Telephone Instruments, When Subject to County License. Licenses, on Telephone Instruments.

Where a monthly or other periodical rent is charged a subscriber for purely local conversations over a telephone instrument, such instrument is liable for a county license notwithstanding the fact it may also be used in interstate conversations. Where no local rent is charged for an instrument, it is liable for a county tax unless the telephone company can show that one or more bona fide interstate conversations had been held over it during the year.

Helena, Montana, March 1, 1910.

Hon. A. C. Spencer,
County Attorney,
Red Lodge, Montana.

Dear Sir—

I am in receipt of your letter of February 24, requesting an opinion upon the following proposition:

> "Under section 2773 of the revised codes of Montana and in accordance with the decision in the case of State vs. Rocky Mountain Bell Telephone Company, 27 Montana 394, how are phones used for 'strictly local or intra-state' business to be separated from phones used for inter-state business for the purpose of levying and collecting this license tax?"

The above question presents a somewhat difficult proposition.

In the case of State v. Rocky Mountain Bell Telephone Company, referred to above, the supreme court merely passed upon the constitutionality of said section 2773, and held that the phrase "doing business in this state," as used in such section, limited the license to purely local or intra-state business, and that it could not be imposed upon the inter-state business transacted over telephone instruments.

However, the question as to whether an instrument which was so situated that it could be used in inter-state business, but had never been so used, was subject to the tax, or the question as to whether an instrument which was used purely for local business, upon a rental basis, and was, or could be, used for inter-state business upon a toll rate, was not considered or passed upon in such case.

It seems now that the telephone company is making the contention that any instrument which is used in one bona fide conversation during any year becomes an instrument used in inter-state business, and, therefore, exempt from the license tax for that year.

Such question was raised in a case tried before Judge Callaway, at Dillon, a couple of weeks ago, and in that case the court held that if the telephone company could show by its records that an instrument had been used in a bona fide conversation with a person in another state that it was exempt from the license tax for that year, but that if the telephone company could not show such fact from its records that the instrument was liable to the license tax.

In our opinion, however, such decision is correct only in part and should be modified as follows:

Where a telephone instrument is installed, and a monthly or other periodical rent charged the subscriber for the purely local conversations had over such phone, and a toll charge is made against such subscriber when he talks to points beyond the jurisdiction covered by the rental charge, or to points without the state, then, in our opinion, the instrument is liable for the license tax, based upon the local business paid for by the rental charge.

Such was the conclusion reached by the supreme court of Utah, in the case of City of Ogden v. Crossman, 53 Pac. 985, and this case was cited and quoted from with approval by our supreme court in the case of State v. Rocky Mountain Bell Telephone Company, supra.

You will also notice that the Utah case was based largely upon the opinion of the supreme court in the case of Osborne v. State of Florida, 164 U. S. 650, and this decision of the United State supreme court has never been modified by that court, and was distinguished but not overruled in the recent case of Western Union Telegraph Company v. Kansas, decided on January 17, 1910.

Therefore, in our opinion, all telephones which pay a rental covering the purely local city or intra-state business should pay this license.

On the other hand, instruments for which a rental charge for local business is not made would not be subject to this license if a single bona fide inter-state conversation had been held over it during the year. On the other hand, if an instrument for which no rental for local business was charged was not used at all during the year for the purpose of carrying on a bona fide inter-state conversation, then, in our opinion, such instrument would be liable to the license, in accordance with the decision of Judge Callaway, and in all such cases the burden of proof is upon the telephone company to show that the instrument, not paying a rental for local business, has been actually used in at least one bona fide inter-state conversation during the year.

We understand the local authorities at Dillon are not appealing the case decided by Judge Callaway, but as we believe the above construction of the law the better rule, we would suggest that if the telphone company refuses to pay the license upon the basis herein indicated that you make a test case so that we can take the matter to the supreme court. It is possible that the facts can be agreed upon in an agreed case, pursuant to sections 7254 to 7256, revised codes.

Very truly yours,

ALBERT J. GALEN,

Attorney General.