

Opinion No. 34-721

February 1, 1934

BY: E. K. NEUMANN, Attorney General

TO: Honorable E. R. Wright, Attorney at Law, Santa Fe, New Mexico.

{*112} Your letter of January 31st enclosing copy of your letter to Mr. Joseph W. Hodges and copy of letter from Mr. Joseph W. Hodges who is the District Attorney at Silver City, New Mexico, has been received.

Question presented by this correspondence is whether or not Chapters 73, 176 and 179 of the Session Laws of 1933 have the effect of repealing those provisions of law which require occupation licenses from wholesalers of oil and gas outside of municipalities or in municipalities where a one-cent municipal gas tax is not imposed.

In the first place, Chapter 73, only relates to retail tax in merchandise. Chapter 179 is amendatory of Section 90-502 of the 1929 Compilation, and grants the power to municipalities to license and regulate numerous businesses, trades and professions. Chapter 176 is the law in regard to gasoline and motor fuels and excise taxes upon same.

Wholesalers under this latter act are called distributors, and before engaging in business license must be obtained from the State Comptroller, as provided in Section 3 of said act.

Under Section 90-501 of the 1929 Compilation, municipalities were empowered to levy an occupation tax upon wholesale merchants of all kinds.

Chapter 73 only repeals such parts of existing law which related to or applied to occupation taxes to be paid by **retail dealers in merchandise**.

In the first place, it is my belief that the law in regard to payment of occupation taxes by wholesalers has not been changed by any of the foregoing acts and that municipalities may levy such occupation tax upon wholesalers in the situations hereinabove set forth. We are unable to find any repeal, either express or by implication in Chapter 176, or any other chapters of the power to levy such occupation tax upon wholesalers.

We may also say in this connection, that the mere fact that the wholesaler is required to obtain a said license under Chapter 176 and also is required to pay an occupation tax to a municipality, will not constitute double taxation.

In 37 Corpus Juris, page 211, section 63, we find the following:

"The provision against double taxation is not violated by the imposing of separate license taxes on the same occupation or privilege by different political branches of the government, in so far as they have concurrent powers so to do; and the mere fact that a person is licensed by the state does not prevent a municipality from imposing a tax on the occupation or privilege licensed, except where the state tax or license is imposed in lieu of all other taxes and licenses."

The same rule is also set forth in the above volume of Corpus Juris at page 182, section 126.

It is therefore our opinion, in view of the foregoing, that municipalities have the right to levy an occupation tax against wholesale dealers of oil and gas where the one-cent municipal gas tax is not imposed, and that where the plant is located outside of the municipality such occupation tax is to be paid to the County Clerk.

By: FRANK H. PATTON,

Asst. Attorney General