

Opinion No. 39-3139

May 18, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. J. O. Gallegos, Commissioner of Revenue, Santa Fe, New Mexico.

{*51} Your letter of May 16 requesting an opinion on a letter submitted by Mr. Owen J. Mowrey, relative to various projects and if the use of the same in connection with the sale of motor fuels would be in violation of Chapter 222, Article 2, Section 201 sub-section (e) Laws of 1939, has been duly received by this office.

The particular section in which you are interested is sub-section (e), which reads as follows:

"(e) It shall be unlawful for any retail dealer, in connection with the sale of motor fuels, to use trading stamps, lotteries, premiums, prizes, wheels of fortune, punch boards, games of chance, or any other type of inducement, or to offer to give or give without charge any motor fuel or other merchandise or thing of value."

This office recently rendered Opinion No. 3120 for Mr. Paul E. Culver, your Director of the Gasoline Tax Division, on this same sub-section (e) as to the giving away of certain merchandise as advertising material from which I quote the following paragraph:

"Since in your letter you state that the articles mentioned are not given for the purpose of an inducement to purchase, and that in fact no purchase is required in order to obtain them, the conclusion is inescapable, that although a pencil, key ring, etc. may be a thing of value, yet since the same is not given away in connection with any sale of motor fuels, the practice cannot be said to be in contravention of said Section 201 (e)."

Would the booklet submitted constitute a lottery wherein receipt stamps are given with each purchase at the gasoline station, and when a sufficient number of stamps are obtained and pasted in the booklet the purchaser is then entitled to a prize which varies from three quarts of oil to twenty dollars in cash according to the number under the large stamp on the cover.

In the case of State vs. Dorau, 198 Atlantic 573, the court decided, "to constitute a lottery there must be a price, a chance and a prize."

In the case of City of Roswell vs. Jones, 41 N.M. 258, being the case known as the Theater Bank Night Case, the court decided that this "Bank Night" as operated by appellees has the usual plan of free registration, the drawing of a number and the awarding of a cash prize for the holder of the number. The winner of the lucky number was permitted to enter the theater without payment of admission in order to receive the

prize. There being no necessity to purchase a ticket after free registering the name to participate in the drawing; the element of a lottery is not present.

In the case of State vs. Butler, 42 N.M. 271, the court decided that the prize given to the purchaser of a ticket for a lucky combination of a baseball pool would be a lottery.

In the case of Jones vs. Smith Oil and Refining Company, 15 N.E. 2nd 42, the court decided that a gas and oil distributor's scheme for promoting business by distributing cards, which qualified the holder to participate in a drawing for a cash prize at the end of each month was illegal as a "lottery," notwithstanding that plan contemplated the free distribution of cards to any auto owner requesting them."

It is, therefore, my opinion that the courts would hold that the booklet, the obtaining of receipt stamps for purchase of motor fuels, and the holding of the lucky number for prizes would be a lottery and in violation of sub-section (e) of Chapter 222 of the Laws of 1939.

I am not familiar with the "Pot of Gold," the "Travel Log," the "Mickey Mouse" or the "Have Your Picture Enlarged" schemes mentioned, but if they are given away or used in connection with the sale of motor fuels, and the purchase of motor fuel is a prerequisite for the obtaining of the premium or prize or gift, and not a free distribution for advertising purposes as explained in our previous Opinion No. 3120, { *52 } then, and in that case, it is my opinion that the said schemes are in violation of the sub-section (e) above quoted.

By: GEORGE LOUGEE,

Asst. Atty. Gen.