

1015.

APPROVAL, BONDS OF TIPPECANOE VILLAGE SCHOOL DISTRICT,
MIAMI COUNTY, OHIO—\$4,800.00.

COLUMBUS, OHIO, September 17, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1016.

GASOLINE—DEALER DEFINED— DELIVERIES FROM OUT OF STATE—
REPORTS TO TAX COMMISSION.

SYLLABUS:

1. *A person, firm or corporation, transporting from outside the State of Ohio and delivering to persons within this state, gasoline in tank cars, tank wagons or drums, is not a "dealer" within the definition of that term as contained in the provisions of Section 5526 of the General Code of Ohio, where such delivery is made to the purchasers in such original tank cars, tank wagons or drums.*

2. *Every person, firm or corporation transporting gasoline from outside of the State of Ohio to persons within this state, in any manner whatsoever, is required by the terms of Section 5529-3, General Code, to make to the Tax Commission the report therein provided.*

3. *An Ohio refiner, who makes delivery of gasoline to another by pipe line, is a "dealer" within the definition of that term contained in Section 5526 of the General Code and such transaction does not come within the terms of Section 5526-4 of the General Code.*

COLUMBUS, OHIO, September 19, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your letter of September 8, 1927, as follows:

"The X company is a foreign corporation authorized to do business in Ohio and West Virginia and manufactures gasoline in the latter state which it sells to a resident of Ohio under the following plan. The company owns filling standards and tank equipment at Marietta Ohio, which are used in connection with the retail sale of the gasoline but which it rents to a tenant by whom these are operated. Tank wagons are filled with the fuel in Parkersburg and the entire contents delivered in Ohio to this tenant as purchaser. The company contends that it is engaged in interstate business, that

the tank wagons are 'cars or original containers' and that such purchaser is the 'dealer' all within the meaning of Section 5526.

The Z company manufactures gasoline in West Virginia and ships the same in fifty gallon drums to persons in this state. Some of these drums are brought by trucks into Ohio. In some cases the entire truck load is delivered direct to a single Ohio purchaser. In other cases the load is divided direct among several purchasers. In some cases the drums are shipped by rail and here again the entire shipment is sometimes to one consignee and sometimes to several. It is the claim of the company that in no case is it liable for the gasoline tax under our law.

The commission will be glad if you will give us your views with respect to the above."

Supplementing this letter you also wrote on September 12th the following:

"As analogous to the inquiries made in ours of September 8th with regard to the gasoline tax law the commission directs me to ask you whether or not under Section 5526-4 an Ohio refiner who sells and delivers gasoline by pipe line to an Ohio dealer is entitled to sell the same tax unpaid as though such fuel had been sold in tank car lots.

For your information we enclose you a copy of the pertinent part of a letter which we have this morning received from the refiner interested."

The copy referred to in this letter is:

"One of our customers has a bulk station within a half mile of our plant and for years we have delivered gasoline to them by pipe line.

These deliveries are made as required by the customer and the amount of each delivery, in gallons, is the equivalent of from three to six or more tank car lots. They are shown on our monthly reports to the commission as deliveries by pipe line and may be verified by reference to our books of record of sales.

While not actually shipped in tank cars, each delivery is much greater than any single car lot and we shall appreciate the kindness very much if your commission will grant us permission to make these deliveries Tax Unpaid."

Considering the two instances cited in your first letter, your question is whether the facts justify the two companies in claiming exemption from the definition of the term "dealer" as contained in Section 5526 of the General Code. The section, after defining very comprehensively the terms "motor vehicles", "motor vehicle fuels" and "dealer", contains the following proviso:

"Provided, however, that when any such person, firm, association, partnership or corporation so importing such motor vehicle fuel into this state, shall sell such motor vehicle fuel in tank car lots or in its original containers to any purchasers for use, distribution or sale and delivery in this state, then such purchasers and not the seller shall be deemed the dealer as to the motor vehicle fuels contained in such tank car lots or original containers."

In the first instance you cite the delivery is made by a foreign corporation to a resident of Ohio in tank wagons. The foreign corporation is qualified to do business in this state and actually owns the filling standards and tank equipment used by

its customer in Marietta. This equipment is rented by the tenant. These latter facts, however, in my opinion, are immaterial so long as there is nothing to show that the relation is a mere subterfuge.

It is quite obvious that the delivery is made from West Virginia to Ohio in a single container, and that the transaction is single, continuing from the filling of the wagon in West Virginia to its delivery to the tenant in Ohio. I have no difficulty in reaching the conclusion that such transaction is within the express language of the exception heretofore quoted from Section 5526 of the General Code. Although the delivery, of course, is not in tank car lots, it certainly is in the original containers in the sense that it is in the original container in which it is brought across the state line. Even though the language of the statute were not so specific, I should be compelled to hold that the transaction in question constitutes interstate commerce, and, therefore, that the state has no power to impose a tax thereon.

It is unnecessary to review the decisions of the Supreme Court of the United States in which the "original package" doctrine is laid down. I call your attention, however, to the opinion of this department, No. 585, rendered to your commission on June 8, 1927, in which reference is made to two late decisions of the Supreme Court of the United States on the question of interstate commerce. The two authorities cited, namely, *Pennsylvania Gas Co. vs. Public Service Commission*, 252 U. S. 23, and *Public Utilities Commission vs. Attleboro Steam & Electric Co.*, decided January 3, 1927, Vol. 47, Supreme Court Reporter (Advance Sheets), p. 294, are pertinent here and warrant the conclusion that, in the present instance, the transaction is one in interstate commerce and so beyond the taxing power of the state. It follows, therefore, that in the first instance the tenant in Ohio must be regarded as the "dealer" within the terms of the gasoline tax law.

There is no difference in principle between the facts in the first instance cited and those relative to the second transaction. In this case, however, the shipment is made in fifty gallon drums to persons in this state and transportation effected either by trucks or rail. While it is true that in this instance single truck loads may be divided among several consignees, yet the drums which constitute the original containers are not, as I understand it, themselves divided. These drums being the original container, I am of the opinion that here again the express language of the proviso of Section 5526 is applicable, and, even if this were not so, under the uniform rulings of the Supreme Court of the United States, the state would be without power to tax the transaction, constituting as it does interstate commerce. It follows that the individual purchaser in Ohio and not the company shipping the gasoline into this state must be regarded as the dealer.

In connection with your inquiry, I direct your attention to the recent amendment of the law relating to the gasoline tax as found in House Bill No. 177 of the 87th General Assembly. Sections 5529-2 and 5529-3 of the General Code, as therein enacted are as follows:

Sec. 5529-2. "Every person, firm, association, partnership or corporation purchasing motor vehicle fuel in tank car lots, and selling the same for delivery in Ohio not required by the provisions of Section 5528 of the General Code to register as a dealer in motor vehicle fuel, shall make a report on or before the fifteenth of each month to the tax commission of Ohio of all such purchases and sales on forms prescribed by the Tax Commission of Ohio, giving a record of each tank car delivered to a point within Ohio and in addition furnish any other information the Tax Commission of Ohio may require relative to such purchases and sales. Such record shall show from whom each such car was purchased, point of shipment, to whom sold, point

of delivery, date of shipment, initials and numbers of each tank car, and the quantity contained in gallons as shown by invoice.

Any person, firm, association, partnership or corporation purchasing motor vehicle fuel in tank car lots, and selling the same for delivery in Ohio, not required by the provisions of Section 5528 of the General Code to register as a dealer in such fuel, failing to submit reports of tank car lot purchasers and deliveries of motor vehicle fuel when the same is delivered to a point within Ohio within fifteen (15) days after the end of the month in which the purchases and deliveries have been made shall be guilty of a misdemeanor and shall be fined an amount not greater than one hundred (\$100.00) dollars for the first offense and shall be fined an amount not less than one hundred (\$100.00) dollars nor more than one thousand (\$1000.00) for each subsequent offense."

Sec. 5529-3. "Every railroad company, every street, suburban or interurban railroad company, every pipe line company and every water transportation company transporting motor vehicle fuel as defined in Section 5526 and 5526-1 of the General Code, either in interstate or in intrastate commerce, to points within Ohio and every person, firm, association, partnership or corporation transporting motor vehicle fuel by whatsoever manner to a point in Ohio from a point without Ohio shall report all deliveries of motor vehicle fuel, so made, to points within Ohio to the Tax Commission of Ohio on forms prescribed by said commission.

Such reports shall cover monthly periods, shall be submitted within sixty (60) days after the close of the month covered by the report, shall show the name and address of the person, firm, association, partnership or corporation to whom the deliveries of motor vehicle fuel have actually and in fact been made, the name and address of the originally named consignee, if motor vehicle fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each car, if shipped by rail, the quantity of each shipment and delivery in gallons, the date delivered, the name of the person, firm, association, partnership or corporation to whom delivered, the point of shipment, the point of delivery, the name of the boat or barge if delivered by water and if delivered by other means, the manner in which such delivery is made."

I believe it is apparent that Section 5529-2 has no application to either instance you cite. Since the report therein required is from any one purchasing motor vehicle fuel *in tank car lots* and selling same for delivery in Ohio, and inasmuch as the deliveries in Ohio in the instances you cite are not made in tank car lots, I feel that this section has no application. Section 5529-3 of the Code, however, should be of assistance in the administration of the law since it requires every person, firm, association, partnership or corporation transporting motor vehicle fuel by whatsoever manner to a point in Ohio from a point without Ohio, to report such delivery to the Tax Commission on forms prescribed by the Commission. It is therefore incumbent upon both of the companies cited in your first letter to make the report therein provided, which should furnish the commission an adequate check upon those who, within the terms of the statute, are "dealers".

While, as I have before pointed out, the authorities are uniform that no tax may be imposed on interstate commerce, it does not follow that reasonable regulations and requirements helpful to the administration of law may not be imposed, although they may incidentally in some measure affect interstate commerce. Such reasonable requirements have been uniformly upheld by the Supreme Court of the United States,

and I feel that the one here under consideration is in all respects reasonable and does not impose any unnecessary burden upon interstate commerce.

Your further question in the supplemental letter is whether an Ohio refiner may sell and deliver gasoline by pipe line to an Ohio dealer without paying the tax thereon. Their claim for authority to deliver the gasoline without the payment of the tax is based upon Section 5526-4 of the General Code, enacted in House Bill 177 of the 87th General Assembly, which is as follows:

"In the event any person, firm, association, partnership, or corporation producing, refining, preparing, distilling, manufacturing or compounding motor vehicle fuel in Ohio, shall sell such motor vehicle fuel in tank car lots to any purchaser who is duly registered as a dealer under the provisions of Section 5528, General Code, then such purchaser and not the seller shall be deemed the 'dealer' as to the motor vehicle fuel contained in such tank car lots."

The exemption therein authorized is only in favor of one selling motor vehicle fuel *in tank car lots*. In the instance you cite, delivery by pipe line apparently normally exceeds the volume of a tank car lot, and it is insisted that this authorizes the application of the exemption to such delivery.

This section, constituting as it does an exception to the otherwise general application of a tax law, must be strictly construed. I do not feel warranted in extending the language to delivery other than in tank car lots. Especially is this true in view of the provisions of Section 5529-3 of the Code, hereinbefore quoted. You will observe that this section requires every common carrier transporting motor vehicle fuel, either in interstate or *intrastate* commerce to a point within Ohio, to make the report therein provided to the Tax Commission. The filing of such reports will obviously provide the commission a method of checking deliveries by tank car from refiners to customers in Ohio, and so facilitate the collection of the tax from the customer. No such additional check, however, exists in case of deliveries by pipe line, and I therefore do not feel warranted in extending the exemption provided for by Section 5526-4 of the General Code beyond its express terms.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1017.

DOG WARDEN'S SALARY—HOW DOG AND KENNEL FUND MAY BE APPROPRIATED.

SYLLABUS:

By the terms of Section 5652-13, General Code, the amount of money which the board of county commissioners may lawfully appropriate out of the dog and kennel fund for the salary of a county dog warden and deputies is a matter within its discretion; but in no event may such board appropriate more than fifty percent of the gross receipts of such fund for the purpose of defraying the necessary expenses of registering, seizing, impounding and destroying dogs in accordance with the provision: