Opinion No. 53-5878

December 21, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Robert J. Barrett Assistant District Attorney Fifth Judicial District Roswell, New Mexico

*{*307}* You have requested an opinion as to whether cotton seed being transported by a farmer to a cotton oil mill after ginning constitutes a farm product so as to be allowed a 20 percent tolerance as provided by Section 68-603 (a) N.M.S.A., 1941. We assume that the original cotton was a product of New Mexico agriculture.

The constitutionality of Section 68-603 (a) is highly questionable as being discriminatory. Statutes not nearly so broad have been held to be unconstitutional. **Smith vs. Calhoun,** 75 Law Ed. 126, 283 U.S. 553. **Lossing vs. Hughes** (Tex. 1922) 244 SW 556. Some reasonable basis for the classification must be found and those cases which have upheld similar but more limiting exemptions have generally done so on one or more of the following grounds:

1. The relative short distance to be traveled by the exempt vehicle or commodity.

2. The infrequency and particular character of use of the highway.

3. The fact that the exempted trip consists of transporting *{*308}* one's own products as against using the highway for engaging in the business of hauling.

4. The practical aspects of enforcing and complying with the law if made applicable to those commodities exempt therefrom.

Continental Baking Company vs. Woodring, 76 Law Ed. 1155. **State vs. Public Service Commission of Wisconsin** (Wis. 1932) 242 NW 668. **Swartzman Service vs. Stahl,** 60 Fed. 2d 1034. **State vs. John P. McNutt** (S.C. 1935) 185 SE. 125. **State vs. Bauer** (Iowa 1945) 20 NW 2d 431.

In the case of **Sproles vs. Binford,** 76 Law Ed. 1167, 286 U.S. 374, Justice Hughes, who had considered similar statutes in **Smith vs. Calhoun,** supra, and **Continental Baking Company vs. Woodring,** supra, held:

"We see no reason for attributing such a broad construction to the provision if its validity can be saved by a narrower one, and held that such a construction: instead of being arbitrary, relives the limitation of an application which otherwise might itself be considered to be unreasonable with respect to the exceptional movements described.

It is not the policy of this office to declare an act of the legislature unconstitutional unless such is clearly the case and cannot be avoided.

The Supreme Court of New Mexico is likewise adverse to declaring a statute unconstitutional if it can be reasonably interpreted in favor of its constitutionality.

In **State ex rel Clancy vs. Hall,** 23 N.M. 422 at page 427 the Court held:

"When a statute is before the court for construction, and the language of the act is reasonably susceptible to two constructions, one of which would render the act inoperative and in contravention of the constitution or law of the land, and the other would uphold the statute, it is the duty of the court to adopt the latter construction."

This is a well-established rule and is set forth in many New Mexico cases, among them **State ex rel Sedillo vs. Sargeant,** 24 N.M. 333, **Abeytia vs. Gibbons Garage** 26 N.M. **622, State vs. Eldodt,** 33 N.M. 347, **Fowler vs. Corlett** 56 N.M. 430. **In Asplund vs. Alarid,** 29 N.M. 129, the rule was followed even though the statute interpreted standing alone would seem to require no construction.

If the meaning of a statute be doubtful the consequences are to be considered in its construction. **Leitensdorfer vs. Webb** 1 N.M. 34. A perusal of these records available with the Highway Department indicate that truck weights are increasing each year; that 38 percent of all trucks with a capacity to haul heavy loads now have tandem axles and that 11 percent of all tandem axles have been found to be carrying weight in excess of 28,000 pounds. 38 per cent of all the bridges in the state highway system are overstressed by tandem axle loads exceeding 24,320, the tolerance allowance. From the most reliable figures available (1936 and 1937 survey) a broad construction of Section 68-603 (a) would increase the present overload frequently seen on the bridges by 26 percent.

A comparison of the New Mexico weight laws with those of other Western states indicates that although the weight limits provided in Section *{*309}* 68-603 are somewhat lower than in the other states with the exception of Texas and Oklahoma, the ruling of the Highway Commission in allowing a designated tolerance in the enforcement of the law is in line with the other states. When the 20 percent tolerance is allowed however in gross maximum weights above 48,00 pounds, such allowance is far in excess of that authorized or permitted in any of the other Western states.

Since Attorney General's Opinion No. 5724 dated April 6, 1953, which held that when products have lost their original character or are processed in any way they no longer come within the exemption, the District Court of the First Judicial District Judge Fox presiding, has held that screened pumice is still a product of a mine and entitled to the tolerance allowance. After a hearing on the law and the facts in that case he gave no indication that he would broaden his decision to include cotton seed and we find no authorities which would lead us to so conclude. On the other hand, the case of **Interstate Commerce Commission vs. Weldon** (U.S. Dist. Ct. Tenn. 1950) 90 F. Sup.

873 and 188 F.2d 367, which has been carried to the Supreme Court of the United States, (Cert. denied, 96 Law Ed. 625) seems to be authority for the contrary view.

In the Weldon case the question was whether shelled peanuts constituted "agricultural commodities (not including manufactured products thereof)". As set out in Section 203 (b) (6), Interstate Commerce Act, the Court there said:

"There must be a time when peanuts cease to be products of the farm and are considered manufactured articles, and it seems appropriate in dealing with the question here involved to say that peanuts are a manufactured product from the time same are sold by the farmer and shelled at the shelling plant.

* * *

Here the peanuts, after harvesting, are transported to a shelling plant where, by the use of elaborate machinery, the shell is removed, thereby leaving the kernel as one product and the shell as another.

The peanut has then undergone its first manufacturing process and is no longer an agricultural commodity but has now been exchanged into a commercial item ready for its next successive process of manufacture which may include its removal to a crushing plant, where the kernels are further processed into such items as peanut oil and peanut butter."

We recognize the question as a close one but in view of the above authorities and the situation confronting us, we feel that we must construe the statute strictly and that cotton seed after passing through the gin loses its true character as a product of agriculture entitled to the exemption and pertains more to a product of manufacture which is not entitled to the tolerance allowance.

By: John T. Watson

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