



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

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

Dear Sir:

Opinion No. G-4867

Re: Whether artificial gas distributor whose office and storage rooms are located outside the corporate limits, who delivers such gas, by truck, to customers within an incorporated city is subject to gross receipts tax levied by Art. 7060, V.A.C.S.

Your letter of September 25, 1942 presents the following facts:

"A liquefied petroleum gas distributor whose office and storage rooms are not located within any incorporated city sells such gas and makes deliveries of same to customers within the corporate limits of a city of more than 1,000 inhabitants, according to the last Federal Census. Such deliveries are made by truck. The customer owns all equipment necessary for the utilization of the gas thus delivered."

You request the opinion of this department as to whether the tax levied by Art. 7060, V.A.C.S. will apply to the distributor above described.

Article 7060, V.A.C.S. reads, in part, as follows:

"Each individual, company, corporation, or association owning, operating, managing, or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric lights, electric power, or water, shall make quarterly, on the first day of January, April, July,

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and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer, or superintendent of such company, or corporation, or association showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water for the quarter next preceding. Said individual, company, corporation, or association, at the time of making said report for any such incorporated town or city of more than one thousand (1,000) inhabitants, and less than two thousand, five hundred (2,500) inhabitants, according to the last Federal Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to forty-four hundredths (.44) of one (1) per cent of said gross receipts, as shown by said report. . . "

The only question presented is whether the distributor is operating a "gas-works" or a gas "plant" "within an incorporated town or city" within the meaning of Article 7050. In discussing this statute the Commission of Appeals, in the case of Utilities Natural Gas Company v. State, 126 S.W. (2d) 1153, in an opinion adopted by the Supreme Court, said:

"The main object of this statute is the laying of an occupation tax against those who engage in a business of the character defined in the statute. The subject matter in respect to which the tax is imposed is a business bearing the characteristic marks specified in the statute. With reference to the business of a gas company, these characteristic marks include, among others which need not be noticed at this time, a gas-works located in any incorporated city in this State which is 'used for local sale and distribution' of gas in said city or town."

In the same case the court makes the further statement that:

"Since, therefore, the use of 'gas-works' in a city or town in this State, for the distribution of gas in said city or town is, by

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statute, made an essential characteristic of the business taxed, it follows that the business in which the plaintiff is engaged, as disclosed by the undisputed facts, is not subject to the tax which this statute provides."

The court had before it the question of whether a gas distributor whose pipe line extended into the city, from which gas was there delivered to a single customer was liable for the tax. As will be seen from the above quotations, the court in holding that such distributor was not liable for the tax construed the statute to levy the tax upon the occupation which has the following characteristic marks: 1. The gas plant must be located within the incorporated city and 2. It must be used for the "local sale and distribution" of gas in such city or town.

The word "located" "has been variously defined as fixed; fixed in place; placed; situated." 38 C.J. 132. The various definitions are synonymous, if not identical, in meaning. They certainly convey clearly the ordinary signification of the word "locate." Thus, paraphrasing the statute, we may say that in order to become subject to the tax levied by Article 7060, V.A. C.S. the gas distributor must (1) own, operate, manage or control a gas plant fixed in place, placed or situated within an incorporated city or town and (2) must use such plant for the local sale and distribution of gas in such city or town.

We think that, under the facts submitted, there is no "gas plant" located within the incorporated city, where the gas is distributed by truck to the customers in the city, and since this is true one element of liability is lacking. Consequently, we hold that the distributor described by you is not subject to the tax. This holding, however, is limited to the fact situation stated in your inquiry, viz: where the distributor owns no machinery, fixtures, equipment or appliances used for the local sale and distribution of gas and located within the city.

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Our opinion No. O-3776 states that:

"It is the opinion of this department in line with the above quoted cases that any individual or corporation selling or distributing liquid petroleum gas to more than one consumer in any incorporated city within the population brackets stated in Article 7060, as amended by House Bill 8, Acts of the Forty-seventh Legislature, 1941, would be subject to the gross receipts tax levied therein."

We were there discussing a fact situation where the plant of the distributor was located within the incorporated city. To the extent that such statement is applicable to distributors whose plants are not located in the incorporated city it is dictum, and it is not applicable to the fact situation here under consideration.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

BY *Fowler Roberts*
Fowler Roberts
Assistant

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APPROVED OCT 15, 1942

Gerard C. Mann

ATTORNEY GENERAL OF TEXAS

