

Opinion No. 44-4584

September 23, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. Victor Salazar, Director, School Tax Division, Bureau of Revenue, Santa Fe, New Mexico

I have your letter of August 14, 1944 wherein you request an opinion concerning whether the town of Gallup can impose an occupation tax on the basis of gross receipts of certain businesses without first deducting business done in interstate commerce.

In view of the fact that the type of interstate commerce which is claimed to be taxed is not specifically designated, it is impossible for this office to give more than a summary of certain general rules which may be considered in answering this question.

The recent United States Supreme Court decisions which have considered this question have in effect held that it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of tax burdens merely because an incidental or consequential effect of the tax is the increase of the cost of doing business. The test is not, under most circumstances, whether it is a tax on interstate commerce, but whether interstate commerce is discriminated against or whether the particular tax is an undue burden on interstate commerce. Upon a finding that the interstate commerce is not discriminated against and that such commerce is not unduly burdened, the taxes have been sustained by the United States Supreme Court in the absence of any federal statute or regulation forbidding such taxes.

In connection with the foregoing rules, we call your attention to the cases of *McGoldrick vs. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565; *McGoldrick vs. Felt*, 309 U.S. 70, 60 S. Ct. 404; *McCarroll vs. Dixie Greyhound Lines*, 309 U.S. 176, 60 S. Ct. 504; *Vest & Co. vs. Maxwell*, 311 U.S. 454, 61 S. Ct. 334; *Nelson vs. Sears-Roebuck & Co.*, 312 U.S. 359, 61 S. Ct. 586; *West India Oil Co. vs. Sancho*, 108 F.2d 144.

See also the following text material: 128 A. L. R. 900; 129 A. L. R. 22, 224 to 230; 12 C. J. Commerce Sec. 141, P. 103; 15 C. J. S. Commerce, Sec. 112, Sub-Sections B and C and Section 114.

The case of *McGoldrick vs. Gulf Oil Corporation* 309 U.S. 414, 60 S. Ct. 664 illustrates the situation wherein a tax may not be levied due to the fact that a federal statute would prohibit the levying of such a tax.

In view of the foregoing authorities, it is noted that there is nothing set forth in your letter wherein this office can determine that the occupational tax levied pursuant to the power granted a municipality by the statutes of the State of New Mexico either discriminates

against or burdens interstate commerce and, therefore, until such time as a specific instance is called to our attention wherein it might be contended that the Gallup occupational tax discriminated against or burdened interstate commerce, we must hold that the occupation tax, as enacted by the town of Gallup, is in all respects valid.

Hoping the above fully answers your question, I am

By HARRY L. BIGBEE,

Asst. Atty. General