

Opinion No. [29-31]

July 31, 1929

TO: State Comptroller, Gasoline Tax Department.

GASOLINE -- Retail dealers in on Indian Reservations.

OPINION

Reference is made to your letter of the 24th inst. in which you say, "We have within the State of New Mexico a few gasoline retail dealers who operate their pumps or filling stations on United States Indian reservations and on this account claim that they are exempt from the state permit license fee required for the operation of such stations. Some of these dealers are Indians and others are Anglo-Americans." You ask for an opinion from this office relative thereto.

Your perplexity under the circumstances is not surprising. By section 2, chapter 175, Laws of 1921, each distributor of gasoline and each retail dealer in gasoline, as defined in the act, is required to make application for a license certificate and to pay an annual license tax. To distribute or sell gasoline without having paid the tax, and without displaying a license certificate, is made unlawful. No penalty other than the liability of being enjoined is provided for such unlawful selling, although penalties are provided for failure to make returns and remittances, or to sell without paying the tax on the gasoline sold.

The Pueblo Indians of New Mexico are citizens of the United States. This has been decided four times by our own Supreme Court. U.S. v. Lucero, 1 N.M. 422; U.S. v. Santistevan, 1 N.M. 583; U.S. v. Joseph, 1 N.M. 593; Territory v. Delinquent Tax Payers, 12 N.M. 141.

In the case last cited it was held that lands belonging to Pueblo Indians were taxable. Congress, however, and while we were yet a territory, passed an act exempting such lands from taxation.

When we adopted a constitution for the State of New Mexico, it contained, as required by the Enabling Act, and in article 21, a definition of Indian country as "all lands owned or occupied by the Pueblo Indians of New Mexico on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state."

"The people inhabiting this state do agree and declare that they forever disclaim all right and title to * * * all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition

and under the absolute jurisdiction and control of the Congress of the United States; * *
* that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe."

It will be noted that the exemption from taxation provided for in these sections of the constitution apply only to lands and other property therein, and that lands and other property outside of an Indian reservation, though owned by an Indian, may be taxed as other lands or property; that is the exemption is to property belonging to an Indian and on the reservation, the Indian, himself, has no exemption, either personally or in property, off the reservation. This is deemed pertinent when we remember that the license tax imposed by this statute is not a property tax, but an excise levied on the sale of gasoline, or a license on the privilege of selling.

In general, property belonging to persons not Indians, located within an Indian reservation, is taxable and no property is exempt from taxation **merely** because on an Indian reservation. *Wagoner v. Evans*, 170 U.S. 588; *Thomas v. Gay*, 169 U.S. 730; *Occidental Con. Co. v. U.S.*, 245 Fed. 817, but a state tax upon a licensed trader within an Indian reservation has been held void in *Foster v. Board of County Commissioners*, 7 Minn. 84, as violating the constitution of the United States by which the several states delegated to Congress the exclusive power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

Our own court, however, has held that Pueblo Indians are not tribal Indians, and the provisions of the Intercourse Act of 1834 not applicable to them. (This may not hold as to Navajos or Indians not of the Pueblos.)

The rule above stated as to taxation of persons other than Indians is with the limitation "unless the reservation is expressly excepted from the jurisdiction of the state when admitted or of a territory when organized."

From what precedes, I should feel inclined to the opinion that the license tax imposed by the statute might be required of both Indians and non-Indians, on the reservation or off, were it not for the language of our constitution, above quoted, providing that "until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." That is, we are confronted with the query as to whether or not the state legislature may impose an occupation tax or any excise tax upon privilege within the confines of a reservation. As to property taxes, the law seems to be clear, irrespective of the legislative authority upon the reservation, but not at all clear as to excise taxes.

A very similar question was referred to the late Frank W. Clancy, when he was Attorney General, and in his opinion No. 879, rendered April 20, 1912, he confessed himself to be unable to reach a satisfactory conclusion, and suggested the advisability of having a test case taken into court and settled by judicial decision.

Another angle which here presents itself, is the jurisdiction of courts, should any attempt be made to enforce this statute on the reservation. I incline to the opinion that the state court would be without jurisdiction and also the federal court inasmuch as the statute is not a federal statute.

It is suggested that unless and until an interpretation is placed on the constitutional provisions holding that the legislature may impose such a tax upon occupations on a reservation, it be considered that this statute is not enforceable thereon.