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EXCISE TAX— TRANSMISSION OF ELECTRIC CURRENT PURCHASED IN WEST VIRGINIA INTO OHIO AND THE SALE THEREOF DIRECT TO CONSUMERS IS INTERSTATE COMMERCE AND NOT SUBJECT TO EXCISE TAX PROVIDED IN SECTION 5483, GENERAL CODE.

SYLLABUS:

The transmission of electric current purchased in West Virginia into Ohio and the sale thereof direct to consumers, is interstate commerce, and the receipts therefrom are not to be included in computing the excise tax provided in Section 5483, General Code.

COLUMBUS, OHIO, June 8, 1927.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date, requesting my opinion, is as follows:

"The W. Electric Company, a foreign corporation, purchases electric current at a point in West Virginia and brings it by a transmission line across the Ohio River into this state where it is turned through proper apparatus into the electric distribution systems of two Ohio municipalities and there sold directly to consumers.

Following an opinion of one of your predecessors in office to be found on page 625 of Volume I of the Opinions of the Attorney General for 1912, this commission has been holding that the interstate character of the transaction ceases when the current reaches the distribution system; a view in which the company acquiesced until 1926. The claim is now made that the commission when so holding was, and is, in error and that the whole transaction, including the distribution and sale of the current to the individual consumers, is in interstate commerce and the receipts therefrom are exempt from excise tax.

We take the liberty of transmitting to you a brief which has been filed with us in behalf of the company.

Please advise us if we shall continue to hold as we have done in the past or shall we concede that the proceeds of the sales of current are not subject to excise tax."

I have considered the opinion of my predecessor, referred to by you, and the brief of counsel for The W. Electric Company submitted with your letter.

Sections 5474, 5475, 5476 and 5483, General Code, are as follows:

"Sec. 5474. In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business

or business done for the Federal Government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state."

"Sec. 5475: On the first Monday of September, the commission shall ascertain and determine the entire gross receipts of each electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then next preceding the first day of May and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the Federal Government."

"Sec. 5476: The amount so ascertained by the commission, in such instance, for the purpose of this act, shall be the gross receipts of such electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling or water transportation companies for business done within this state for such year."

"Sec. 5483. In the month of October, annually, the auditor of state shall charge, for collection from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent of all such gross receipts, which tax shall not be less than ten dollars in any case."

These sections expressly exempt from the excise tax provided in Section 5483, General Code, *supra*, receipts from interstate business. The sole question to be determined is, whether the purchase of electric current by The W. Electric Company in West Virginia, the transportation across the line and the distribution thereof direct to consumers in Ohio, constitutes interstate commerce.

The opinion of my predecessor, dated September 27, 1912, and reported in Vol. I, Annual Report of Attorney General for 1912, p. 625, dealt with this same question, except that the commodity was natural gas instead of electric current. The conclusions reached were:

1. That natural gas produced in West Virginia, transported across the state line and delivered to a distributing company in Ohio, was up to the point of such delivery interstate commerce.

2. That the delivery of the same gas direct to consumers in Ohio ceased to be interstate commerce when the purely transportation operation ceased and the distribution began.

While the first conclusion is consistent with the later decisions of the courts hereinafter referred to, the reasoning in support of the second conclusion, while consistent with the then existing authorities, has not been adopted by the later decisions, and the conclusion reached is not supported thereby.

A number of cases might be cited and discussed, but the question is disposed of by two decisions of the Supreme Court of the United States rendered since that opinion was written.

In *Pennsylvania Gas Company vs. Public Service Commission*, 252 U. S., 23, it was held:

"We think that the transmission and sale of natural gas produced in

one state, transported by means of pipe-lines and directly furnished to consumers in another state, is interstate commerce. * * *

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York * * * . Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single, and is, in our opinion a transmission in interstate commerce. * * * ”

In *Public Utilities Commission vs. Attleboro Steam & Electric Co.*, decided Jan. 3, 1927, Vol. 47, Supreme Court Reporter (Advance Sheets), p. 294, it was held:

“The transmission of electric current from one state to another, like that of gas, is interstate commerce.”

These cases are decisive of your question, and you are therefore advised that the proceeds of the sale of the current in question are not subject to the excise tax provided in Section 5483, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

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APPROVAL, BONDS OF CITY OF CAMPBELL, MAHONING COUNTY—
\$32,825.43.

COLUMBUS, OHIO, June 8, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

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APPROVAL, BONDS OF HARDIN COUNTY—\$8,205.00

COLUMBUS, OHIO, June 8, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

588.

APPROVAL, NOTES OF SCHOOL DISTRICTS IN ASHTABULA AND
MONROE COUNTIES.

COLUMBUS, OHIO, June 8, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.