

Opinion No. [29-56]

March 22, 1929

TO: Office of the Attorney General of New Mexico

LICENSES -- Dealer in merchandise and distributor of gasoline.

OPINION

This will acknowledge the receipt a few days ago of your letter of the 16th instant transmitting to this office a copy of a letter written you by Judge E. R. Wright, and in which he requests, on behalf of a client of his, that you secure from this office a rule on the question of computing the amount of license tax to be paid under Sec. 3299 of the Codification of 1915 by dealers in merchandise who are also distributors of gasoline, paying the \$ 25.00 distributor's license fee provided for in Sec. 2 of Chapter 175 of the Laws of 1921. That is, more specifically, should the sales of gasoline distributed under the distributor's license be included in the amount of annual sales made the basis of computing of license tax or occupation tax to be paid by dealers in merchandise as required in Sec. 3299 of the Code?

Of course, this question does not in any way affect your department, in that the gasoline distributor's tax collected through your department is not at all based on the volume of business done but is a uniform occupation tax of \$ 25.00 imposed upon all distributors of gasoline, irrespective of the amount distributed. However, the question having been submitted, we have given it careful consideration and have examined a number of cases in which similar or like questions have been involved. It is not my purpose to make of this letter a brief of argument or authority, but to come rather directly to conclusions.

As we interpret the statutes hereinabove referred to, these are not two separate occupation taxes imposed, one by the State and one through delegated authority by the county, but both taxes are imposed by the same branch of government, that is, by the state legislature, although provision is made for the collection of that tax which is levied under Sec. 3299 by the county, and in some instances the city, and the tax imposed upon distributors of gasoline to be collected by the Gasoline Tax Department of the State Comptroller. Perhaps it will be more easily seen that there is no conflict between these statutes and no double taxation imposed thereby if the two statutes are read together as one. We thus get the effect of a statute prescribing an occupation tax upon dealers in merchandise, based upon gross annual sales plus an additional \$ 25.00 to be paid by such dealers as distribute gasoline as a part of the merchandise sold. Such provisions have been upheld in many places, as for example, where dealers in merchandise have been required to pay a license on the general business and also as a dealer in oleomargarine, or to pay license on a general merchandise business which included the sale of meats and also to pay a license on the business of selling meat. We believe it is permissible for the legislature to impose a license tax or occupation tax

upon dealers in merchandise, the amount of such tax to be dependent upon or regulated by the volume of business done, irrespective of the commodities handled, and at the same time to require an additional payment for the privilege of distributing gasoline as one of such commodities. Having reached this conclusion, the answer to the question proposed is, that in computing the amount of license or occupation tax to be paid by dealers in merchandise outside of an incorporated municipality, the annual sales should be made the basis for computing the amount to be paid, irrespective of commodities sold, whether gasoline or something else.