



**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN
~~XXXXXXXXXXXXXXXXXXXX~~
~~WILL WILSON~~
ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable Geo. H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-1878
Re: Construction of Article 7070,
Vernon's Annotated Civil
Statutes, regarding the appli-
cation of the tax levied
thereby to gross receipts of
domestic telephone companies
derived from interstate calls.

We have for answer your letter of January 22, 1940, sub-
mitting for the opinion of this Department the following inquiry
and accompanying fact situation, which we quote:

"On May 29, 1935, I made a request of the Attorney
General for an opinion as to the gross receipts tax in
Article 7070 R. C. S. 1925 required of an operator of a
telephone exchange, and on May 31, 1935 Assistant Attor-
ney General Hubert T. Faulk rendered an opinion as per
enclosed copy; on September 17, 1935, Mr. Faulk reversed
his former opinion, copy of which is also enclosed.

"You will note that Article 7070 RCS 1925 provides that
the gross receipts tax applies on the gross receipts
from all business done within this State, from the use
of other line or lines, telephone or telephones, and
from the lease or use of any wire or equipment within
this State.

"There are several companies operating near the bor-
ders of this State whose lines are wholly within the
boundaries of the State. Where a telephone call ori-
ginates within this State and is transmitted over said
company's lines to the border, then is picked up by
another company for some point outside of the State,

the Texas company is paid for that part of the use of their lines within the State, and the company completing the call to the destination outside of the State is paid their commission, and you will please review this matter and give me your opinion if such calls as outlined would be termed interstate calls or if the gross receipts earned on these calls by the Texas company would be taxable."

The general rule stating the limitations and restrictions upon the taxation by a state of interstate commerce, or the regulation of interstate commerce by a state under the guise of taxation, is fully stated in 12 C. J. p. 96:

"It is well settled that a state cannot lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, and the power to regulate belongs to congress. Indeed, taxation has been said to be one of the principal forms of regulation attempted by the states, and to be a form of regulation that has been uniformly condemned by the courts. It is equally well settled that the right of a state to tax property within its borders is not impaired or defeated by the fact that it is used in interstate commerce, and that to warrant interference by the courts with the exercise of the taxing power of a state, on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, although in the guise of taxation, impose real burdens on interstate commerce as such. In determining whether a state taxation law is valid as imposing a tax on property having a situs within its boundaries, or invalid as a burden on, and an interference with, interstate commerce, the purpose of the taxation, or the intent of the framers of the statute, is immaterial, as is also the mode of collection provided. Where a carrier is engaged in both interstate and intra-state business, in the imposition of a tax on such carrier in the interstate business must be discriminated from the intra-state business, or it must be made capable of such discrimination,

so that it may clearly appear that the intra-state business alone is taxed. Whenever the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted on by the courts, and the state will be permitted to collect the tax arising on commerce solely within its own territory."

Under the recognized principle announced above that property within the borders of the State may be taxed by that State despite the fact that it is used in interstate commerce, (Pullmann Palace Car Company vs. Penn., 141 U. S. 18, 35 L. ed. 613, 11 Sup. Ct. Rep. 876) taxes have been sustained that took account, not only of the local tangible values of the property, but, in addition, considered the augmentation of value from the commerce in which it was engaged. Adams Express Co. vs. Ohio, State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Adams Express Co. vs. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

Moreover, it has been held that a tax on the property and business of a railroad company operating within a state, might be computed, on a gross income or receipts basis, by adding to the income derived from business done wholly within the State, the proportion of income from interstate business equal to the proportion between the road over which the business was carried within the State to the total length of the road over which it was carried. Wisconsin & M. R. Co. vs. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

This method of determining a fair and equitable property tax upon the property of companies engaged in both intrastate and interstate commerce, by computing same on the basis of a fixed percentage of the earnings of the property, finds illustration, as to telephone companies, in the case of State vs. Northwestern Telephone Exchange Company, 120 S. W. 534. The tax statute upon which the case turned did not levy a property tax computed upon gross receipts from intrastate business only, but, additionally, upon a proportionate part of the gross receipts of which company from interstate business or commerce. The court reviewed the authorities upholding similar taxes upon the gross receipts of railroad companies, and upheld the tax in the case before it because it was based upon a proportionate part of the earnings of the telephone companies derived from interstate commerce, rather than a flat per centum of gross earnings derived from any source whatsoever, whether interstate or intrastate. This latter method of taxation was condemned as violative of the commerce clause of the Constitution of the United States

in the case of Galveston, Harrisburg and San Antonio Ry. Co., et al vs. State of Texas, infra.

Under the facts here, the "gross receipts" sought to be taxed, were derived not from tolls on calls originating and ending within the confines of the State of Texas, but rather from tolls on calls originating in Texas and terminating in other states, or vice versa, - in other words, in interstate commerce. The fact that the telephone company in question receives only such part of the tolls as represents payment for the facilities and services furnished by it in transmitting the call from or to the borders of the State does not prevent such receipts from being stamped with the interstate commerce feature.

The statute under consideration here, Article 7070, Vernon's Annotated Civil Statutes, contains no language computing the tax upon gross receipts of interstate business upon the proportionate mileage basis recognized by these cases, but designates such tax an occupation tax and computes same upon gross receipts received by the telephone company "from all business within this State" etc. Are the "gross receipts" described above brought within this tax statute, as being derived from "business within this State," by reason of the fact that the company's lines lie wholly within the State? If so, then the statute presents the vice denounced in the cases of Galveston, Harrisburg & San Antonio Ry. Co. et al vs. State of Texas, 210 U. S. 217, 28 Sup. Ct. Rep. 638; Ratterman vs. Western Union Telegraph Co., 127 U. S. 411, 32 L. ed. 229, 8 Sup. Ct. Rep. 1127; Western Union Telegraph Co. vs. Texas, 105 U. S. 460, 26 L. ed. 1067; Western Union Telegraph Co. vs. Penn. 128 U. S. 39, 32 L. ed. 345, 9 Sup. Ct. Rep. 6.

In the case of Galveston, Harrisburg & San Antonio Ry. Co., et al, vs. State of Texas, supra, the Supreme Court of the United States, per Mr. Justice Holmes, held that the State of Texas could not impose a tax upon railway companies whose lines lie wholly within the State, "equal to one per centum of their gross receipts," where a part, and, in some cases, much the larger part, of these gross receipts, is derived from the carriage of passengers and freight coming from, and destined to, points without the State.

Likewise, the instant case involves a company whose facilities or lines lie wholly within the State of Texas, and a statute which purports to levy a tax of certain per centum upon the gross receipts therefrom. But the one saving dis-

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inction is that we may fairly and properly give a narrow and limited construction to the words of the statute "gross amount received from all business within the State," and say that same excludes the gross receipts described in your letter, even though such receipts were derived from the company's lines wholly intrastate, and might, in a general sense, be considered as stemming out of "business within the state. The statute involved in the above case could not be so construed and therefore was stricken down as an unlawful regulation of interstate commerce.

In recognition of our duty to so construe a statute, where possible, as to render same constitutional rather than unconstitutional, we hold that it was not the intention of the Legislature to bring gross receipts from the described telephone calls within the scope of Article 7070, Vernon's Annotated Civil Statutes, so as to be taxable thereunder.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Pat M. Neff, Jr.
Assistant

PMN:N--pam
APPROVED MAY 9 1940
GERALD C. MANN
ATTORNEY GENERAL OF TEXAS

APPROVED OPINION COMMITTEE
BY BWB, CHAIRMAN