

Opinion No. 39-3067

March 27, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. J. O. Gallegos, Commissioner of Revenue, Santa Fe, New Mexico. Attention: Mr. G. S. Carter, Director School Tax Division

{*27} I have examined the case of Comer vs. State Tax Commission, 41 N.M. 403, to which you called my attention in your letter of March 22. You inquire whether in view of that decision, filling stations should be licensed in the name of the owner, instead of being licensed in the name of the agent or operator under contract with the company owning the filling station.

In that case it was held that a person selling petroleum products on a commission basis was not "engaged in business of acting as agent," but that he acted merely in the capacity of an employee. The transaction attempted to be taxed, however, was that between the agent and the company, and not the sales to the public. In other words, the case is not exactly in point.

The court points out that it was alleged and admitted that plaintiff had a contract with the Phillips Petroleum Company which imposed upon him the duty of devoting all his time and efforts in promoting the sale at wholesale of Phillips Petroleum Products.

If the lessees of service stations to which you have referred are required by their contracts to sell only the products and wares of the company, on commission, it would seem that such sales constitute transactions by the agent-operator for the company as an employee, and that the company and not the agent is engaged in the business of selling. If so, it follows that the company and not the agent should be licensed and should pay the School Tax on such sales as come within the provisions of that Act. Without further information as to their contracts one cannot say whether they or the company are engaged in the business taxed.

Trusting that this may be of assistance {*28} to you in determining the matter, I remain,

By: A. M. FERNANDEZ,

Asst. Atty. Gen.