Opinion No. 34-738

March 8, 1934

BY: E. K. NEUMANN, Attorney General

TO: Honorable Byron O. Beall, Chief Tax Commissioner, Santa Fe, New Mexico.

*{*120}* We have received in this office correspondence from certain attorneys wherein the question is presented as to the power of the State to impose the income tax, for which provision is made in Chapter 85 of the Laws of 1933, upon corporations engaged strictly in interstate commerce and also upon those corporations engaged in both interstate and intra-state commerce where the receipts from such business are incapable of segregation.

It may be well at this time to decide the question of whether or not, under the Act, it is possible to impose the tax upon any foreign corporation due to the language of Section 29, which reads as follows:

"Every domestic corporation doing business in this state shall pay a tax for each taxable year upon its entire net income derived from business done or property located in this state, except such corporations as pay a tax to the State upon gross receipts, insurance companies; reciprocal or inter-insurance exchanges which pay a premium tax to the State as provided by law, banks, banking associations and trust companies, building and loan associations or companies, and religious, educational, benevolent and other corporations not organized or conducted for pecuniary profit."

It is at once apparent that foreign corporations are not included in the foregoing. However, upon an examination of the Enrolled and Engrossed Bill, on file in the office of the Secretary of State, we find that in the Act as printed certain words were omitted, evidently through an error in typing. These words appear in the Bill on file: After the words "domestic corporation" follows the words, "organized under the laws of this state and foreign corporations," so that the entire phrase reads as follows: "Every domestic corporation organized under the laws of this state and foreign corporations doing business in this state shall pay a tax * * *."

Therefore, due to this fact, it is our opinion and we so hold that foreign corporations doing business in this state are included within Chapter 85 of the Laws of 1933.

As to corporations engaged in interstate commerce, a more serious proposition is presented. Section 8 of Article I of the Constitution of the United States provides that Congress *{*121}* shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes. This power, therefore, having been surrendered by the states, is vested exclusively in the Federal Congress and no state can enact and enforce any measure, the effect of which is to constitute or impose a direct burden upon interstate commerce.

We must then consider and determine whether the said Chapter 85, as applied to foreign corporations engaged in interstate commerce, may be enforced.

Said Section 29, heretofore quoted, provides for the payment of the tax upon the net income derived from the business done or property located in the state, and further provision is made for the filing of reports and returns with the State Tax Commission.

In the case of Alpha Portland Cement Company vs. Massachusetts, 268 U.S. 203, 69 L. Ed. 916, it was held that the state could not impose an excise tax measured in part upon the net income of a foreign corporation engaged in interstate commerce. In this connection, the Court said:

"It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the 14th Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. v. Massachusetts, 231 U.S., 68, 87, 58 L. Ed. 127, 134, 34 Sup. Ct. Rep. 15, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."

"The local business of a foreign corporation may support an excise measure in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 65 L. Ed. 165, 41 Su. Ct. Rep. 45, approved such an excise measure by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state. * * *"

"The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but intrastate business within the state. * * *"

69 L. Ed. 1924.

It is also held in Ozark Pipe Line Company vs. Monier, 26, U.S. 551 and Anglo Chilean Nitrate Sales Corporation vs. Alabama, 288 U.S. 218, that certain statutes imposing franchise taxes were invalid when applied to foreign corporations engaged exclusively in interstate commerce.

"No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce." Atlantic and Pacific Telegraph Co. vs. Philadelphia, 190 U.S. 160, 47 L. Ed. 995.

This leads to the further question of whether or not the income tax imposed by Chapter 85 is a direct burden upon and therefore an interference with interstate commerce or whether the resulting burden is the mere incidental result of the law due to the position in which a foreign corporation engaged in interstate commerce and doing business in this state finds itself.

In discussing a license tax, the Court, in Postal Telegraph Co. vs. Richmond, 249 U.S. 257, 63 L. Ed. 594, said:

"The principle of these cases, and of many others cited in the opinions, is that, as against Federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it it in this case, to the right to *{*122}* do local business within its borders, where such tax does not burden, or discriminate against, interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. * * *"

63 L. Ed. 594.

In other words the state is not possessed of power to impose a tax upon interstate business, though it may tax the local business of a corporation engaged in interstate commerce.

In Postal Telegraph Co. vs. Adams, 155 U.S. 688 at page 695, the Court pointed out that property of a foreign corporation engaged in interstate commerce could be taxed in the state where located, but that duties laid on the subjects of interstate commerce or on the receipts derived therefrom amounted to a regulation of such commerce and therefore was repugnant to the Commerce Clause of the Constitution.

A tax upon gross receipts of a telegraph company engaged in interstate commerce will be enjoined as to that portion of the receipts derived from interstate commerce. Rotterman vs. Western Union, 127 U.S. 411.

In other cases cited in the Rotterman case it is held that a state tax on interstate telegraph messages is not enforceable. To the same effect is the holding in Western Union Telegraph Co. vs. Seay, 132 U.S. 472.

It is said in a very recent case in our own Supreme Court, Transcontinental and Western Air, Inc., vs. Lujan, 36 N.M. 64, 8 Pac. (2nd) 103, "Interstate commerce is sacred only because of the exclusive power of the Congress to regulate it. Many forms of state taxation are permitted, even though a burden may fall upon those engaged in commerce among the states. 'Even interstate commerce must pay its way'."

However, in this connection, we are considering a case where the foreign corporation is engaged exclusively in interstate commerce and our income tax law imposes the tax upon the net income of such company. This tax it appears to us is a tax upon the

business itself and, if this premise is correct, it is invalid as being contrary to the Commerce Clause of the Federal Constitution.

In view of all the foregoing we are compelled to deduce the following conclusions:

1. Where the business transacted in this state is wholly interstate, the income tax, being a tax upon the net income of the company, is a tax upon the business itself and constitutes a direct burden upon interstate commerce and is therefore invalid.

2. Where the interstate business is so commingled with the intrastate business as to be incapable of segregation, the result is the same and no part of the business may be taxed.

3. The tax may be imposed upon that part of the net income which is derived from intra-state business when segregation from the interstate revenues is possible.

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