

## Opinion No. 45-4721

May 17, 1945

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Ralph Apodaca Superintendent of Insurance State Corporation Commission  
Santa Fe, New Mexico

{\*72} I have your letter of April 26, 1945, requesting an opinion of this office concerning the constitutionality of Section 60-403 of the 1941 Compilation which relates to retaliatory taxes and fees which are levied against certain foreign insurance companies. This question was raised in view of the recent decisions of the U. S. Supreme Court in the cases of U. S. v. Southeastern Underwriters' Association, 322 U.S. 533, 64 Supreme Court, 1162, and the Polish National Alliance case, 322 U.S. 643, 64 Supreme Court, 1196.

The Supreme Court of the United States held in the above opinions that insurance was commerce, overruling a previous line of decisions that had been followed for about 75 years. See Paul v. Virginia 8 Wall. 168, 19 L. Ed. 357, and numerous other cases cited in Footnote 18 in 64 Supreme Court, page 1168.

It is, of course, a fundamental rule of law that in the absence of any federal authorization that interstate commerce cannot be discriminated against and, therefore, since the effect of the retaliatory tax is to impose a higher rate of taxation on certain foreign companies than on domestic insurance companies, there would seem to be a discrimination which would be prohibited by the federal Constitution unless otherwise authorized by a federal statute. See McGoldrick v. Berwind-White Coal Co. 309 U.S. 33, 60 S. C. 388, 84 Law Ed. 565, 128 A. L. R. 876 with the annotation appearing on pages 900 to 905; Fiteger Co. v. Kremer 199 Wisc. 338, 226 N. W. 310; Travis v. Yale and Towne Mfg. Co. 252 U.S. 60; Walling v. Mich. 116 U.S. 446, 460.

It is, however, well established that retaliatory statutes similar to the one herein involved have been sustained prior to the holding of the U. S. Supreme Court that insurance was commerce. See Fire Assoc. of Phila. v. N. Y. 119 U.S. 110. It has also been stated that the purpose of such statutes is not to raise revenue, but to secure for domestic insurance companies even-handed treatment by the legislatures of other states. See Life and Casualty Insurance Co. v. Coleman 233 Ky. 350, 25 S. W. 2d, 748; Bankers Life Co. v. Richardson, 192 Calif. 113, 218 P. 586. It is therefore, clear that section 60-403 is a constitutional section unless unconstitutional for the reason that it is a burden on interstate commerce.

Public Law, 15, 79th Congress, being an act entitled "To Express the Intent of the Congress With Reference {\*73} to the Regulation of the Business of Insurance," provides in part:

"That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

In view of the above provisions and with emphasis on Section 2 (a) above quoted, wherein it is declared that the business of insurance shall be subject to the laws of the states which relate to the taxation of such business, and since Section 60-403 of the 1941 Compilation relates to the taxation of insurance which the federal act specifically provides that the business of insurance shall be subject to, it would appear that by the specific consent of Congress that it cannot be held that our Retaliatory Tax is unconstitutional as a burden on interstate commerce. While this question is not entirely free from any doubt, it is the duty of this office and of all state departments and officials to uphold the validity of the statutes of this state and, therefore, since it is doubtful whether or not this statute is constitutional, we are compelled to hold the statute constitutional and leave it to the decisions of the court to finally determine this question.

By HARRY L. BIGBEE,

Asst. Atty. General