Opinion No. 57-252

October 4, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. Walter R. Kegel, District Attorney, First Judicial District, County Court House, Santa Fe, New Mexico

QUESTION

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1. Does a county have the right to collect occupation tax from a person who has a trading store on an Indian reservation within the county?

2. May the county prohibit the trader from doing business until he has paid the license tax?

CONCLUSIONS

1. Yes.

2. See opinion.

OPINION

ANALYSIS

From the presented information, it is our understanding that the question above arises from a situation where a trader, duly licensed by the Department of Interior to carry on commerce with the Indian tribe, has leased property from the tribe, on reservation land, for the purpose of conducting business as a trading post. Based on this understanding, the County Clerk of the county in which the trading post lies has required that the trader comply with the county occupation tax law.

Section 60-1-1, N.M.S.A., 1953 Compilation, in requiring the imposition of an occupation tax, provides as follows:

"A license tax or occupation tax, one-half to be paid into the general school fund, and one-half to the general current expense fund of the respective counties, shall be imposed each year upon the business or avocations mentioned in this chapter, carried on by any person within the state of New Mexico:"

With reference to the language aforequoted, it is clear that the license or occupation tax considered is levied upon the incident of doing business or carrying one's trade or avocation as distinguished from a levy on real or personal property.

A great number of cases appear in the reports and encyclopedias providing that:

"It is well settled that a state or territory may tax personal property situated on land owned by the United States within its limits, provided such personal property does not belong to the United States or to Tribal Indians or is not otherwise exempt from taxation." 51 Am. Jur. 294. See also 26 R.C.L. 100.

But it has further been held that:

"Local taxation by a state or territory of property of others than Indians on an Indian reservation is not an interference with the unlimited power of Congress to deal with the Indians, their property, and commercial transactions so long as they keep up their tribal organizations. The stock and personalty of an Indian post trader are not exempt from taxation by a state or territory, inasmuch as he is a licensee and not an agent of the government. Such a tax is not a regulation of commerce with the Indian tribes." 51 Am. Jur. 293.

Recalling again the situation giving rise to the present inquiry, we find that the trader is a licensee of the Federal Government, and possibly it might be argued that he serves also in the capacity of an agent of the Interior Department in effectuating the delegated function of conducting commerce with the particular Tribe. This premise is probably farfetched however. In any event, there is no showing that the trader stands as an agent of the Tribe; he is merely a lessee of certain real property used in the conduct of his business. Further, and of prime importance, there is no showing that the profits and proceeds realized by the trader are to be considered in any light different from the same being subject to the personal use of the trader alone, acting as an individual.

Treatment is given Federal instrumentalities and projects under licenses, 33 Am. Jur. 334, in the following language:

"A state has no power to tax the means and instrumentalities which the Federal Government employs to carry on its proper functions. Therefore, a license or occupation tax upon instrumentalities of the Federal Government is void. However, a state may tax the property of an individual or corporation at the same rate as other property of like character within the state, although such property is devoted to use in carrying out the acknowledged function of the Federal Government."

In considering the subject of immunities from state taxation, it was pointed out in Federal Compress & Warehouse Co., et al., v. McLean, Sheriff, et al., 291 U.S. 17 at 22, as follows:

"Appellant's license under the United States Warehousing Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehousing Act confers upon licensees certain privileges and secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. **It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it.** Susquehanna Power Co. v. Tax Commission, 283 U.S. 291; Fox Film Corp. v. Doyal, 286 U.S. 123; Broad River Power Co. v. Query, 288 U.S. 178, 180. (Emphasis supplied).

The fact that the license is used also as a means of government control of appellant's business does not call for a different conclusion. The national government has not assumed to tax the business or to exercise any control over the taxation of it by the state. The state does not tax the license itself and the tax upon petitioner's business, applied without discrimination to all similar businesses whether licensed or not, does not impair the control which the federal authority has chosen to exert. The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare Susquehanna Power Co. v. Tax Commission, supra; Broad River Power Co. v. Query, supra. See Willcuts v. Bunn, 282 U.S. 216, 226, 230."

Similarly, in the instant situation, the licensed trader is, in effect, carrying out a governmental purpose, that of conducting commerce with the Indians, but in addition thereto is also enjoying a privilege for his own benefit. And further, there is no burdening of an area of taxation or control granted exclusively to the Federal Government by the imposition of the occupation tax aforestated. Accordingly, it is our opinion that a county may impose and collect the tax provided for by § 60-1-1 et seq., Statutes supra, in the case of licensed traders on Indian reservations.

In response to your second question, it is briefly our opinion that the existence of legal and criminal remedies, as provided for in § 60-1-7, would defeat the doing of equity until after it becomes possible to show exhaustion of said remedies.