Opinion No. 63-159

November 21, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Charles C. Brunacini Commissioner of Revenue

QUESTION

FACTS

A local trucking company, holding a certificate to operate in this state as a contract motor carrier, performs transportation services in New Mexico for certain out-of-state sellers of goods. Salesmen of the sellers take orders in New Mexico. The goods are shipped from another state by railroad to Albuquerque. The local trucking company unloads the railroad cars and warehouses the goods briefly in Albuquerque, then distributes them to the buyers in New Mexico.

QUESTION

Are the gross receipts derived by the local trucking company from its transportation service subject to the emergency school tax act?

CONCLUSION

Yes.

OPINION

*{*373}* **ANALYSIS**

At the outset, we assume, in addition to the facts given, that the goods are shipped by the seller F.O.B. buyer's place of business. The goods are owned by the seller throughout the transportation *{*374}* period, and are not accepted or owned by the buyer until delivered to his place of business. The journey, except for the temporary warehousing or storage in Albuquerque, is continuous. Although the local trucking company performs its transportation service exclusively between points in this state, it is clear that its performance is a part of a shipment in interstate commerce.

Section 72-16-4.6, N.M.S.A., 1953 Compilation, provides, in part as follows:

"The tax shall be computed at an amount equal to two per cent (2%) of the gross receipts derived from such businesses of every person engaging or continuing in the following business: . . .

"C. Transporting for hire persons or property by railroad, motor vehicle, air transportation, pipeline or by any other means from one point to another point in this state. . ."

It will be noted that this section does not purport to impose any tax on a transportation service from a point in another state to a point in this state, or from a point in this state to a point in another state, or from a point outside this state, thence through this state to another point outside this state. The tax is imposed only where the point of origin and the point of destination are both within this state. Under the facts posed, the point of origin, insofar as the local trucking company is concerned, is within this state, and the point of destination is also within this state. The question is whether our tax can be applied in light of the fact that the local transportation is a part of an interstate movement.

The emergency school tax act contains no exemption for interstate transactions. Its operation is limited only by the commerce clause of the Constitution of the United States, and the interpretations of that clause by the courts, particularly the Supreme Court of the United States. Interstate commerce has been the subject of thousands of decisions by the courts, and it is neither practical nor instructive to attempt any review of them here. We will turn to certain cases that are closely in point on their facts.

In **Gross Income Tax Division v. J. L. Cox & Son,** 227 Ind. 468, 86 N.E. 2d 693, a pipeline company was building a pipeline through the state of Indiana. The pipe was purchased from a seller in another state, and shipped by railroad in interstate commerce to a terminal in Indiana. The pipeline company was both consignor and consignee of the pipe, and took delivery of the pipe at the rail terminal. A local trucker was hired to unload the pipe at the railhead, and transport it to the site of pipeline construction. The Court held that the gross income of the local trucker was subject to the Indiana "gross income" tax, a privilege tax. This case can be distinguished from the question before us only in that the goods were accepted by the purchaser at the railhead and might be said to have acquired a tax situs within Indiana at that time; in other words, the interstate commerce had terminated.

In **Stone v. Dunn Brothers,** 224 Miss., 762, 80 So. 2d 802, **dismissed per curiam,** 350, U.S. 878, 76 S. Ct. 134, the facts were virtually identical to the **J. L. Cox** case, above. The Mississippi Court reached the same result, saying that the transportation was purely local and subject to local tax. Interestingly enough, however, while the Court characterized the activity as local, it indicated that the tax would be imposed even if the local transportation *{*375}* was a part of an interstate movement.

The case of **Interstate Pipeline Co. v. Stone,** 203 Miss. 715, 35 So. 2d 73, **affirmed,** 337 U.S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613, involved a pipeline company that transported oil from the wellhead or tank batteries in Mississippi to a railhead in the same state. The oil was delivered to railroad tank cars or placed temporarily in storage tanks at the rail siding until it could be loaded onto the railroad tank cars. The shipping orders called for a through shipment of the oil from the wellhead to an out of state

refinery. Clearly, the transportation of the oil through the pipeline was a part of an interstate shipment. Mississippi imposed its gross receipts tax on the pipeline company. The Mississippi tax is legally indistinguishable from the New Mexico school tax. The Supreme Court of the United States approved this result, saying at 337 U.S. 666:

"We do not pause to consider whether the business of operating the intrastate pipeline is interstate commerce, for, **even if we assume that it is, Mississippi has power to impose the tax involved in this case."** (Emphasis added)

In other words, the Court was saying that a local tax on an interstate activity did not necessarily offend the commerce clause. The Court listed these reasons for so holding: (1) all the activities taxed occur within the state, (2) the tax does not discriminate in favor of competing intrastate commerce, (3) the nature of the subject makes apportionment unnecessary, hence the gross receipts were subject to the tax, (4) there was no attempt to tax any activity that took place outside the state's boundaries, and (5) no other state could tax this activity, so the possibility of double taxation was eliminated.

In reaching the result indicated, the Court relied on **Central Greyhound Lines v. Mealey,** 334 U.S. 653. In that case, the state of New York imposed its privilege tax on a bus line that carried passengers from a point in New York through the states of Pennsylvania and New Jersey to a point of destination in New York. The New York courts had upheld the tax on the theory that the trip lost its interstate character because both the point of origin and the point of destination were in New York. The United States Supreme Court quickly disposed of this idea, holding that the transportation was interstate commerce on which the state of New York sought to impose a direct tax. However, the tax was upheld so long as it was based only upon the mileage travelled within the state of New York. The Court quite clearly held that a state can lay a direct tax on interstate commerce, so long as it limits its tax to that portion of the interstate commerce that occurs within the boundaries of the state, and does not discriminate against interstate commerce. This is to say no more than that interstate commerce should pay its way, and is not entitled to be favored over local commerce.

In the situation posed for this opinion, if the transportation was purely intrastate, the local trucker would be subject to tax at the same rate that we seek to impose upon the transaction in question. There is no discrimination, but, on the contrary, the tax places interstate commerce on the same footing as intrastate commerce. The transportation being from a point in New Mexico to another point in New Mexico, all the criteria of the Central **Greyhound** case are met: (1) all the activities taxed take place within New Mexico, (2) the tax does not discriminate in *{*376}* favor of competing intrastate business, (3) the nature of the subject makes apportionment unnecessary, (4) no attempt is made to tax any activity that takes place outside New Mexico, and (5) no other state can tax this activity.

Where the above criteria are met, it is our opinion that the New Mexico emergency school tax applies, even though the local activity in question forms a part of interstate commerce.

By: Norman S. Thayer

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