1978 S.C. Op. Atty. Gen. 154 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-119, 1978 WL 22588

Office of the Attorney General

State of South Carolina
Opinion No. 78-119
June 20, 1978

***1 SUBJECT: Corporate License Fees**

The state may subject a corporation organized pursuant to the laws of a state to the South Carolina business license tax. The tax must, however, apply only to a corporation with substantial nexus with the state, it must be properly apportioned, it cannot discriminate against interstate commerce and it must be fairly related to the services and protections provided by the state.

TO: Mr. C. H. Brooks
Director
Income Tax Division

QUESTION:

Does the South Carolina annual report and corporate license requirement violate the import-export clause or the commerce clause of the United States Constitution if it is applied to a steamship company with an office in Charleston that provides a transportation service of moving ocean freight inward and outward between Charleston, Europe, the Far East and the West Coast?

CONSTITUTIONAL AUTHORITIES:

'The Congress shall have power * * *

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *.' United States Constitution, Article I, § 8, Clause 3.

'No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.' United States Constitution, Article I, § 10, Clause 2.

STATUTORY AUTHORITIES:

Chapter 19 of Title 12 of the 1976 Code of Laws.

Chapter 19 of Title 12 of the 1976 Code of Laws provides for the license fees of corporations. Section 12–19–20, as amended, specifically requires an annual report of any corporation required to file an income tax return. Section 12–19–70 generally provides for the license fee of corporations at the rate of one mill upon each dollar paid to the capital stock. Section 12–19–80 provides for proration of the license tax where a corporation does business in part within the state and in part without the state. The proration must be according to the ratios prescribed for determining income tax, namely the ratios set forth in § 12–7–1140 to § 12–7–1170 and § 12–7–1190 of the Code.

The Import-Export Clause

On April 28, 1978, the United States Supreme Court in the case of Washington Revenue Department v. Washington Stevedoring Companies, see CCH 200–013, examined the Washington business and occupation tax as it applied to stevedoring. Relying principally upon its decision in Michelin Tire Corp. v. Wages, 423 U. S. 276, it held that the tax was not prohibited by the import-export clause. An ad valorem tax upon imported tires and tubes had been upheld in Michelin.

In the two decisions, the court examined the history of the Constitution and the policies of the clause and said that the tax did not threaten the policies of precluding state disruption of foreign policy, protecting federal revenue and avoiding friction and trade barriers among the states. In both cases, the court found that the tax was not an impost or duty.

***2** The court also, in the stevedoring case, considered that the tax was not a tax upon the goods but was upon the business of loading and unloading ships, i.e., the business of transporting cargo within the state. No foreign business or vessel was taxed although the activity occurred upon goods in transit. The tax was held to be indirect and inconsequential and in reasonable relationship with the services and protection provided by the state.

Finally, the court expressed its desire to avoid interstate friction and related the commerce clause principles to the import-export clause. It said that frictions between the states will be vindicated if the tax falls upon a taxpayer with reasonable nexus to the state, is properly apportioned, does not discriminate and relates reasonably to the services provided by the state. See Canton R. Co. v. Rogan, 340 U. S. 511.

Commerce Clause

The Washington Revenue Department case, supra, overruled Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90, and Joseph v. Carter & Weeks Stevedoring Co., 330 U. S. 422. The cases were overruled because of the analysis and reasoning set forth in Complete Auto Transit v. Brady, 430 U. S. 274, which held that under appropriate conditions a state may tax directly the privilege of conducting interstate business. The gross receipts tax in Complete Auto was sustained against a corporation transporting motor vehicles in interstate commerce. The court recognized that a state has a significant interest in exacting from interstate commerce its fair share of the cost of government. Only when a tax unfairly burdens commerce with more than a just share from interstate activity will it fall.

Again the principle referred to above was followed that a tax will be sustained if it is applied to an activity with substantial nexus with the state, is properly apportioned, does not discriminate against interstate commerce and that is fairly related to the services provided by the state. General Motors Corp. v. Washington, 377 U. S. 436; Northwestern Cement Co. v. Minnesota, 358 U. S. 450, Memphis Gas v. Stone, 335 U. S. 80, Wisconsin v. J. C. Penney, 311 U. S. 435, and Colonial Pipeline Co. v. Traigle, 421 U. S. 100.

The South Carolina Taxing Statutes

It appears clearly from the above that the state may impose the license tax. The tax, however, must be apportioned so as to avoid multiple tax burdens on interstate commerce. Complete Auto Transit v. Brady, supra. Judge Spruill, in Plantation Pipe Line Co. v. South Carolina Tax Commission and Colonial Pipeline Co. v. South Carolina Tax Commission, in 1973 in a Circuit Court decision, upheld the South Carolina license tax on the basis that it was properly apportioned to activities of the pipeline companies in South Carolina. See also Mid-Valley Pipeline Co. v. King, 431 S. W. 2d 277; Roadway Express, Inc. v. New Jersey, 50 N. J. 471, 236 A. 2d 577, cert. denied 390 U. S. 745; Memphis Natural Gas v. Stone, 355 U. S. 80.

***3** In Complete Auto, the court further recognized that it must correct errors of apportionment where they occur.

CONCLUSION:

The state may subject a corporation organized pursuant to the laws of a state to the South Carolina business license tax. The tax must, however, apply only to a corporation with substantial nexus with the state, it must be properly apportioned, it cannot discriminate against interstate commerce and it must be fairly related to the services and protections provided by the state. The question whether or not the South Carolina statutes satisfactorily apportion the tax is not the subject of this opinion. Further factual information would be necessary to render an opinion on apportionment.

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