

## Opinion No. 35-959

March 25, 1935

**BY:** FRANK H. PATTON, Attorney General

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

{\*55} We have your letter of March 12th asking our opinion as to the power of municipalities in New Mexico to levy occupation taxes on gasoline filling stations within their respective corporate limits, and also whether the power to levy such occupation taxes is altered where the filling station also sells tires and other automobile accessories.

The Statutes with respect to the levying of occupation and license taxes are somewhat confusing, and we deem it advisable to refer to all of the statutes more or less in detail in order to arrive at a logical interpretation of them.

Section 1 of Chapter 21 of the Laws of 1927, being Section 90-501 of the 1929 Code authorized the governing bodies of cities, towns and villages to impose an occupation tax on various kinds of business and the general retail businesses therein defined are broad enough to include retail gasoline filling stations. The maximum amount of the tax that might be levied under this section was fixed by Section 90-505 of the 1929 Code at \$ 1.00 per annum for each \$ 1,000.00 gross volume per annum of business done.

Section 2 of Chapter 21, Laws of 1927, being Section 90-502 of the 1929 Code, provides, that the governing bodies of cities, towns and villages shall have the power to license and regulate certain business and specifically includes gasoline and oil filling stations, and {\*56} further provides that said municipalities shall have the power to fix the license to be paid thereon or therefor and might impose a separate license on each place of business maintained by the same person, etc. The amount of license fee under this section was evidently left to the discretion of the municipalities.

Chapter 159 of the Laws of 1931, authorized the governing bodies of cities, towns and villages to levy a license tax not to exceed one cent per gallon on gasoline and motor fuel sold within the municipalities, and provided that the sale to be taxed should be a retail sale. Section 7 of this Chapter provides, that where any municipality elects to levy a gasoline tax authorized by this Act, it shall be in lieu of any other licenses or occupation taxes against dealers in gasoline and oils. In other words, any municipality levying the gasoline tax under this law could not levy an occupation or license tax on retail gasoline filling stations under the provisions of Sections 90-501 and 90-502 of the 1929 Code, above referred to.

Chapter 73 of the Laws of 1933, commonly known as the Chain Store Tax, levied an occupation and license tax by the State on retail dealers in merchandise other than \_\_\_ oil, gas and other motor fuel. The repealing clause of this Act, Section 16, provides:

" \_\_\_ all of that part or portion of \_\_\_ Article 5 of Chapter 90 of New Mexico Statutes, Annotated, 1929 Compilation, that relates to or applies to the licensing of or occupation taxes to be paid by retail dealers and merchandise as herein defined, or which may otherwise be in conflict with this Act, and any laws in conflict herewith be and the same are hereby repealed."

Section 1 of this Act, is the Section containing definitions. Paragraph (a) thereof provides:

"Retail dealer or retail dealers in merchandise', as used herein shall mean and include any person or persons, firm, association, partnership, stock Company, company or corporation, having a fixed and established place of business, dealing in merchandise by selling to the ultimate consumer for consumption or use and not for resale purposes in smaller quantities than they purchased, and who sell in small parcels, packages, bales, boxes or other containers of whatsoever kind and not in gross, except sales to Federal, State or County Authorities or Charitable Institutions."

Paragraph (b) of this Section then provides:

"The words 'other than liquors, oils, gas and other motor fuel' as used herein, shall mean and be construed as exempting only that portion of retail sales from the tax herein imposed as shall be derived from the sale of liquors, oil, gas and other motor fuel and shall not exempt retail sales of other articles where sale of both types are made by one dealer."

The question naturally arises as to the effect and operation of Section 16, the repealing clause as quoted herein above. The language is somewhat ambiguous as to whether or not it repeals the portion of Article 5 of Chapter 90, 1929 Code, relating to the licensing or levying of occupation taxes on retail dealers in oil, gasoline and other motor fuels.

Section 16 repeals that portion of the former law relating to retail dealers in merchandise as defined in said Chapter 73. The definition given in Section 1-A of this Act, probably includes retail gasoline filling stations, but when this definition is taken in connection with paragraph (b) of Section 1 and construed with the whole wording of Section 16, we are of the opinion that it was not the intention of the legislature to repeal Article 5 of Chapter 90, of the 1929 Code, in so far as it relates to the licensing and levying of occupation taxes on retail gasoline filling stations.

The words "or which may otherwise be in conflict with this Act," referring to Article 5 of Chapter {57} 90 of the 1929 Code, leads us to believe that the intention of the Legislature was to repeal only so much of this Article as might be in conflict with Chapter 73. Chapter 73 did not purport to levy an occupation tax on retail gasoline filling stations, but specifically exempted them from its operation, and therefore, the power of municipalities to levy occupation and license taxes on these stations, under the said Article 5 of Chapter 90, could not conflict any way with it.

If we should consider that the repealing clause of Chapter 73 repealed Sections 90-501 and 90-502 as to gasoline filling stations, then neither the state nor the municipalities could tax or license such stations. As a general rule, the intention to tax may be presumed, while the intention to exempt from the tax is always construed very strictly. Hence, where there is an ambiguity or as uncertainty as to whether or not the power of the municipalities to license gasoline filling stations is repealed by Section 16 of Chapter 73 of the Laws of 1933, we feel that this rule as to the exemption from taxation controls this point and the construction is to be placed against exempting such stations from taxation.

Chapter 179 of the Laws of 1933 amends Section 90-502 of the 1929 Code, by providing that no business shall be required to pay an occupation tax under both Section 90-501 and 90-502, and that if an occupation tax is levied by municipalities under the provisions and authority of Section 90-501, and additional license tax may not be levied under the provisions of Section 90-502.

Chapter 33 of the Special Session Laws of 1934 repeals Chapter 73 of the Laws of 1933 and reenacted the Chain Store tax in substantially the same manner as the said Chapter 73, the definition of retail dealers in merchandise, remains the same, but it does not repeal or amend any portion of Article 5 of Chapter 90, 1929 Code, other than that already repealed by Chapter 73 of the Laws of 1933.

From the foregoing, it is our opinion that the situation under the above Laws at present is: In a municipality that has levied a gasoline tax under the provisions of Chapter 159, Laws of 1931, no further occupation taxes or license can be levied either by the state or municipality on a retail gasoline filling station, doing no other business than selling gasoline, oil and other motor fuels, but, if the gasoline filling station is also dealing in tires and other automobile accessories, it is subject to the occupation taxes levied by the state under the provisions of Chapter 33 of the Laws of 1934.

In a municipality which has not levied a gasoline tax under the provisions and authority of Chapter 159 of the Laws of 1931, it is our opinion that the municipality may by proper ordinance levy either an occupation tax under Section 90-501 of the 1929 Code, or a license tax under Section 90-502 of the 1929 Code, upon a retail gasoline filling station dealing in oils, gasoline and other motor fuels, and if the filling station also deals in tires and other automobile accessories, that part of the business is subject to an occupation tax, payable to the state under the provisions of Chapter 33, of the Laws of 1934.

By J. R. MODRALL,

Asst. Atty. General