Coal—License Tax on When Shipped from Another State.

Chapter 3 of the Extraordinary Session Laws of 1921 construed not to require a license tax upon coal shipped from another State when consigned directly to the consumer in the original package.

State Board of Equalization,
Helena, Montana.

Gentlemen:

You have requested my opinion whether the coal shipped into Montana from Wyoming and sold to Hardin Light & Power Co., by the Bair-Collins Co., of Forsyth, Montana, is subject to tax under Chapter 3, Extraordinary Session Laws of 1921.

As I understand the facts in this case, the Bair-Collins Co. owns a mine in Wyoming and is also the owner of the Hardin Light & Power Co., at Hardin, Montana. The coal in question is loaded into cars at the mine and shipped directly to the consumer at Hardin in the same cars.

This raises the question of interstate commerce, which has been the subject of much litigation and many opinions of the courts.

One of the leading cases on the subject is that of Askren v. Continental Oil Co., 64 L. Ed. 654, in which the Supreme Court of the United States, in considering a license tax on gasoline shipped into the taxing State from another State, used the following language:

> "As to the gasolene brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from an-

other state into his own state, for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasolene brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state.

"The plaintiffs state in the bills that their business in part consists in selling gasolene in retail in quantities to suit purchaser. A business of this sort, although the gasolene was brought into the state in interstate commerce, is properly taxable by the laws of the state."

The above case was again before the United States Supreme Court, and was decided on June 6, 1921. In deciding the case the lower court held that the business of the plaintiff was inseparable, and therefore, the tax was void. The Supreme Court reversed this finding, saying:

"The decree under review should be reversed, and the cause remanded, with directions to grant a decree enjoining the enforcement, as against plaintiff * * * of the excise tax upon the sale or use of gasolene only with respect to sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that state; but without prejudice to the right of the state, through appellants or other officers, to enforce collection of the excise tax with respect to sales of gasolene from broken packages in quantities to suit purchasers, notwithstanding such gasolene may have been brought into the state in interstate commerce, and with respect to any and all gasolene used by plaintiff at its distributing stations or elsewhere in the state in the operation of its automobile tank wagons or otherwise; and without prejudice to the right of the state, through appellants or other officers, to require plaintiff to render detailed statements of all gasolene received, sold, or used by it, whether in interstate commerce or not, to the end that the state may the more readily enforce said excise tax to the extent that it has lawful power to enforce it, as above stated."

Bowman v. Continental Oil Co., 65 L. Ed. 1139.

Where property which has moved in the channels of interstate commerce is at rest within a state and has become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon interstate commerce, and it

makes no difference that it ultimately reaches the hands of the consumer in the original package in which it was imported. This, however, has reference to property tax and not to excise tax.

Cases sustaining this conclusion are as follows:

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365;

Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382;

Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091;

May v. New Orleans, 178 U. S. 496, 44 L. Ed. 1165, 20 Sup. Ct. Rep. 976.

In the case of Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403, the court held that it makes no difference whence the property comes or to whom it should be ultimately sold, because upon its arrival in the State when it is offered for sale and intermingled with the general property of the State, it becomes and is a part of the taxable property of the State.

Applying to Chapter 3 above the rules established by the Supreme Court of the United States in the above cited cases, it is my opinion that coal shipped from without the State and consigned directly to the consumer is in interstate commerce and is not subject to the license tax provided by said Chapter 3, but that such coal consigned to the Bair-Collins Co., or to any person other than the consumer, and afterwards distributed to consumers in quantities to suit the purchaser, not in the original package, becomes commingled with the taxable property of the State and is subject to such tax.

Very truly yours,

WELLINGTON D. RANKIN,

Attorney General.