

Natural Gas—Taxation—Interstate Commerce—Foreign Commerce—Discrimination.

After natural gas has entered the pipe line moving for destinations beyond the state it is in interstate commerce and cannot be taxed. Tax may be laid at the well without taxing interstate commerce.

If tax is laid at the well that which is intended for interstate commerce cannot be taxed at a higher rate than that intended for local consumption. Tax may not be laid on natural gas exported to a foreign country. It may be taxed before it enters into foreign commerce.

Mr. T. E. Nelstead,
Member of Committee on Revenue
and Taxation,
House of Representatives,
Helena, Montana.

January 28, 1931.

My dear Mr. Nelstead:

You have submitted the following inquiry: "Can a larger tax levy be made for natural gas piped out of the State of Montana than for natural gas used within the state?"

In the case of *U. S. Fuel & Gas Co. vs. Hallahan*, 257 U.S. 277 it was held by the Supreme Court of the United States that natural gas collected within a state and moving through pipe lines for destinations beyond the state is in interstate commerce and cannot be taxed.

In *Eureka Pipe Line Co. vs. Hallahan*, 257 U.S. 265 the supreme court held a tax of two cents per barrel on transportation of oil, in so far as it was measured by the quantity produced in but moving out of the state, was void under the commerce clause of the constitution of the United States.

In *Hope Natural Gas Co. vs. Hall*, 274 U.S. 284, the United States Supreme Court held that the state may levy a privilege tax on gas at the well even though it is to be sold in another state as the tax is laid before it enters interstate commerce.

Under these decisions it appears that the tax must be laid on the gas prior to the time that it enters the pipe line as a part of its movement in interstate commerce and that a tax measured upon any part of it moving in interstate commerce is void as being a tax upon that commerce.

If the tax is laid at the well before the gas enters in interstate commerce, in my opinion, no classification can be made based upon that which is intended for interstate commerce and that which is intended for local consumption, by which classification that intended for interstate commerce is taxed at a higher rate than that which is intended for consumption within the state. Such increased tax would, in my opinion, be a discrimination against interstate commerce to the extent of the difference between the two tax rates.

In *Pennsylvania vs. West Virginia*, 262 U.S. 553, the Supreme Court of the United States said that even the power of the states to levy and collect taxes, comprehensive and necessary as that power is, cannot be exercised in a way which involves a discrimination against interstate commerce. About the only reason for exacting a higher rate of tax on gas produced within a state to be shipped out of the state would be founded upon the theory that to the extent it is piped out of the state it depletes the natural resources of the state for the benefit of residents of other states and therefore the tax is intended to restrain depletion of the state's resources for the benefit of the citizens of other states, or, in lieu thereof to place in the possession of the state funds derived from such taxation.

In the last mentioned case the state of West Virginia attempted to require companies transporting through pipe lines gas produced within

the state to points without the state to give preference to the citizens of the producing state, owing to the fact that the natural gas resources were being depleted. It was, therefore, a law having for its purposes the conservation of the natural resources of the state for the benefit of its own citizens. The United States Supreme Court held that as to commerce between the states the citizens of each state must be treated alike as they constitute but one nation and that the law seeking to give preference to the citizens of West Virginia was a regulation of interstate commerce in violation of the federal constitution and that it discriminated against such commerce.

With regard to the exportation of natural gas to foreign countries it is my opinion that the provision of the federal constitution forbidding the taxation of exports would prevent the taxation of natural gas exported to the foreign country or moving in foreign commerce. The above principles concerning the taxation of property moving in interstate commerce apply likewise to foreign commerce. The state may not levy taxes on exports. (*Almay vs. California*, 65 U.S. 169, 16 L. Ed. 644).

The product could be taxed before it enters into foreign commerce, but if that which is intended for foreign commerce is taxed at a higher rate than that intended to be used within the state it is my opinion that this would amount to a tax upon exports and a regulation of foreign commerce which is forbidden by the United States constitution.

Very truly yours,

L. A. FOOT,
Attorney General.