License Tax on the Sale of Gasoline—Whether Retroactive or Not—Determined Upon Sales Made Prior to the Passage of the Law.

The license tax provided for by Chapter 156 of the Laws of 1921 for the first quarter of the year 1921 should be computed upon the entire sales made during the quarter ending March 31, 1921, even though the law was not passed and approved until March 5, 1921.

The law is not invalid because retroactive.

J. W. Walker, Esq.,
State Treasurer,
Helena, Montana.

My dear Mr. Walker:

You have submitted for my opinion the question whether the license tax to be collected by you as of March 31, 1921, in connection with the business of selling or distributing gasoline provided by Chapter 156 of the Laws of 1921, approved March 5, 1921, should be determined by the sales for the entire quarter from January 1 to March 31, 1921, inclusive, or by the sale between March 5, the date of approval of the Act, and March 31, 1921.

The provisions of the law relating to the determination and time of payment of the license are as follows:

> "Section 2. Every distributor shall, for the year 1921, and each year thereafter, when engaged in such business in this State, pay to the State Treasurer a license tax for engaging in and carrying on such business in this State, in an amount equal to one cent for each gallon of gasoline, and one cent for each gallon of distillate refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into, and distributed or sold by him within this state, during such year; provided, however, * * *"

that goods in original packages, etc., are excepted.

> "Section 3. Every dealer shall for the year 1921, and each year thereafter, when engaged in such business in this state, pay to the State Treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in such business in this state, equal to one cent for each gallon of gasoline and one cent for each gallon of distillate sold or distributed by such dealer in this state during each year. Provided, however, * * *"

that goods in original packages, etc., are excepted.

> "Section 4. Such license tax shall be paid in quarterly installments for the quarters ending, respectively, March 31st, June 30th, September 30th and December 31st, in each year, beginning with the quarter ending March 31st, 1921, and the amount of such license tax becoming due for each quarter shall be paid to the State Treasurer within thirty days after the end of the quarter for which the same is due."

Section 5 provides for the keeping of records by distributors and dealers.

Section 6 requires duplicate forms of reports to be made to the State Board of Equalization and the State Treasurer within thirty days after the quarter ending March 31, 1921, and within thirty days after the end of each quarter thereafter.

> "Section 7. Each distributor and each dealer must, within thirty (30) days after the end of each such quarter, and at the same time the statement required by Section 6 of this Act is delivered to the State Treasurer, pay to the State Treasurer, the amount of the license tax shown by such statement to be due for the quarter for which the statement is made and filed."

The right of the Legislature of this State to provide for a license tax, measured by the amount of sales, or of business done, is settled in this State.

> State v. Hammond Packing Co., 45 Mont. 343;
> Equitable Life Assurance Co. v. Hart, 55 Mont. 76, 86.

The above quoted sections specifically require the payment within thirty days after March 31, 1921, of the license tax therein provided, the amount being measured by the number of gallons of gasoline distributed or sold during the quarter ending on that date.

It is clear that the intention of the Legislature was to provide for the payment of a tax based upon sales for the quarter ending March 31, 1921. Hence the conclusion is inevitable that the Act purports either to tax the privilege of selling or distributing gasoline during the first quarter of 1921, as well as during the quarters following the enactment of the law, or to require payment in advance for exercising that privilege after the passage of the Act. The question to be decided is therefore: Had the Legislature the power to give this Act an apparently retroactive effect, or to provide that on March 31, 1921, the end of the first quarter, a sum should be required of dealers in gasoline measured by the amount of gasoline sold during the entire quarter, a major portion of which quarter had passed prior to the date of the approval of the Act?

A license tax such as that here under consideration is not a tax upon property, but a tax upon the privilege of engaging in the business described in the Act.

Northwestern Mutual Life Ins. Co. v. Lewis & Clark Co., 28 Mont. 484, 490;
State v. Camp Sing, 18 Mont. 128;
State ex rel. Sam Toi v. French, 17 Mont. 54;
25 Cyc 597-598;
Gray's Limitations of Taxing Power, Sec. 67, Sec. 1403a et seq.;
Hudson on Taxation (2d Ed.), 335, 369 and 574;
Flint v. Stone-Tracy Co., 220 U. S. 107;
License Tax Cases, 5 Wall. 462;
Clark v. Titusville, 184 U. S. 329;
Sprekles Sugar Refining Co. v. McLain, 192 U. S. 397;
17 R. C. L., p. 474.

The payment required by the Act to be made within thirty days after March 31, 1921, computed on a basis of one cent per gallon for each gallon of gasoline or distillate distributed or sold during the quarter preceding is not a tax upon the business done during that quarter, but a condition precedent to the transacting, after the passage of the Act, of the business of distributing or selling gasoline at retail. It is a payment required in advance for the exercise of that privilege. (17 R. C. L., pp. 479, 480, Sec. 7, and cases cited.) It is analogous to the payment of fees required in advance from corporations desiring to transact business in this State in a corporate capacity. The value of the privilege of engaging or continuing in said business is measured by the volume of business transacted, and what more reasonable, accurate, or convenient measure

of such volume and consequently of the value of the privilege could be found than the number of gallons of gasoline sold during the preceding quarter?

The situation here presented is not different from that long existing in this State in connection with other license taxes required to be paid under laws applicable to corporations and insurance companies. The latter have long been required to pay a license tax measured by the volume of business transacted during the preceding year. (Chap. 79, Laws of 1917, as amended by Chap. 258, Laws of 1921.) The foregoing Act, which was approved March 3, 1917, contains the following provision relating to the requirement for the payment of the license tax during the year in which the law was enacted:

> "For the purpose of fixing the license fee to be paid for the year 1917, every corporation, subject to the license tax fee herein imposed, shall make the required return as to its annual net income for the year 1916 on or before the first day of May, 1917."

The obligation of such corporations to pay the entire license fee for the year 1917 has never been questioned in the courts, nor has it been claimed by any insurance company that it should pay only part of the license fee provided in said Act on the ground that such company had transacted business for only a part of either the current or preceding year, or on the ground that the Act of 1917 was not operative so as to include the entire year of 1917, although the law became effective on March 3rd of that year. And there is no difference in principle between the provisions of the law here under consideration and the provisions of the law just referred to. The requirement that statements of business transacted shall be submitted quarterly instead of annually, as in the corporation license tax law, does not vary the underlying principle that the amount of the license tax imposed shall be determined by the volume of business done during some preceding period.

From the foregoing the conclusion follows that there is nothing in fact retroactive in the requirements of the Act. The Legislature has merely provided that certain payments shall be made on certain dates for the privilege of engaging in the business mentioned subsequently to the approval of the Act, which amounts are measured by the business of the preceding period. But if it were retroactive, it is not for that reason alone invalid. The Constitution of Montana contains no direct prohibition against retrospective legislation, except as to ex post facto laws and laws conferring benefits retroactively upon corporations or individuals (Constitution of Montana, Sec. 13, Art. XV), and in the absence of such prohibition, retrospective laws are not invalid unless they violate some constitutional provision not directed at retrospective laws as such—that is, impair the obligation of contracts, destroy vested rights, or come within the definition of ex post facto laws.

Mutual Benefit Life Ins. Co. v. Winne, 20 Mont. 20;
12 C. J. 1085, and numerous cases cited;
Commonwealth v. The United Cigarette Co., 120 Va. 835.

That the legislative body, having power to levy license taxes, has the power to change by lessening or increasing the amount of such tax, or even cancel licenses by repeal of the law under which the same were granted before the expiration of the period of the license, provided that vested interests are not destroyed, is well established. In the case of Patton v. Brady, 104 U. S. 608, a tobacco manufacturer had paid the license tax under the law then in force. Congress thereafter enacted a law requiring an additional tax equal to the amount already paid. The Supreme Court of the United States held that this action was within the power of Congress.

Portland v. Cook, 48 Ore. 550, 9 L. R. A. (N. S.) 733, and note;
Union Pass. R. Co. v. Philadelphia, 101 U. S. 528;
State v. Horvoka, 100 Minn. 249, 110 N. W. 870;
17 R. C. L., pp. 476-7, p. 554 et seq.

In Income Tax Cases, 148 Wis. 456, 514, the contention that an income tax is invalid because assessed for the whole year by a law effective July 15th of that year was overruled as unsubstantial, the court stating that it did not consider it necessary to make any comment on this contention.

It has also been held by the United States Supreme Court that a privilege tax is properly measured by the entire income of those subject to it during the preceding year.

Flint v. Stone-Tracy Co., 220 U. S. 107.

To the same effect is Sprekles Sugar Refining Co. v. McClain, 192 U. S. 397, 410. This decision construed and held valid the revenue law of 1898, which contained language almost identical and provisions similar in principle with the law here under consideration. Section 27 of that Act is as follows:

"Sec. 27. That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars.

"And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association,

corporation or company may be located, or in which such person has his place of business. Such return shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars * * * "

The Montana case of Equitable Life Assurance Company v. Hart, 55 Mont. 76, while applying to corporations, is valuable for the general proposition in regard to license taxes herein involved. In that case, Chapter 76 of the Laws of 1917 above referred to was attacked upon constitutional grounds, and the license tax on corporations therein provided was upheld.

It is, therefore, my opinion that Chapter 156 of the Laws of 1921 requires that persons engaged in the business of distributing or selling gasoline, and subject to said Act, shall pay as a license tax fee, within thirty days after March 31, 1921, an amount computed at one cent for each gallon of gasoline distributed or sold during the entire quarter commencing January 1, 1921, and ending March 31, 1921.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.