1974 S.C. Op. Atty. Gen. 91 (S.C.A.G.), 1974 S.C. Op. Atty. Gen. No. 3730, 1974 WL 21248

Office of the Attorney General

State of South Carolina
Opinion No. 3730
March 8, 1974

***1 Section 65–609 improves a license fee on gross receipts which include receipts from local sales of electricity which, although marketed in this state, is generated in another state.**

Director
Income Tax Division
South Carolina Tax Commission

This is in reply to your recent request for an opinion of this office with regard to the application of Section 65–609 of the Code. That Section imposes an annual license fee on utilities based on the entire gross receipts from business within this State. The phrase 'from business within this State' has been the subject of two earlier opinions of this office dated January 29, 1970 and November 9, 1973. The 1970 opinion held that receipts received by a utility for interstate business would not be within the measure of the tax provided for by Section 65–609. The 1973 opinion involved a telephone company and stated that receipts from calls which originated or terminated in another state were interstate transactions and, therefore, should be excluded from the tax base. In addition to the authority stated in that opinion, this result is also dictated by the 1935 United States Supreme Court opinion of *Cooney v. Mountain States Telephone and Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477.

The question to be decided now is whether the gross receipts from certain sales of electricity to South Carolina residents should be excluded because the electricity, although marketed in South Carolina, is generated in another state. If these sales are interstate transactions, they must be excluded from gross receipts; first, because it is our opinion that the statute does not attempt to reach them and, secondly, because as stated in *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 58 S. Ct. 72, a gross receipt tax on interstate commerce violates the provisions of the Commerce Clause of the United States Constitution.

Because the limitations which the Commerce Clause places on state taxation have never been defined by the Congress, but instead have been decided in the courts on a case by case basis, the facts of a particular case must be closely scrutinized before any determination can be made. The situation you have described is that of an electric company which services a number of cities in South Carolina. The company generated, transmits, distributes and markets electricity in this State. It maintains offices in the localities which it serves. All of this business is clearly intrastate. However, the question has arisen over certain electric power which, although distributed and marketed here, is generated by the company in North Carolina. When generated, the electricity is carried over highvoltage transmission wires. It is then stepped down in a transformer and conducted in distribution lines to the ultimate consumer. The sale is made to the consumer when he switches on the current.

A closely analogous question was presented to the United States Supreme Court in the case of *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465, 51 S. Ct. 499, when Ohio included in its gross receipts tax certain receipts from the sale of gas which had been transmitted from West Virginia. The Court held:

***2** '* * * when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas

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in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. * * *. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State.'

In the case of *South Carolina Power Co. v. South Carolina Tax Commission*, 52 F. 2d 515 and 60 F. 2d 528 (after final hearing), the Fourth Circuit Court of Appeals decided that sales of electricity generated in another state but distributed and marketed in this State were subject to the South Carolina power tax now imposed by Section 65–901 of the Code. The power tax specifically excludes 'electric power manufactured or generated in another state and brought into this State until such power has lost its interstate character and immunities.' The Court, in including sales to South Carolina customers of electricity brought in from another state, relied heavily on the *East Ohio Gas Co. case* and stated:
'The high-voltage current which comes into the state is not sold. It is used to induce in the transformer the low-voltage current which is sold. Even if the current sold be considered as the current which is brought in, it has gone through a process in which it has been 'broken up' or changed from one current of high voltage to many currents of law voltage; * * *.'

In the case of *Norton Co. v. Department of Revenue of State of Illinois*, 340 U. S. 534, 71 S. Ct. 377, the Supreme Court had before it a privilage tax based on gross receipts from sales of merchandise manufactured by the seller in another state. The Court held that when a corporation has gone into a state to do a local business, it can avoid taxation on receipts from certain sales only by showing that the particular transactions are disassociated from local business and are interstate in nature.

It is the opinion of this office that an electric company which is engaged in the business of marketing and distributing electricity in South Carolina is subject to a license fee based on its gross receipts from customers in this State and that these receipts must include sales of electricity to South Carolina customers, even though the electricity is generated by the company in another state.

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