, see **Horwith v. City of Fresno**, 74 Cal. App. 2d 443, 168 P.2d 767, and **City and County of San Francisco v. Boss**, 83 Cal. App. 2d 445, 189 P.2d 32, 34.

In addition, Opinion of Attorney General No. 65-176, dated September 7, 1965, held that the Private Investigators' Act (Sections 67-33-1 to 67-33-49, N.M.S.A., 1953 Comp.), is a comprehensive act which destroyed the power of municipalities to regulate private detectives, leaving only street patrol officers and their employers subject to municipal regulation.

Section 14-37-1, supra, the section allowing **licensing and regulation** of certain businesses, provides:

"The governing body may declare, by ordinance that the licensing or regulation of a business **not otherwise exempt by law** is conducive to the promotion of the health and general welfare of the municipality and may impose a license fee and a separate license on **each place of business** conducted by the same person, firm, corporation or association. **The license fee shall bear a reasonable relation to the regulation of the business.**" (Emphasis added)

As appears from **City of Lovington v. Hall**, 68 N.M. 143, 145, 148, 359 P.2d 769, the purpose of such an ordinance must be to charge license fees to defray the cost of regulation, and not primarily to produce revenue, and any license fee charged primarily to produce revenue would render the ordinance void, unless, regular inspection is provided, either by the licensing ordinance or some other ordinance.

The cases hold that if **some** revenue is produced by licensing under Section 14-37-1, supra, this, of itself will not render the ordinance void.

"A 'place of business' means the entire premises to which the public generally is expressly or impliedly invited for the purpose of transacting business with the owner and is simply a location where business is transacted or, a *{*111}* shop, office, warehouse, commercial establishment."

Simpson v. Goldworm, (Fla.) 59 So.2d 511, 513.

Section 14-37-1, supra, does not authorize a municipality to regulate or impose a license fee on a non-resident contractor because he has no "place of business" in a municipality in which he is merely doing construction work. Furthermore, the right to both license and regulate has been taken away as to both residents and non-resident contractors by the comprehensive nature of the "Construction Industries Licensing Act" except in certain minor respects.

The phrase "not otherwise exempt by law" in Section 14-37-1, supra, evidently refers both to the exemptions from licensing and regulation created by the "Construction Industries Licensing Act" those created by the "Private Investigators' Act", supra, and possibly to other statutory exemptions.

The other statute regarding licensing of occupations, and charging an occupation tax, **for revenue only**, is Section 14-37-3, N.M.S.A., 1953 Compilation, which supersedes former Sections 14-42-7 and 14-42-11 which have been repealed. The new section, 14-37-3, covers occupations the municipality does not seek to regulate under Section 14-37-1, supra, no longer specifies **particular** occupations, professions, etc., for occupation taxation, and states in part:

"A municipality may impose an occupation tax and classify any occupation, profession, trade, pursuit, corporation and other institution and establishment, utility and business of whatever name or character, like or unlike, and not licensed as authorized in Section 14-37-1, N.M.S.A., 1953 Compilation, or not licensed by the municipality as authorized by any other law."

This statute (Section 14-37-3) provides the same tax rate formerly stated in Section 14-42-11, now repealed, which was \$ 1 per annum for each \$ 1,000 of gross receipts, with a minimum tax of \$ 5 per annum and a maximum of \$ 25 per annum for each business.

The statute further provides a municipality **may** classify all occupations for occupation tax purposes and if it does, the classifications which shall be used are:

1. Manufacturing;
2. Utility;
3. Wholesale;
4. Retail;
5. Banking;
6. Financial.

Municipalities have only such powers as are given them by general statute, and their powers are strictly construed. **City of Clovis v. Crain**, 68 N.M. 10, 13, 357 P.2d 667.

Also, a statute enacted for the primary purpose of dealing with a particular subject matter supersedes a general statute which does not refer to that subject although broad enough to cover it. **Varney v. City of Albuquerque**, 40 N.M. 90, 92, 55 P.2d 40, 42, 106 A.L.R. 222, 224. See Opinion of Attorney General No. 65-167, supra. Revenue statutes are strictly construed. **Beatty v. Santa Fe**, 57 N.M. 759, 762, 263 P.2d 697. It follows that the legislature evidently intended to bar municipalities from taxing all contractors under Section 14-37-1, supra, and that a municipality may not levy any occupation tax under said section on contractors who are doing construction work in such municipalities and are non-residents thereof.

As stated in **Atlantic Greyhound Corp. v. Winchester**, 195 Va. 302, 78 S.E. 2d 666, 669:

"It is a well established rule that the powers of a municipality to impose occupation taxes are strictly construed in {*112} favor of the taxpayers and against the municipality."

"As is said by Judge Cooley in his work on Taxation, 'the general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations, and authorities concur in holding that if it is not manifest that there has been a purpose by the legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal.'" **McQuillin, Municipal Corporations**, (3rd Rev.Ed.) Vol. 16, Section 44.191, page 589.

It should be noted that contractors, lawyers, doctors, dentists and other persons engaged in performing personal services do not fall into any of the classifications suggested in Section 14-37-3, supra, for possible municipal use, but are included in the general language of the statute which purports to allow an occupation tax on "any occupation, profession, trade, pursuit." Evidently, the legislature intended **all** occupations should be taxed, and the mere fact they are not included in the suggested classifications which a municipality could choose to use, does not prevent taxation of resident or non-resident contractors with a minimum tax of \$ 5 and a maximum of \$ 25 for an occupation license, unless the municipality has issued a license to a contractor under any other law. Any such tax must be **measured only** by the work done in the particular municipality levying the tax, under Section 14-37-5, N.M.S.A., 1953 Comp.

It follows that contractors may no longer be licensed and regulated under Section 14-37-1, supra, by either municipalities of which they are a resident or non-resident, subject to the minor exceptions provided in Section 67-35-53C, supra, but may be licensed by municipalities in which they are residents or non-residents doing construction work, under Section 14-37-3, supra, so long as the tax is within the \$ 5 minimum and \$ 25 maximum provided by that statute, and is measured by the gross receipts for the work done in the municipality levying the tax.

The tax authorized by this section is not limited to permanent residents, as appears from **Farmington v. Miller**, 64 N.M. 330, 334, 328 P.2d 589, wherein an itinerant salesman was held properly convicted of soliciting orders for clothing without an occupation license from the Town of Farmington, New Mexico.

"The legislature has power to grant to municipalities authority to impose taxes upon business and occupations." **McQuillin, Municipal Corporations**, Vol 16 (3rd Ed., Rev.), Sec. 44.191, p. 589.

In **Gaugler v. City of Allentown**, 410 Pa. 315, 189 A. 2d 264, an ordinance taxing all persons engaged in an occupation in Allentown (both residents and non-residents) \$ 10 per year, was sustained as constitutional.

All municipalities have power to enact rules and regulations and make inspections pursuant to the Construction Industries Licensing Act, and charge for building or installation permits, but can add no requirements whatsoever thereto, except possibly as to the character and quality of installations, and even this admits of some doubt, if the work passes state inspection.

Opinion of the Attorney General No. 59-74, dated July 20, 1959, held that a contractor is not subject to the county occupation license requirements of Section 60-1-1, N.M.S.A., 1953 Comp.

This opinion omits from consideration taxation of dealers by municipalities under Section 60-1-11, N.M.S.A., 1953 Comp.