

Opinion No. 38-2010

July 23, 1938

BY: FRANK H. PATTON, Attorney General

TO: Motor Vehicle Division Bureau of Revenue Santa Fe, New Mexico. Attention: J. O. Walton Attorney

{*253} This will acknowledge receipt of your recent letter, together with a letter to the Bureau of Revenue from Mr. Woodward, who concurs in an opinion attached to his letter holding Chapter 137, New Mexico Session Laws of 1937 unconstitutional.

As I understand the contention made in the opinion, it is to the effect that said Chapter 137 contravenes the Commerce Clause of the United States Constitution, and further that the act contravenes the due process clauses of the State and United States Constitution in that the same is discriminatory or preferential.

1. Chapter 137, New Mexico Session Laws 1937, is not a discriminatory or preferential statute. Section 1 of the act provides as follows:

"Section 1. Every dealer in used, or second hand, motor vehicles who is a non-resident of the State of New Mexico or who does not have a permanent place of business in this State, and every person, firm or corporation who bring any used, or second hand motor vehicles into {*254} the State of New Mexico for the purpose of sale or re-sale except as a trade-in on a new motor vehicle or another used car, shall within ten days from the date of entry of said motor vehicle into the limits of the State of New Mexico, register such motor vehicle with the Motor Vehicle Division of the Bureau of Revenue on a form to be provided by it, and under such rules and regulations as may be promulgated by said Motor Vehicle Division of the Bureau of Revenue from time to time, and shall before said used or second hand car is put on a used car lot for sale or offered for sale, or sold, execute a bond with two good and sufficient sureties, or with a surety company duly authorized to do business in the State of New Mexico as a surety or sureties thereon, payable to the State of New Mexico for the use and benefit of the purchaser and his vendees, conditioned to pay all loss, damages and expenses that may be sustained by the purchaser, and/or vendees, that may be occasioned by reason of the failure of the title such vendor or by reason of any fraudulent misrepresentations or breaches of warranty as to freedom from liens, quality, condition, use or value of the motor vehicle being so sold. Said bond shall be in the full amount of the sale price of such motor vehicle but in no event to exceed the sum of one thousand dollars (\$ 1,000.00) and shall be filed with the Commissioner of the Bureau of Revenue of the State of New Mexico by the vendor and be approved by him as to amount, from and as to the solvency of the surety or sureties, and for which service by said commissioner, in registering said vehicle, the vendor shall pay a fee of one dollar (\$ 1.00) and a fee of five dollars (\$ 5.00) for each bond so filed and approved, which sums shall be paid into the State Treasury to the credit of the General Fund."

As we understand the act, it applies to "every person, firm or corporation who bring any used, or second hand motor vehicles into the State of New Mexico for the purpose of sale or re-sale, except as a tradein on a new motor vehicle or another used car." Although Section 1 commences by enumerating non-resident dealers and dealers not having permanent place of business in the state, yet, this is mere surplusage in view of the remaining portions of Section 1 last above quoted.

In other words, the act applies to all persons, residents and non-residents of the State of New Mexico, dealing in used cars that are brought into the state for the purpose of sale or re-sale. There is, therefore, no discrimination between resident and non-resident dealers of used cars brought into the state for the purpose of sale or re-sale.

The only possible discrimination that might be argued may be between the dealer who sells second hand cars that have not been brought into the state and the dealer who sells second hand cars that have been brought into the state. However, there is ample basis for such a classification.

Chapter 137, supra, is merely an exercise of the police power reserved to the state intended for the protection of the public in the state in the purchase of second hand automobiles. The basis for differentiating between the dealers of second hand cars brought in from outside the State of New Mexico, and the dealers selling second hand cars already in the state is obvious.

The New Mexico purchaser of a New Mexico second hand car may very easily trace the title of the car {*255} he proposes to purchase and check encumbrances that might be found of record against it. Whereas, the New Mexico purchaser of a car just brought in from California must ordinarily rely solely on the representations of the vendor and cannot in the absence of great inconvenience trace the title, etc., in California. He must run the risk of someone in California, or some other state, claiming some title or interest in the car which he purchases in good faith, and it is elementary that a good faith purchaser of personal property from a third party purchases nothing as against the legal owner, etc.

The fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction, or if any state of facts reasonably can be conceived to sustain it. *State Board of Tax Commission vs. Jackson*, 75 L. Ed. 1248, 283 U.S. 527.

Clearly, Chapter 137 falls within the last above enunciated principle and cannot, therefore, be unconstitutional as providing for an arbitrary and unreasonable classification of dealers in used or second hand cars.

2. Chapter 137, New Mexico Session Laws of 1937, does not contravene the Commerce Clause of the United States Constitution.

The major portion of the brief submitted to you by Mr. Woodward is devoted to the proposition that said Chapter 137 contravenes the Commerce Clause of the United States Constitution. With this contention we cannot agree.

It must be borne in mind that Chapter 137, *supra*, does not require the registration of the used car while it is in transit into the state. The dealer has ten days after the entry of the car within the state in which to register the same. Furthermore, the bond required by said act need not be executed by the dealer on such used car until such car is "put on a used car lot for sale", "offered for sale", or "sold". In other words, before the provisions of Chapter 137 become effective the used car in question has ceased to be in transit and has become part of the common mass of property within the State of New Mexico and for this reason it cannot be said that what the State of New Mexico might thereafter require in connection with such car is a burden on interstate commerce.

The Supreme Court of the United States has many times construed the Commerce Clause of the United States Constitution, particularly in connection with state taxation, which cases are somewhat analogous and clearly persuasive here. For example, the so-called "use tax" imposed upon property purchased outside the limits of the levying state has been upheld. *Henneford vs. Silas Mason Company*, 81 L. Ed. 814, 300 U.S. 577.

Property acquired or transported in interstate commerce may be subjected to a property tax non-discriminatory in its operation when such property has become a part of the **common mass** of property within the state of destination. *Will Oil Corporation vs. Pennsylvania*, 79 L. Ed. 838, 294 U.S. 169; *Cudahy Packing Company vs. Minn.*, 62 L. Ed. 827, 246 U.S. 450; *Brown-Forman Company vs. Kentucky*, 54 L. Ed. 883, 217 U.S. 563; *American Steel and Wire Company vs. Speed*, 48 L. Ed. 538, 192 U.S. 500; *Woodruff vs. Parham*, 19 L. Ed. 382, 8 Wall. 123. This is so, notwithstanding the fact that the property involved is still in the original package. *Sonneborn Brothers vs. Curton* 67 L. Ed. 1095, 262 U.S. 506; *American Steel and Wire Company vs. Speed*, *supra*, *Woodruff vs. Parham*, *supra*. For like reasons such property may be subjected, **when once it is at rest**, to a non-discriminatory tax upon use or enjoyment. *Nashville Railway vs. {*256} Wallace*, 77 L. Ed. 730, 288 U.S. 249; *Edlman vs. Boeing Air Transport*, 77 L. Ed. 1155, 289 U.S. 249. *Monomotor Oil Company v. Jackson*, 78 L. Ed. 1141, 292 U.S. 86.

Furthermore, the tax upon the privilege of use or storage when the chattel used or stored has **ceased to be in transit** is now, as stated by the United States Supreme Court, "an impost so common that its validity has been withdrawn from the arena of debate". *Henneford vs. Silas Mason Company*, *supra*, *Nashville Railway vs. Wallace*, *supra*, *Edlman vs. Boeing Air Transport*, *supra*, *Monomotor Company vs. Johnson*, *supra*, *Vancouver Oil Company vs. Henneford*, 183 Wash. 317, 49 P. 2nd 14. See also *Milton Coverdale vs. Arkansas-Louisiana Pipe Line Company*, 82 L. Ed. 735 (No. 14 L. Ed. Advance Opinions).

In view of the foregoing we conclude that Chapter 137, New Mexico Sessions Laws of 1937, does not contravene the Commerce Clause of the United States Constitution.

This opinion is to be considered merely an answer to the opinion submitted by Mr. Woodward on the proposition of whether or not the act contravenes the Commerce Clause of the United States Constitution and also on the question of whether or not Section 1, which is the main portion of the act, is discriminatory or preferential, and we are not, at this time, attempting to pass on Section 3 of the act, which attempts to close the doors of our courts to certain dealers who do not abide by the act. We shall pass on that question when it is presented.

By: FRED J. FEDERICI,

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