



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

July 8, 1960

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. WW-875

Re: Application of occupation
tax on insurance ad-
justers, levied by
Article 19-01, Section 3,
Title 122A, Taxation-
General to independent
local recording agents.

Dear Mr. Calvert:

As your recent letter requesting our opinion upon the referenced subject contains a detailed fact situation, we quote it in full, as follows:

"Section (3) of Article 19.01 of Title 122A, Taxation-General, being HB. 11, 56th Leg. 1959, 3rd C.S., Ch. 1, p. 187, levies an occupation tax on Insurance Adjusters.

"A question has arisen whether the tax is due from independent Local Recording Agents having limited authority to pay small claims, and who participate to a limited extent in an advisory capacity in the disposition of other insurance claims on policies written through their agencies, all as incidents of their primary occupation as independent Local Recording Agents.

"Mr. Forest S. Pearson, acting for himself and other independent Local Recording Agents similarly situated, presents the typical situation.

"Mr. Pearson's business is that of an independent Local Recording Agent representing several different companies and 'groups'. His primary activity is the solicitation of insurance business, the writing and issuance of insurance policies, and the collection of premiums, all of which, insofar as it pertains to his insurance business, consumes the major portion of his time

and effort. His compensation from his insurance business is by way of commissions directly proportionate to the volume of premiums written through his agency.

"Mr. Pearson pays small losses which require no independent investigation, the liability and amount involved being without question. He also acts frequently in an advisory capacity and to a limited degree in the negotiation of settlements upon request of either the insured or the adjuster. Practically all losses on policies written through his agency are first reported to him by the insured. If the reported loss is of a type that has any investigation or adjustment problems, the company or its assigned Insurance Adjuster is immediately notified, at which point his responsibility for investigation, negotiation, or reporting thereon ends. Losses involving substantial sums or substantial questions of liability fall within the latter category. If the loss does not fall within such category, Mr. Pearson pays it and is reimbursed by the company. He receives no additional or special pay for any service rendered on losses.

"Mr. Pearson does not maintain a claims department; he does not employ a claims adjuster; he does not hold himself out to insurance companies, other agents, or the public as an Insurance Adjuster; he is not an expert in the techniques of investigation, negotiation, appraisal, or ascertainment of liability, characteristic of the profession of Insurance Adjusters or claim agents; and the only losses which Mr. Pearson has anything to do with are those which arise out of policies written through his agency. He never participates in a responsible capacity in the handling of any loss which arises out of a policy written through another agency. His activities in the field of losses are necessary incidents of his primary occupation as an independent Local Recording Agent, being limited to such as is necessary to efficiently serve his clients.

"Mr. Pearson's business is in the nature of an independent business rather than that of a branch office of a particular company or group of companies. His clientele hold him responsible for the selection of companies which most adequately and appropriately meet the insurance requirements of his clients. He is free to restrict his activity to the primary occupation of soliciting and writing of insurance policies and the collection of premiums. In these respects his 'independent' agency is different from a 'direct writing' agency, where the agent is an employee or under the direct control of the principal company or 'group', and may be directed to perform on behalf of the employer any duties assigned to him, including those duties normally performed by professional Insurance Adjusters. The 'direct writing' agent has no choice of companies.

"Kindly advise whether, under these facts, the tax applies to Mr. Pearson. A brief on behalf of Mr. Pearson, prepared by O'Quinn, McDaniel & Randle, Attorneys at Law, 422 Perry-Brooks Building, Austin, Texas, is enclosed herewith. The attorneys represent Mr. Pearson and the Texas Association of Insurance Agents whose membership is vitally interested in the question presented."

It is our opinion that a Local Recording Agent, as illustrated in your letter, is not liable for the occupation tax on insurance adjusters.

Chapter 19, Title 122A, Taxation-General (H.B.11, 56th Leg., 3rd C.S.) levies miscellaneous occupation taxes. Article 19.01 (3) reads as follows:

"Insurance Adjusters. From every person engaged in the occupation of adjusting insurance losses in this State, there shall be collected an annual tax of Ten Dollars (\$10.00).

"For the purpose of this Subsection, a person shall be deemed to be engaged in the occupation of adjusting insurance losses when he investigates or ascertains the liability or amount of damage, or negotiates the adjustment

of insurance claims or losses, or reports thereon; whether employed by an insurance company, or companies, or the insured, or is a member of a firm, association of persons, or an employee, or representative, or officer of such firm, association of persons, or an employee, or representative, or officer of such firm, association, or of a corporation, when such firm, association, or corporation is engaged in adjusting insurance losses."

This language is a partial verbatim re-enactment of the previously existing Article 7047-10 (a), R.C.S. Deleted in this re-enactment by the 56th Legislature was an exemption clause which read as follows:

"Provided that this tax shall not apply to any local, recording, soliciting or special agents of any insurance company, nor to any person regularly employed on a salary by any insurance company, who may adjust insurance losses only for a company represented by him, such person not charging or being paid for his services as an insurance adjuster on a fee basis."

Thus, under the previously existing Article 7047-10 (a), no tax liability was incurred by a "local, recording, soliciting or special" agent, or by a salaried adjuster of any insurance company. Though the agent might be handling the duties of an adjuster, his agent's status provided an exemption. The obvious intent of the 56th Legislature in deleting this exemption provision from the present Article 19.01 (3), Title 122A, was to extend the coverage of this tax to every person pursuing the occupation of insurance adjuster, notwithstanding his title or method of compensation.

Therefore, in determining whether or not the present provision was intended to include "independent local recording agents", it is necessary to determine with particularity the nature of the services performed by such agents, then to decide whether or not those services are sufficient to classify them as "insurance adjusters" within the statutory definition.

The tax here involved is an occupation tax. See Hurt v. Cooper, 130 Tex. 433, 100 S.W.2d 896 (1937); See also State v. Galveston, H & S A Ry. Co., 210 U.S. 217, 28 S. Ct. 638, reversing 100 Tex. 153, 97 S.W. 71, (1906); Attorney General's Opinion No. 0-2120. Its incidence is upon every person embraced within the statutory definition. However, such definition was intended to delineate the occupation being

taxed; mere performance of an act or acts specified in the definition cannot create liability for the tax if done incidentally to the pursuit of another occupation. Johnson v. State, 136 S.W.2d 837, (Tex.Crim.App. 1940); Bailey, State Tax Collector v. Southern Bell Telephone Company & Telegraph Company, 40 So.2d 606 (Miss.1949); Appalachian Electric Power Company v. Koontz, 76 S.E.2d 863 (W.Va., 1953); Karnes v. City of Benton, 258 Ky. 425, 80 S.W.2d, 558 (1935). See Attorney General's Opinion No. O-4576 (1942).

We view the acts done by Mr. Pearson in paying small, undisputed claims, and in an advisory capacity during negotiation, as incidental to his occupation as an independent local recording agent, and as such, insufficient to bring him and others similarly situated into the statutorily defined class upon which the tax is levied.

It should be understood, of course, that this opinion is limited to the fact situation which you set forth in your letter as typical of independent local recording agents. Any increased exercise of discretion or granting of authority in the adjustment of losses might compel a different result.

SUMMARY

Independent local recording agents, performing described duties, are not within the scope of Art. 19.01(3), Title 122A, Taxation-General, and not subject to the occupation tax on insurance adjusters.

Yours very truly,

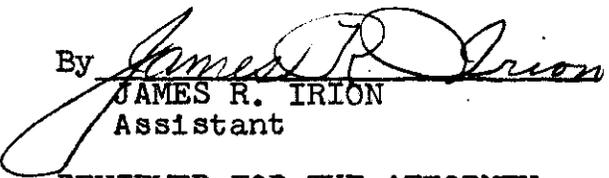
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