



THE ATTORNEY GENERAL
OF TEXAS

GERALD C. MANN
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ATTORNEY GENERAL

AUSTIN 11, TEXAS

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

Dear Sir:

Opinion No. O-3923

Re: Is the holder of a "contract carrier" permit, issued under the authority of the Railroad Commission of Texas, subject to the occupation tax on gross receipts levied by Article 7066b, Vernon's Texas Civil Statutes, despite the fact that such gross receipts are derived exclusively from transporting property for hire or compensation for the United States Army, on shipments originating and terminating at army camps, posts, depots and sites but passing through two or more incorporated cities, towns or villages?

Your letter of March 10, 1942 submits for our opinion the following question, which we quote therefrom:

"Article XIV of House Bill No. 8 of the Forty-seventh Legislature provides for a quarterly gross receipts tax of 2.2% on receipts earned by Contract Carriers and such Contract Carrier being identified in Chapter 277, Acts of the Regular Session of the Forty-second Legislature.

"This department has been holding that a Contract Carrier, operating under a permit from the Railroad Commission, who makes hauls between one incorporated town and another incorporated town within this State is subject to the gross receipts tax.

"I now have an inquiry from Spears, Taylor & Spears of San Antonio, Texas, copy of which I am enclosing, on behalf of one of their clients who hauls commodities for the United States Army. You will note they state that none of the merchandise is picked up or delivered in incorporated towns or cities, but it is my understanding that they may traverse through two or more incorporated towns to reach their destination.

"Please tell me if, in your opinion, the fact that the receipts are earned on hauls for the United States Army would exempt them from payment of gross receipts tax as provided for in Article XIV of House Bill No. 8 of the Forty-seventh Legislature."

You also attach copy of letter from Spears, Taylor and Spears, Attorneys of San Antonio, Texas, pointing out that the hauls made by the contract carrier in question are not picked up or delivered in incorporated cities or towns but are exclusively for the United States Army, originating and terminating in army camps, depots, posts and sites. It is suggested therein that in view of such circumstances, said carrier does not fall within the scope and purview of the taxing Act.

Article 7066b, Vernon's Texas Civil Statutes, levies the following occupation tax upon the gross receipts of each "motor bus company," "motor carrier" or "contract carrier:"

"(a) Each individual, partnership, company, association, or corporation doing business as a 'motor bus company' as defined in Chapter 270, Acts Regular Session of the Fortieth Legislature, as amended by the Acts of 1929, First Called Session of the Forty-first Legislature, Chapter 78, or as 'motor carrier' or 'contract carrier' as defined in Chapter 277, Acts Regular Session of the Forty-second Legislature, over and by use of the public highways of this State, shall make quarterly on the first day of January, April, July, and October of each year, a report to the Comptroller, under oath, of the individual, partnership, company, association, or corporation by its president, treasurer, or secretary, showing the gross amount received from intrastate business done within this State in the payment of charges for transporting persons for compensation and any freight or commodity for hire, or from other sources of revenue received from intrastate business within this State during the quarter next preceding. Said individual, partnership, company, association, or corporation at the time of making said report, shall pay to the State Treasurer an occupation tax for the quarter beginning on said date equal to two and two tenths (2.2) per cent of said gross receipts, as shown by said report. Provided, however, carriers of persons or property who are required to pay an intangible assets tax under the laws of this State, are hereby exempted from the provisions of this Article of this Act."

The above tax Act refers to Chapter 277, Acts, Regular Session, 42nd Legislature, Article 911b, Vernon's Texas Civil Statutes, for the definition of a "contract carrier," subject to the tax thereby levied.

We quote said definition from the statute advised to:

"(h) The term 'contract carrier' means any motor carrier

as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."

"Motor carrier" as used in the foregoing definition, is, in turn, defined by subdivision (g) of said Act as follows:

"The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever, owning, controlling, managing, operating or causing to be operated any motor propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided that the term 'motor carrier' as used in this Act shall not include and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns." (Emphasis ours)

The requirements of the statutory definition of a "motor carrier," underlined above, have, by our opinion No. O-1592, been held to be met and satisfied where two or more incorporated cities, towns or villages are involved or traversed by a person, firm or corporation transporting property for hire, even though such incorporated city, town or village is not the point of origin or the terminus of the shipment. We believe such opinion to be determinative of the status of the subject concern as a "motor Carrier," subject to the jurisdiction of the Railroad Commission and this gross receipts tax, despite the fact that the goods transported are picked up and delivered on army posts, camps, depots and sites and not in incorporated cities, towns or villages, provided two or more incorporated cities, towns or villages are traversed en route. We enclose a copy of such opinion for your consideration.

It remains to be determined whether or not the "contract carrier" in question is exempt from reporting and paying the occupation tax levied by Article 7066b, Vernon's Texas Civil Statutes, by virtue of the fact that its gross receipts, upon which said tax is computed under the Act, are derived exclusively from payments or compensation from the United States of America for the transportation of property for and on behalf of the Army of the United States. The only theory upon which such immunity from State taxation could rest in the instant case would be that the levying of such tax upon gross receipts derived from the U. S. Treasury would be tantamount to a tax burden upon the United States Government or an agency or instrumentality thereof and therefore unconstitutional. We will address ourselves to that point.

The incidence of the tax levied upon a "contract carrier" falls squarely upon such carrier, for the privilege of conducting the business allowed by its permit and there is no requirement in the statute that

such tax should be passed on and collected from the shipper or the person paying for such transportation services. The tax is an occupation tax directly upon the person, firm or corporation pursuing the described business, and the quarterly gross receipts are merely used as a medium for computing such tax, the source of such receipts being of no materiality. Even though the amount of such tax should, as a matter of sound business practice, be passed on to the Federal Government, as part of the cost or compensation for transporting goods for the Army, nevertheless, such tax or burden would be too remote and indirect to be considered unconstitutional.

The situation is analogous to that before the United States Supreme Court in *James v. Dravo Construction Co.*, 302 U. S. 134, wherein it was held that the State of West Virginia might collect a tax of 2% on the gross receipts of a contractor from work performed by him in the construction of dams and locks for the Federal Government in the State. Chief Justice Hughes, in the opinion in that case declared, at page 160;

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In *Trinity Farm Construction Co. v. Grosjean*, 291 U. S. 466, the taxpayer entered into a contract with the Federal Government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax on the gross receipts of the contractor in the *Alward* case (*Alward v. Johnson*, 282 U. S. 509) might have increased the cost to the government of the carriage of the mails did not impress the Court as militating against its validity."

While the *Dravo* case was decided by a divided court, its authority cannot now be questioned, having been recently cited with approval by the United States Supreme Court in the opinion by Chief Justice Stone, announcing the unanimous decision of the court in *Alabama v. King*

& Boozer, 86 L. Ed. 1, wherein a state sales tax of 2% upon building materials was sustained as applying to materials purchased by a contractor engaged in constructing an army camp for the United States under a "cost-plus-a-fixed-fee" contract. We quote from the opinion in the King & Boozer case:

"So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory, of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi (277 U. S. 218) and Graves v. Texas Co. (298 U. S. 393), we think it no longer tenable."

We think the question submitted by you is foreclosed by the above decisions and should accordingly be answered in the negative.

Yours very truly

ATTORNEY GENERAL OF TEXAS

BY s/Pat M. Neff, Jr.
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PMN:ej:wc

APPROVED APRIL 8, 1942
s/Grover Sellers
FIRST ASSISTANT
ATTORNEY GENERAL

Approved Opinion Committee By BWB Chairman