Opinion No. 58-166

August 13, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker, Assistant Attorney General

TO: Mr. Reuben E. Nieves, Assistant District Attorney, Ninth Judicial District, County Court House, Clovis, New Mexico

QUESTION

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May the City of Clovis levy an occupation tax against an out-of-state laundry service business, which solicits contracts for laundry service or rental from local businesses such as restaurants, and from local individual residents, and which picks up laundry, processes the same outside the state and delivers same to the customers at Clovis?

CONCLUSION

Yes.

OPINION

ANALYSIS

Your inquiry chiefly involves the question of the validity of a municipal occupation tax under the circumstances stated, as against the contention that such tax would constitute an undue burden upon interstate commerce. In a series of cases involving "drummers" (itinerant salesmen soliciting orders for goods later transported in interstate commerce for delivery within the state), stemming from Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887), the United States Supreme Court has invalidated local licensing taxes as applied to such drummers, as discriminating against, or imposing an undue burden upon, interstate commerce.

In these cases, the United States Supreme Court has said that it looks to the "operating incidence" of the tax, as construed by the state court, to determine whether the tax levied has a discriminatory impact upon interstate commerce, and to the probability of exclusion of interstate commerce in favor of local competing business, judged by the "practical consequences" of the operation of the tax.

Thus, in West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957), the Court struck down a flat-sum privilege tax levied by ordinance of the City of Opelika, Alabama, on wholesale grocers delivering in the city from points outside as applied to a Georgia wholesale grocer. (Local wholesale grocers paid a tax levied as a percentage

of gross receipts.) In Memphis Stem Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952), the Court struck down a Mississippi privilege tax levied upon any person soliciting business for a laundry not licensed in the state, as applied to a Tennessee laundry corporation, as unconstitutional, either as a tax upon the solicitation of interstate business or, if viewed as a tax upon the local activities only (picking up and delivering laundry and cleaning), as discriminating against interstate commerce, since the tax protested was $ 50 per truck, while local laundries paid a fixed fee to the municipality in which located, plus $ 8 per truck on trucks used in other municipalities. In Nippert v. Richmond, 327 U.S. 416 (1946), the Court struck down an annual license tax levied by city ordinance in a fixed amount plus a percentage of gross receipts, upon those engaging in business as solicitors, as applied to an itinerant salesman, soliciting orders for out-of-state confirmation and shipment into the state, on the ground that the actual and potential effect of the tax was unduly to suppress or burden interstate commerce.

In all of these cases, the Court relied heavily on the discriminatory effect of the actual operation of the tax and the difference in its impact as between interstate commerce and its local competition. In the Nippert case, the Court also relied upon the lack of any showing of a regular course of business, in distinguishing McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940), in which the Court had previously sustained the application of the New York City sales tax to the delivery there of coal shipped from Pennsylvania pursuant to contracts of sale previously made in New York.

On both grounds, this office views the occupation tax which you describe as valid. In The Town of Farmington, New Mexico, v. Miller, No. 6389, filed July 18, 1958, the New Mexico Supreme Court upheld the validity of a municipal occupation tax in a similar situation. We deem that decision controlling here, and it requires that the validity of the tax be sustained. The Farmington ordinance levied an occupation tax of a percentage of gross receipts, with a $ 5.00 minimum, upon all occupations and pursuits. Appellant, a non-resident drummer, as a regular course of business solicited orders in Farmington for later delivery there after shipment in interstate commerce. The New Mexico Supreme Court found that the tax had no discriminatory impact on interstate commerce, but merely caused such commerce to bear its fair share of the cost of local government; that the McGoldrick case, supra, had narrowed the rule of the "drummer" cases to fixed-sum license taxes imposed on the business of soliciting orders for goods to be shipped interstate; and that the United States Supreme Court, in the Nippert case, supra, had distinguished casual solicitation from solicitation as a regular course of business.

For all of these reasons, the decision of the New Mexico Supreme Court just cited is viewed as binding in the case which you put. One other matter should be mentioned in this recent New Mexico case, our Court necessarily considered the regular course of solicitation of orders sufficient to subject the itinerant vendor to the municipal occupation tax. In that respect, our Court followed the strong indication given by the United States Supreme Court, in the Nippert case, supra, that regular and continuous solicitation within the state, sufficient to constitute a course of business, would properly subject the solicitor to a local tax "which in other respects would be sustainable (327 U.S. 416 at

426)." Such indication was given in the latter Court's discussion of International Shoe Co. v. Washington, 326 U.S. 310 (1945).

In opinion No. 58-12, issued January 20, 1958, this office passed upon the application of a municipal occupation tax in a situation involving no local activity except solicitation of orders and later delivery of goods following acceptance of such orders, but having no interstate commerce aspect. We there concluded that such local activity was insufficient to justify application of the municipal occupation tax. In view of the decision in Farmington v. Miller, supra, and the view there taken, that a regular course of solicitation is sufficient to subject one to the municipal occupation tax, the effect of our earlier opinion must now be restricted to cases which do not involve a regular course of business involving solicitation of orders and delivery of goods. In the latter situation, and in that described in your inquiry, the occupation tax validly applies. To the extent that Opinion No. 58-12 conflicts with this conclusion, it is hereby overruled.

Finally, we call your attention to the facts that the decision in Farmington v. Miller, supra, has not yet become final, motion for rehearing having been filed, and that the Court of Appeals for the Tenth Circuit, in Miller v. Stinnett, No. 5757, filed July 9, 1958, a case involving a claim for false arrest and imprisonment, arising out of the same transactions involved in Farmington v. Miller, held the Farmington ordinance unconstitutional as applied to the itinerant vendor, relying upon Nippert and Memphis, supra. Since the question involved is ultimately a federal constitutional question, and in view of the conflict between the views of the New Mexico Supreme Court and those of the Tenth Circuit, it seems likely that the United States Supreme Court may finally determine the question. Meanwhile, the view of the New Mexico Supreme Court must be accepted as governing.