Opinion No. 57-211

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BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. Manuel Garcia, Jr., Assistant District Attorney, Eighth Judicial District, Raton, New Mexico

QUESTION

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1. Phillips Petroleum Company, represented by its local distributing agent, entered into a contract in Texas with a trucking firm for the furnishing of oil and gas for the trucking firm's fleet of trucks headquartered in Raton. The Phillips Petroleum Company brings the gas and oil to Raton and delivers it to local storage belonging to the trucking firm within the city limits of Raton for the exclusive use of trucks owned by the trucking firm. May Raton impose and collect a tax on gasoline and motor fuel in this situation?

2. The Texas Company, represented by its local distributing agent, entered into a contract in Texas with another trucking firm for the furnishing of gasoline for its fleet of trucks headquartered in Raton. In this situation The Texas Company delivers the gasoline to its own storage in Raton for exclusive use of the trucks of the trucking firm. May Raton impose and collect a tax on gasoline and motor fuel in this situation?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

ANALYSIS

Section 14-43-1, N.M.S.A., 1953 Compilation, et seq., as amended, constitutes enabling legislation which authorizes municipalities and H class counties to impose a license tax upon gasoline and motor fuels sold therein, but not to exceed the sum of one cent per gallon. Section 14-43-1, N.M.S.A., 1953 Compilation, 1957 Supplement, reads as follows:

"The governing bodies of cities, towns and villages whether incorporated under general or special act, and H class counties, shall have the power to fix and have collected a license tax upon gasoline and motor fuel sold within the limits of such municipalities or

counties and shall have the power to fix the amount of the license tax to be paid thereon; Provided, that no such license tax shall exceed the sum of one cent ($ .01) per gallon upon such gasoline and motor fuel sold within such municipality or county."

Distributor of gasoline and retail dealer in gasoline are defined in § 14-43-2, N.M.S.A., 1953 Compilation, respectively, as follows:

"The term 'distributor of gasoline,' means a person engaged in the business of selling gasoline or motor fuel in this state from refineries, tank farms, tank cars, receiving tanks or stations, or in or from tanks, barrels, drums or other containers, in quantities exceeding fifty-six (56) gallons in any one (1) sale and delivery, except persons engaged in selling exclusively in interstate commerce.

The term 'retail dealer in gasoline,' means a person other than a distributor of gasoline who sells gasoline or motor fuel in this state in quantities less than fifty-six (56) gallons."

Section 14-43-3, N.M.S.A., 1953 Compilation, 1957 Supplement, in defining taxable sales, reads as follows:

"That where gasoline or motor fuel is sold by a distributor of gasoline to a retail dealer in gasoline and subsequently sold by the retail dealer in gasoline to the consumer, the sale by the distributor of gasoline shall be construed as the taxable sale for purposes of this act (14-43-1 to 14-43-8). Provided, however, that where the sale from the distributor of gasoline to the retail dealer in gasoline takes place outside the limits of any incorporated city, town, village or H class county and the sale from the retail dealer in gasoline to the consumer takes place within the limits of any municipality or H class county, the sale by the retail dealer within the limits of such municipality shall be construed as the taxable sale for the purposes of this act and such sales by the distributor of gasoline shall not be taxed by the county in which the sale is made.

Provided, further, that where the sale from the distributor of gasoline to the retail dealer in gasoline takes place within the limits of any municipality or H class county and the sale from the retail dealer in gasoline to the consumer takes place outside the limits of such municipality or H class county, the sale by the retail dealer outside the limits of such municipality or H class county shall be construed as the taxable sale for the purposes of this act and such sale by the distributor of gasoline shall not be taxed by the municipality or H class county within which the same is made."

At the outset, we do not interpret the last quoted statute as meaning that no tax may be imposed on transactions unless there is a separate distributor and a separate retailer. As we construe § 14-43-3, supra, it is nothing more than a legislative prohibition against double taxation by municipalities of sales of gasoline.

Furthermore, we assume that two local distributors in Raton, as well as the trucking company concerned, are not persons exclusively engaged in interstate commerce within the meaning of the exception set forth in the definition of "distributor of gasoline"

above quoted. Be that as it may, it is nevertheless necessary to carefully consider the question of interstate commerce, since both of your questions present that issue. We turn to a review of some cases which we believe are of help in answering your questions.

Sonneborn Brothers v. Cureton, 262 U.S. 506, 43 S. Ct. 643, involved a Texas statute levying an occupation tax equal to 2% of sales of petroleum products made by wholesale dealers. Involved in the case were the applicability and constitutionality of the tax as applied to the sale of oil in drums or barrels which had been shipped into Texas and afterwards sold from the wholesaler's warehouse in the original unbroken containers. The Supreme Court of the United States sustained the tax, holding that it was neither a regulation of nor a burden upon interstate commerce, pointing out how the oil had come to a state of rest in the warehouse of the taxpayer and had become a part of their stock with which they proposed to do business as wholesale dealer in Texas, and further, that the interstate transportation was at an end, and whether in the original package or not, a state tax upon the oil as property or upon its sale in Texas, so long as the Texas statute and its application was not discriminatory against interstate commerce, constituted neither a regulation or a burden of the same. In short, the decision seemed to rest upon the fact of nondiscrimination, that the oil had reached its destination, and that it was in a state of rest in the taxing state.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, involved the constitutionality of a New Mexico statute levying a privilege tax upon gross receipts of those engaged in certain specified businesses, particularly that of publishing newspapers and magazines. The tax was at the rate of 2% of the amounts received. The taxpayer sold advertising space in its publication to advertisers out of the State. Circulation of the publication was both to subscribers within New Mexico and to nonresident subscribers. The question was whether the tax as applied imposed an unconstitutional burden on interstate commerce. It was held that it did not. The taxpayers insisted that the sum earned under the contracts were immune because the contracts were entered into by transactions across state lines. The Court refused to entertain such contention, holding that the mere formation of a contract between persons in different states is not within the protection of the commerce clause. Furthermore, it was held that the transactions in question were not immune from the tax by virtue of the fact that there was involved interstate distribution of the publication. The Court viewed the tax as an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, even though the preceding transactions were ones across state lines and even though some of the journal's circulation was in interstate commerce. We think some analogy obtains in the instant case in that the tax would appear to be one imposed upon doing a local business, that is to say, selling and delivering fuel oils within municipal boundary lines.

Perhaps the most persuasive case is that of **McGoldrick v. Berwind-White Coal Mining Company,** 309 U.S. 33, 60 S. Ct. 388 There the New York Legislature had enacted enabling acts permitting the City of New York to levy a sales tax of 2% on certain broad classes of sales of commodities for consumption. The taxpayer, a

Pennsylvania corporation, produced coal outside of the State of New York. It maintained a New York sales office and sold its commodity to consumers in New York City. The coal moved by rail from the mine to a dock in the State of New Jersey and thereafter was delivered by means of barge to the purchaser in New York City. The sale contracts were entered into in New York City. The Court upheld the constitutionality of the tax. The Court pointed out that that the only relation to the commerce clause arose from the fact that immediately preceding transfer of possession to the purchaser within the City of New York, which was the taxable event regardless of where the title passed, the merchandise had been transported in interstate commerce and brought to its journey's end. You will notice in this case the interstate journey had ceased only immediately prior to the sale and delivery of the coal in New York City, whereas the interstate journey had apparently ended some time before the wholesaler's sale and delivery in the Sonneborn Brothers case, supra. The Court said that it could find no adequate basis for distinguishing the present tax laid on the sale and delivery upon arrival at the destination from a tax which could be laid in like fashion **on the property itself.** The Court refused to make any distinction between shipments of coal made without previous contract and shipments of coal made with previous contracts. It is interesting to note in the McGoldrick case the further fact that title to the coal under many shipments passed f.o.b. at the mines in Pennsylvania. In our opinion, we take this to mean that the Court, insofar as constitutional law was concerned, interpreted sales in a practical sense, that is to say, **the delivery** to the purchaser-consumer in New York City, and did not for this purpose take sales to mean the technical passage of legal title, which under the f.o.b. shipments in Pennyslvania would not have occurred in New York City.

We view the enabling legislation enacted by New Mexico to be very much like the Supreme Court viewed the New York enabling legislation. In other words, what we have here is a privilege tax on sales and delivery to the consumer occurring in municipalities in New Mexico. Under the McGoldrick decision, we do not believe it is material whether the seller stores the motor fuel and gasoline in its own tanks in Raton or whether the motor fuel and gasoline is stored in the purchaser's tanks in Raton. The commodity is delivered to the purchaser in Raton, which under our interpretation of the law under the above authorities is the taxable incident. We deem it immaterial that the contracts of sale may have been negotiated elsewhere or were negotiated across state lines.

This opinion is conditioned upon Raton's having enacted a valid ordinance, since we do not have the same before us.