1981 S.C. Op. Atty. Gen. 93 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-69, 1981 WL 96595

Office of the Attorney General

State of South Carolina
Opinion No. 81-69
July 21, 1981

***1 SUBJECT: State Agencies—Statutory Construction—Rules and Regulations—Taxation and Revenue—Interstate Commerce**

(1) Assessment provided for in Section 39–33–40 of Code of Laws, 1976, as amended, may properly be assessed on milk which is processed and/or packaged in South Carolina but sold out of State.

TO: Mr. Charles Shaw
Executive Director
State Dairy Commission

QUESTION:

1. Does the assessment provided for in Act No. 82 of the 1981 Acts and Joint Resolutions of the South Carolina General Assembly amending Section 39–33–10 et seq., of the South Carolina Code (1976) apply to milk which is processed and/or packaged in South Carolina but which is sold out of State.

OPINION:

In reference to the question asked, the Section of Act No. 82 of the 1981 Acts and Joint Resolutions of the South Carolina General Assembly which amends Section 39–33–40 of the South Carolina Code (1976) reads in pertinent part:
The commission shall prepare an annual budget and shall collect from licensed distributors, in the form of a monthly assessment on each hundred pounds of milk handled or sold in this State, the sum of money required for this budget. (Emphasis added).

From a reading of the Section in question, it is clear that the word ‘or’ is used in its normal and usual sense as a disjunctive particle which indicates an alternative such as either one or another. United States Fidelity and Guaranty Co. v. Security Federal and Loan Co. 248 S. C. 307, 149 S.E.2d 647 (1966); Brewer v. Brewer, 242 S.C. 9, 129 S.E.2d 736 (1963). Thus under the language of the statute, the assessment would apply to either milk which is ‘handled’ in South Carolina or milk which is ‘sold’ in South Carolina by a licensed distributor,' as defined in the Act, Section 39–33–10, ‘distributor,’ South Carolina Code (1976) as amended. Therefore, under the statute as construed, milk which is ‘handled’ in South Carolina but which is ultimately sold outside of the State would be subject to assessment. However, the validity of the assessment on such milk is dependent on the authority of the State to levy the assessment on such milk as a part of interstate commerce.

In Washington Revenue Department v. Stevedoring Association, 435 U.S. 734, SS L.Ed.2d 682, 98 S.Ct. 1386 (1978), the United States Supreme Court stated that it was proper for a State to exact from interstate commerce its fair share of the costs of state government and to levy against those services or activities performed within the State. The Court further stated that such assessments or taxes were not violative of the United States Constitution and in particular the commerce clause, if they:
(1) are applied to activity with a substantial nexus with the state;

(2) are fairly apportioned;

(3) do not discriminate against interstate commerce and;

(4) are fairly related to the services provided by the State.

***2** As applied to the present assessment, the assessment applies only to milk which is actually handled or sold by licensed distributors, as defined in Section 39–33–10, who are conducting business in the dairy industry within South Carolina and who are subject to the regulatory authority of the Commission under the Act. The assessment is applied evenly to each hundred pounds of milk which is actually handled or sold by the distributor as part of his doing business in the dairy industry of South Carolina. Since the assessment is made evenly on all milk handled or sold in the State, there is no overburdening or discrimination against interstate commerce nor is there any improper advantage given to milk which is handled totally intrastate. Finally the assessment is specifically limited to providing for the budget necessary for the Dairy Commission to provide the administrative and regulatory duties and services necessary to the regulation of the dairy industry in South Carolina, Section 39–33–10 et seq. Further in Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361, 11 L.Ed.2d 389, 84 S.Ct. 378 (1973), the Court found that a Florida regulatory fee assessed on each gallon of milk handled by Florida distributors regardless of where purchased or to whom it was eventually sold which abated at any time during the year when the fees collected exceeded a certain percentage of the expenses of the Florida Dairy Commission and which was established for the avowed purpose of financing the activities of the Commission was a valid exercise of the State's authority to levy the assessment. The Court further found that the activity of processing or bottling milk in Florida was a substantial activity occurring within the State of Florida which was a proper subject of taxation. (Emphasis added). Therefore, the present assessment as applied to milk which is processed and/or packaged in South Carolina by licensed distributors doing business in the State but which is sold out of State is a valid exercise of the authority of the State to assess such a regulatory fee.

It is the opinion of this Office that the assessment established in the Act applies to milk which is processed and/or packaged in South Carolina by licensed distributors doing business in the State, but which is sold out of State.

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