TERRITORY OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU

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OPINION NO. ~~1747~~ 1720

AUGUST 22, 1939.

TAXATION: INTERSTATE COMMERCE:

The application of the tax imposed by Act 141, L. 1935 as amended, to revenues derived from stevedoring, rigging gear, checking freight and similar services depends upon whether such services are conducted by the taxpayer or whether on the other hand the revenue is derived from the mere supplying of facilities and labor.

SAME: SAME:

The revenue derived from service which is preliminary or subsequent to the interstate transportation but not a part thereof, is not immune from taxation under the interstate commerce clause.

SAME: SAME:

The interstate commerce clause does not prohibit the imposition of a privilege tax measured by gross receipts where a similar levy by other states may not be imposed and consequently a multiplication of tax levies cannot result.

Honorable William Borthwick
Tax Commissioner of the Territory of Hawaii
Honolulu, T. H.

Dear Sir:

You have requested our opinion as to the liability to tax under Act 141, L. 1935, of certain revenues of Kauai Terminal, Limited, as follows:

(1) Said Company contends that it is not liable to gross income tax upon its revenues derived from the loading and unloading of shipments arriving and departing by vessels traveling between Hawaii and the mainland, including revenues derived from "activities of stevedoring, rigging gear, checking freight and damaged cargo, lightering, standby charges, hiring launches and tugs, use of moorings and running mooring lines."

(2) The company further contends that it is not liable to gross income tax upon its revenues derived as follows: The company operates trucks which pick up sugar, pineapple and molasses at Kekaha, Waimea, Koloa and the Kauai Pineapple Company. These products are trucked to the company's warehouse at Port Allen and stored until sufficient cargo is accumulated for loading interstate vessels, which is stated to be ordinarily for a short time only, until the next steamer arrives. The company states that the interstate destination has been determined before the storage and that the shippers exercise no supervision or control over the products after they have been picked up by the company's trucks.

(3) On certain freight which comes into the Territory under regular interstate bills of lading the trucking charges have been prepaid. The company claims that its charges for trucking such freight may not be subjected to gross income tax.

These contentions will be considered in order.

1.

As to the various activities listed above under (1), stevedoring comes within the exact decision in Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, 82 L. Ed. 68, and is not taxable if the company itself

conducts the stevedoring but is taxable if the company merely supplies the labor. I understand that you have been following this rule as to stevedoring services, but the other items have not previously been the subject of a ruling. In each instance the test of the Puget Sound case is to be applied. In that case the court said:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners"'. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52,62, 58 L. ed. 1208, 1212, 34 S. Ct. 733, 51 L. R. A. (N. S.) 1157. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540, 68 L. ed. 433, 44 S. Ct. 165, 24 N. C. C. A. 42. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. * * *
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> What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540, 68 L. ed. 433, 44 S. Ct. 165, 24 N. C. C. A. 42, supra. True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. Sometimes, though not, it seems, under appellant's contracts, the work in the hold is done by members of the

> crew, and the work upon the dock by employees of the dock company. Sometimes the cost is absorbed by the vessel and sometimes billed as an extra charge to shipper or consignee. The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest," and vice versa.' In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purpose of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 26, 48, L. ed. 325, 327, 24 S. Ct. 202, where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.'
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> The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state."

We think that under the reasoning of the Court there must be included in the non-taxable category all of the activities of the company listed under (1) above, which are directed and controlled by the company as distinguished from the mere supplying of labor or facilities. The checking of freight and damaged cargo might be open to question as to whether in its nature it is a part of the transportation, since this is

a step beyond "carriage to and from the 'first place of rest'", of which the court speaks, but we think it is within the reasoning of the case since freight must be checked if transportation is to be accomplished. Assuming that the charge for checking freight is a charge to the interstate vessel, not the consignee, this service for the vessel which might well be performed by the ship's own crew, is indispensable to the transportation. Transportation would be futile if the surrender of the freight in exchange for surrender of the bill of lading could not be accomplished. Towing and lightening interstate vessels clearly are activities which are part of the interstate transportation (Foster v. Davenport, 63 U.S., 22 Howard, 244) and therefore the same are immune from taxation when conducted by Kauai Terminal, Limited.

The facts are not sufficient to finally dispose of the question whether Kauai Terminal, Limited conducts these various services or merely supplies facilities or labor, although some of the activities such as "use of moorings" and "hiring launches and tugs" suggest that the charge is merely for the supplying of facilities, or facilities and labor.

2.

As to the trucking of outward bound freight, we think this comes within the principle of New York ex rel Penn. R. R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, cited

and distinguished in the Puget Sound case. In the Pennsylvania railroad case there was involved a franchise tax imposed by the state of New York for carrying on the business of running cabs and carriages for hire. The company ran a ferry between New York and New Jersey. It had established a cab stand on its own premises on the New York side and the cabs were licenses to stand on these premises only. The sole business done by these cabs was to bring the company's passengers to and from the New York ferry. A special charge was made by the company for this service. The company contended that the cab service was an extension of and part of its interstate transportation service, which was thus commenced or completed at the home instead of the ferry landing. The court said:

> "It is true that a passenger over the Pennsylvania Railroad to the city of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state and be subject to national control. The State may not tax for the privilege of doing an interstate commerce business. Atlantic & Pacific Telegraph Company v. Philadelphia, 190 U. S. 160. On other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.

> Undoubtedly, a single act of carriage or transportation wholly within a State may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is an interstate carriage.
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> As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction. Coe v. Errol, 116 U. S. 517, though not in all respects similar, is very closely in point. * * *
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> As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?
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> We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation.

It appears from this decision and the reasoning of the court in the Puget Sound case that to secure immunity from taxation the service must be part of the interstate transportation as distinguished from service preliminary or subsequent thereto.

Kauai Terminal, Limited, does not claim that it is a common carrier. So far as appears no bill of lading is issued except at Port Allen for the transportation on the interstate vessel. If the interstate vessel owner itself were to operate a trucking service, at a separate charge, to pick up freight from different points on the Island of Kauai and bring it into Port Allen, and should there issue the bill of lading and for the first time receive the property as a common carrier, the trucking service would be regarded as preliminary service and not part of the transportation proper. Penn. R.R. Co. v. McGirr's Sons Co. 287 Fed. 333 and cases cited. Such a case would not be distinguishable from Penn. R. R. Co. v. Knight, supra.

It might be argued that the case of Penn. R. R. Co. v. McGirr's Sons Co. supra is not a fair test of what constitutes a preliminary service because that case involved transportation by a common carrier and under the statute involved services were classified in accordance with whether they were part of the duty of the common carrier as such or on the other hand were services which the shipper normally supplied for himself. We think, however, that these very services which the shipper normally supplies for himself are the preliminary services contemplated in Penn. R. R. Co. v. Knight, supra and in the Puget Sound Case where the court says: "What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage

of transportation and its reasonable incidents. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540; 68 L. ed. 433; 44 S. Ct. 165; 24 N.C.C.A. 42, supra." The question is whether the activity of Kauai Terminal, Limited is part of the actual interstate transportation. It is not sufficient if it merely furthers such transportation, no matter how closely connected with it. Coverdale v. Arkansas-Louisiana Pipe Line Co. 303 U. S. 604, 82 L. ed. 1043.

Under the principle of Coe v. Errol, 116 U.S. 517, cited in Penn. R. R. Co. v. Knight, supra, the interstate journey had not begun when these products were picked up by the company's trucks to be taken to the warehouse at Port Allen. Coe v. Errol, supra, involved a personal property tax on timber claimed to be in course of interstate transportation. The timber had been placed in a New Hampshire stream to be floated down the stream and down a river to a point in Maine. The court held the timber had not yet begun its interstate journey and said:

> "* * *When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started their ultimate passage to that State. * * *
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> * * *It is true, it was said in the case of The Daniel Ball, 10 Wall, 557, 565: 'Whenever a commodity has begun to move as an article of trade, from one State to another, commerce in that commodity between the States has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

We think that Port Allen is the "entrepot for that particular region" and that the interstate journey begins at Port Allen. It is true that the point of beginning of the interstate journey is not necessarily the point of shipment on a through bill of lading calling for an interstate route, for the interstate journey sometimes has commenced though only a local bill of lading covering a route entirely within the state has been issued. Texas and N.O.R.Co. v. Sabine Tram Co. 227 U. S. 111; U.S. v. Erie R. Co. 280 U. S. 98. In those cases the contemplated movement of the freight was the test. But in those cases the freight at least had been

shipped by a common carrier under a bill of lading which controlled the delivery of the goods. Kauai Terminal, Limited does not claim to be a common carrier but points out that it is an independent carrier. We do not see why this is material. The sugar is fully as subject to the control of the sugar company as if sent to Port Allen in the sugar company's own trucks. The activity of Kauai Terminal, Limited is no different from any drayage of goods to the wharf of an interstate vessel, for it does not appear that Kauai Terminal, Limited has the characteristics of an express company. We have not been cited any authority that a truck which picks up baggage or freight to be taken to the wharf of an interstate vessel may not be taxed for doing so, and the cases of Penn. R.R. Co. v. Knight, supra, and Puget Sound Stevedoring Co. v. Tax Commission indicate that it may be taxed.

It should also be noted that in some instances and for some purposes the interstate journey has been held to have commenced although the freight is still within the state and though no common carrier is involved. Champlain Co. v. Brattleboro, 260 U. S. 366; Hughes Bros. Co. v. Minn. 272 U.S. 469 But in those cases the freight had already passed the gathering point or depot and the question was whether it had entered upon a continuous interstate journey. The reasoning of the court in the Champlain Co. case clearly indicated that the mere bringing of the goods to the point where they were gathered

to be dispatched was not part of the interstate journey, and in each case once the interstate journey had begun there was no point at which the goods were held until means of shipment were available and a suitable quantity of freight had been gathered. We think that for transportation to such a gathering point to constitute part of the interstate journey it at least must be by common carrier under a bill of lading which controls the delivery of the goods, or must be conducted under a single contract which embraces the whole interstate journey. Otherwise the trucking service is merely a service of the type normally furnished by the shipper himself and not part of the interstate transportation proper, but on the contrary preliminary thereto, it being immaterial whether such trucking is conducted in the shipper's own trucks or in the trucks of an independent private carrier, or even in trucks operated by the interstate vessel itself.

A second point which militates against the claim of tax immunity is the principle that even though interstate commerce is involved tax immunity does not necessarily follow. The field of interstate commerce and the field of tax immunity are not the same, and even though a thing is subject to state taxes it may nevertheless be interstate commerce and subject to federal regulation as such. Binderup v. Pathe Exchange, 263 U. S. 291, 311. In the most recent case on the subject the Supreme Court summarizes the principle involved as follows:

> "* * *Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself. This rule is applicable to a tax on gross receipts from interstate transportation; * * * The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies it (is) upheld."
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> Southern Pacific Co. v. Gallagher, U. S. Sup. Ct. Jan. 30, 1939, 83 L. ed. Adv. Sh. 352, 355-356.

The imposition of the tax in this instance could not possibly result in a multiplicity of tax levies. In the Puget Sound case the charge for stevedoring had been included in a single contract. Either state could have taxed the whole commerce. The fact that the interstate vessel subcontracted the stevedoring was held to be immaterial. Here the trucking service is a separate charge and a separate contract. It is not part of the commerce which may be taxed by the mainland state as well as by the Territory.

3.

As to the revenue from trucking inward bound freight where the trucking charges have been prepaid, it does not appear that the trucking charges are part of a single charge for the freight transportation or that the interstate vessel's contract includes, as a single contract, the deposit of the freight at the place of business of the consignee so far as appears, the prepayment of the trucking charges is a convenience, and the trucking remains a separate contract

for which a separate charge is made. Accordingly the inward bound freight is in the same category as the outward bound freight, under the principle of Penn R. R. Co. v. Knight, supra, which denied tax immunity both as to service preliminary to transportation and also as to service subsequent thereto. Moreover, since the trucking services constitute a separate contract and a separate charge the mere collection of the freight in advance as a matter of convenience could not give rise to a right of taxation of the trucking services by the state or embarkation, and there is no possibility of a multiplication of state levies.

Respectfully,

Rhoda V. Lewis

Rhoda V. Lewis
Deputy Attorney General

APPROVED:

Acting Attorney General