Opinion No. 64-68

May 22, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S Thayer, Assistant Attorney General

TO: Charles C. Brunacini, Commissioner of Revenue

QUESTION

FACTS

A common carrier operating through New Mexico in interstate commerce buys tangible personal property in this state for use by itself at places outside this state. The seller delivers the property to the carrier at a point in this state, and it is immediately transported outside the state by the purchasing carrier.

QUESTION

Are the gross receipts from such a transaction subject to the emergency school tax?

CONCLUSION

Yes.

OPINION

ANALYSIS

Where property is sold within this state, and the property is delivered to the purchaser within this state, it does not offend the commerce clause of the United States Constitution for the state to levy its emergency school tax against the gross receipts of the sale, even though the property is intended solely for use in another state, is immediately transported out of this state, and is actually and completely used and consumed in another state. **State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.,** 372 U.S. 605, 10 L. Ed. 2d 8, 83 S. Ct. 925 (1963).

The question at hand is made more difficult by the fact that the purchaser is a common carrier operating in interstate commerce. Traditionally, carriers have taken the position that they can act in a dual capacity, and that they do not take delivery within the state as a **purchaser,** but take delivery as a **carrier,** and are to be treated just like any other out-of-state purchaser making a purchase in interstate commerce.

In the case of **In re Globe Varnish Co.,** 114 F.2d 916 (1940), the varnish company, located in Illinois, sold locomotive paint to an interstate railroad company, f.o.b.

Chicago, Illinois. The paint was delivered to the railroad's siding in Illinois, and was consigned to the railroad's yards in Milwaukee, Wisconsin. The paint was actually delivered in Wisconsin, and was used there. It was not stated whether the seller paid the freight, but presumably it did not, since the contract called for f.o.b. Chicago. The court did observe that the shipment was handled exactly as if the purchaser was someone other than the carrier. The ruling was that Illinois could not levy its privilege tax against the receipts of the sale, because the transaction was one in interstate commerce.

Shortly thereafter came the case of **Department of Treasury v. Wood Preserving Corporation,** 313 U.S. 62, 85 L. Ed. 1188, 61 S. Ct. 885 (1941). Interestingly enough, this was an appeal from the same court that decided **Globe Varnish Co.,** supra. The facts were that the Wood Preserving Corporation was in the business of creosoting railroad ties, and also in the business of buying and selling ties, except that it sold ties only to businesses with which it had contracts for creosoting. The Baltimore & Ohio Railroad ordered ties from Wood. The order was placed from the railroad's offices in Baltimore, and was received and accepted at Wood's offices in Ohio. Wood ordered untreated ties from producers in Indiana. The ties were delivered to a Baltimore & Ohio siding in Indiana, where inspectors for both the railroad and Wood inspected the ties. Satisfactory ties were immediately loaded on railroad cars and transported to the Wood treatment plant in Ohio. Wood was the consignor in the bill of lading, and the Railroad was the consignee. Wood paid the producers for the ties, but paid no freight to the Railroad for transportation. Indiana imposed its gross income tax on the sale of the untreated ties from Wood to the Railroad. Wood maintained no offices or agents in Indiana other than the inspector who went there to inspect the ties being purchased. The United States Court of Appeals had held that the commerce clause prevented the imposition of the state's tax, 114 F.2d 922, relying on its decision in **In re Globe Varnish Co.,** supra. The Supreme Court of the United States, however, reversed the decision, holding that both the sale and delivery having taken place in Indiana, the transaction was a taxable intrastate transaction, even though the goods were destined out-of-state and were immediately shipped out-of-state.

In **Superior Coal Co. v. Department of Revenue,** 4 Ill. 2d 459, 123 N.E.2d 713 (1954), and **Moffat Coal Co. v. Daley,** 405 Ill. 14, 89 N.E.2d 892 (1950), the coal company sold coal within Illinois to an interstate railroad for use solely outside Illinois. The sale was f.o.b. point of origin, and the coal was loaded onto the purchasing railroad's cars at the place of business of the coal company. The contract of sale called for the coal to be shipped to points outside the state, it was waybilled by the railroad as company freight without transportation charges, and was actually delivered outside the state. The court pointed out that the Illinois tax was a privilege tax for the privilege of doing business within that state, and said that for all practical purposes the seller's transaction was complete at the time the coal was delivered to the railroad cars, that the railroad took possession as a purchaser, not as a carrier, and, therefore, the receipts of the transaction were taxable in Illinois.

In **Standard Oil Co. of California v. Johnson,** (Cal.) 132 P.2d 910 (1942), Standard sold fuel oil and greases to interstate railroads operating through the state of California. The contracts were made in California and the goods were delivered to rail sidings in California of, respectively, the Southern Pacific R.R. Co. and the Atchison, Topeka and Santa Fe Railway Company. The contracts called for delivery of the good to points outside of California; the goods were so delivered, and were consumed exclusively at points outside California. Standard did not pay any freight charges, but delivered the goods f.o.b. points in California. California imposed its retail sales tax on the sales, and the court held that the sales were not in interstate commerce, but were local sales subject to local taxation.

Thereafter, Standard changed its method of doing business, and was soon back in court in the case of **Standard Oil Co. of California v. Johnson,** (Cal.) 147 P.2d 577 (1944). Under its modified contract, Standard still delivered the goods to rail sidings in California, but the goods were sold f.o.b. points outside California, and Standard prepaid the freight charges, and billed the railroads for the cost of the goods, plus freight. The court discussed the dual capacity of the railroads as carriers on the one hand and purchasers on the other. It ruled that whether the delivery within California was a delivery to the railroads as **purchasers** was a question of intent, and observed that, ordinarily, where the seller prepays the freight charges, f.o.b. destination, delivery is not made, and title does not pass, until the goods are actually delivered at their destination. On the other hand, where the buyer bears the freight charges, and the goods are delivered at a point within the state, the transaction is local and subject to local taxation. The transaction in question being sales f.o.b. points outside the state, freight prepaid, they were held to be interstate transactions not subject to the California tax.

Depending on the facts, it is clear that a sale of goods within the state to an interstate carrier is subject to local taxation even though the goods may be intended solely for use outside the state, and are immediately transported outside the state. It makes no difference whether the tax involved is a sales tax, or a privilege tax. That New Mexico's emergency school tax is a privilege tax is well settled. **Black Hawk Consolidated Mines Co. v. Gallegos,** 52, N.M. 74, 191 P.2d 996; **Bradbury & Stamm Construction Co. v. Bureau of Revenue,** 70 N.M. 226, 372 P.2d 808.

The New Mexico emergency school tax is imposed on the gross receipts of various businesses operating within New Mexico, including the business of selling tangible personal property at retail. See Sections 72-16-4.1 and 72-16-4.5, N.M.S.A., 1953 Compilation (P.S.). The statutes contain no exemptions for sales to carriers, interstate or intrastate.

Under 50A-2-106, N.M.S.A., 1953 Compilation, a "sale" consists in the passing of title from the seller to the buyer for a price. Under Section 5OA-2-401, N.M.S.A., 1953 Compilation, title to goods passes from the seller to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest, and even though a document of

title, including particularly a bill of lading, is to be delivered at a different time or place. When the contract calls for f.o.b. the place of shipment, the seller's obligation under the contract ends when he has delivered the goods to the carrier. If the contract is f.o.b. place of destination, the seller's obligation continues at his expense and risk until the goods are delivered at the destination. Section 50A-2-319, N.M.S.A., 1953 Compilation.

Therefore, it is our opinion that where a New Mexico business sells tangible personal property to an interstate carrier operating through this state, and the goods are delivered to the carrier f.o.b. a point within this state, then the carrier takes delivery of the goods as a purchaser, and the gross receipts of the transaction are subject to the emergency school tax, even though the goods are intended solely for use outside this state, are immediately shipped outside the state, and actually used outside the state.