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Op. No. 64-52

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii 96810

November 5, 1964

Mr. Edward J. Burns
Director of Taxation
State of Hawaii
Honolulu, Hawaii

Dear Sir:

This is in response to your request for an opinion from this office concerning the matter which Dr. Shelley Mark, Director of the Department of Planning and Economic Development, State of Hawaii, raised, regarding the applicability of Hawaii state taxes to sales made by companies located within the proposed Hawaii Foreign Trade Zone.

More specifically, the questions posed by Dr. Mark are as follows:

1. The applicability of state taxes to sales made within the trade zone.

2. The applicability of state consumption taxes to sales made within the zone.

3. The applicability of state taxes to sales made in Hawaii.

4. The applicability of state taxes to sales made in a foreign country.

5. The applicability of state taxes to sales made in another state.

In view of the broad nature of the questions, it will be necessary to limit the fact situation for each question asked. Since so many different combinations of hypothetical conditions are possible, it is virtually impossible to formulate an opinion which will apply to every case. In this posture then, we shall make the following assumptions, for the purposes of this opinion.

(1) State Taxes - Four of the questions asked refer to state taxes. The Department of Taxation is responsible for the administration of eleven different taxes, each being peculiar in nature, scope, and incidence. Consequently, their application under various conditions would not necessarily be the same in every instance. Since the questions asked refer to the tax consequences arising from the sale of goods from the activities of persons engaged in business within the foreign trade zone, we shall confine our discussion to the general excise tax under Chapter 117 and the consumption tax under Chapter 119 since their application is more closely related to sales activities.

(2) Treaties - The United States has entered into a number of treaties and commercial conventions with foreign governments concerning the subject of tax immunity. Since it is contemplated that foreign companies will be engaged in business within the zone, presumably, some of them may qualify for some form of tax immunity by force of these treaty or convention provisions. Hence, for the purposes of this opinion, we shall assume that no treaty or convention exists which would grant tax exemption to foreign corporations operating within the zone. See 15 C.F.R. § 400.1003.

(3) Nature of the Transactions - The conclusions reached in this opinion will be dependent on the nature of the transaction that occurs in the sale and purchase of the goods in the foreign trade zone. [1]/ For example, a

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1/ We shall also assume that all sales of goods made within the zone shall comply with the requirements of the provisions of 19 U.S.C.A. § 810(d) and 15 C.F.R. § 400.808 relating to the sale of goods in the zone. Hence, this opinion shall only deal with the sale of such domestic, duty paid, or duty free goods which are brought into the zone from the customs territory.

> corporation which operates in the zone may also be engaged in business in the state. It may be actively engaged in the solicitation and sale of goods manufactured in the zone. In this process, it may store the goods in warehouses within the state, may make deliveries of the goods to purchasers in the state, and may make billings and collections on account of these sales. Conversely, a corporation may be operating only within the zone premises, and all sales activities will be confined within the zone so that delivery and possession of the goods will be effected there. 2/

In view of the myriad of situations that may arise, we shall present the facts to each question and then pass on the tax consequences arising therefrom.

2/ As illustrative of a sales transaction that might arise in a foreign trade zone, the facts in G. D. Searle and Co. v. Byron Chemical Co., 223 F.Supp. 172 (1963) are illuminating. There, defendant received an order for propantheline bromide (P.B.) from a prospective buyer in Japan through its agent there. The order was accepted by a partner in Long Island City, New York. A purchase order was then prepared by defendant at its offices in Long Island for the purchase of P.B. in Germany. The purchase order provided for delivery in New York. Defendant sent his labels to the German supplier, who affixed them to the drums of P.B. The drums were marked for delivery and consignment to defendant. The drums were unloaded in the Foreign Trade Zone in New York for reshipment by a carrier to Japan. The court said that at the time the merchandise arrived in New York, title was in defendant. Title passed to the defendant's purchaser in Japan when the goods were delivered aboard the outgoing vessel to Japan. The District Court concluded therefore that since title passed in the Foreign Trade Zone in New York, pursuant to a contract consummated in Long Island, New York, the sale occurred within the territorial limits of the court, and the case was properly before the court.

QUESTIONS 1 AND 2

1. Would state taxes apply to sales made within the foreign trade zone?

2. Would state consumption taxes apply within the zone?

ASSUMPTION OF FACTS

For purposes of question 1, we shall assume that a corporation engaged in business within the foreign trade zone sells goods to another corporation engaged in business within the zone for purposes of re-export. Title to the goods passes within the zone. Purchaser accepts the goods within the zone. The question asked is whether the general excise tax applies on account of such sale. For purposes of question 2, we shall assume that a corporation engaged in business within the zone imports goods from another state or from a foreign country which are incorporated by the importer into a finished product for purposes of re-export. The question asked is whether the consumption tax applies on account of the property so imported.

CONCLUSION

We answer these two questions in the negative. Since the proposed foreign trade zone will be created pursuant to the paramount and plenary powers of Congress to regulate trade with foreign nations, Congress has assumed exclusive regulatory powers within the zone, and no local regulation may interfere with these powers.

DISCUSSION

The Foreign Trade Zones Act was enacted into law by Congress and became effective on June 18, 1934, authorizing the establishment, operation, and maintenance of foreign-trade zones in ports of entry in the United States. Public Law 397, 73d Congress, 48 Stat. 998-1003, 19 U.S.C.A. §§ 81a-81u. It was enacted pursuant to the powers of Congress to regulate foreign commerce. As its title indicates, the purpose of the Act is to expedite and encourage foreign commerce. See <u>New York Foreign Trade Zone Operators, Inc.</u>

v. State Liquor Authority, et al., 285 N.Y. 272, 34 N.E.2d 316 (1941).

A foreign trade zone is an isolated, enclosed and policed area in or adjacent to a port of entry, into which may be brought all categories of foreign and domestic merchandise, other than those items prohibited by law, without being subject to the customs laws of the United States. 15 C.F.R. § 400.101. In the zone this merchandise may be stored, exhibited, manufactured, handled, displayed, or used for processing and subsequently imported into the United States or shipped abroad. Foreign merchandise transferred from a foreign trade zone into the customs territory of the United States is subject to the laws and regulations of the United States affecting imported merchandise. 19 U.S.C.A. § 81c.

Ever since Gibbons v. Ogden, 5 Wheat. 1 (1824), it has been tacitly recognized that Congress has plenary powers in the regulation of commerce.

> "This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignity of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions in the exercise of the power as are found in the constitution of the United States. . . ." (p. 195).

This power of Congress is complete in itself and knows no limitations except the prohibitions and limitations of the Constitution and its amendments. Holland v. Lowell Sun Co., 315 U.S. 784 (1941); Ammex Warehouse CO. of San Ysidro, Inc. v. Dept. of Alcoholic Beverage Control for the State of California, 224 F.Supp. 546 (Calif. 1963); Southern Ry. Co. v. State Highway Dept., 134 S.E 2d 12 (Ga. 1963); City of Columbus v. McGuire, 195 N.E.2d 916 (Ohio 1963). It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power its exercise may not be limited, qualified, or impeded to any extent by state action.

Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, 56-57 (1933). Generally any state law or regulation interfering with this enumerated power of Congress is invalid. Sinot v. Davenport, 63 U.S. 227 (1859); People v. Compagnie Gen. Transatlantique, 107 U.S. 59 (1882). As the Court in Board of Trustees of the University of Illinois v. United States, supra, said at p. 57:

> ". . . If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, as the Congress may (cases cited), no State by virtue of any interest of its own would be entitled to override the restriction. The principle of duality in our system of government does not touch the authority of Congress in the regulation of foreign commerce."

See also Buttfield v. Stranahan, 192 U.S. 470 (1904); The Abby Dodge, 223 U.S. 166 (1912); Weber v. Freed, 239 U.S. 325 (1915); Brolan v. United States, 236 U.S. 216 (1915).

In During v. Valente, 267 App.Div. 383, 46 N.Y.S.2d 385 (1944) the court held that the state of New York had no power to subject goods within a foreign trade zone to local regulations. Involved in that case was the question of whether or not a person must comply with New York's Alcoholic Beverage Control Law requiring a solicitor's permit to sell liquor, where the sale was of liquor stored in the Free Trade Zone of the Port of New York. In denying the applicability of the state's laws to goods within the zone, the court said at page 388:

> ". . . The imposition of these complicated regulations upon foreign commerce in liquor within trade zones would not only interfere with the exclusive control of Congress over this commerce but would seriously impair, if not defeat, the purpose for which these zones were established."

Moreover, the provision of the United States Constitution forbidding the states to lay any imposts or duties on imports or exports would preclude the state from exercising its taxing powers to goods which are brought into the zone from foreign countries. Article I, section 10, par. 2. All goods which are imported from a foreign country into the zone and are brought out from the zone into the customs territory shall be treated as imported merchandise. 19 U.S.C.A. § 81c. As imported merchandise, they would qualify as imports within the meaning of the constitution so as to preclude the state from laying any prohibited imposts. They would be subject to the import laws applicable to like articles manufactured in a foreign country. 15 C.F.R. § 400.806. The imposition of a tax by the state on the business of manufacturing, producing, packaging or selling these foreign goods within the zone would amount to a prohibited exaction. As the Court in Brown v. Maryland, 12 Wheat. 419 (1827) said in which there was considered a $50 Maryland license fee imposed upon the importers of foreign articles:

> ". . . All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So, a tax on the occupation of an importer is, in like manner, a tax on importation. . . ." p. 444.

Although the foreign and domestic merchandise imported into the foreign trade zone would be removed from original containers and may be changed somewhat in producing the finished product, the merchandise would still appear to be an "import" within the scope of federal immunity from state taxes. The syllabus in During v. Valente, supra, is as follows:

> "The mere geographical location of goods, which are under the control of the federal government for purpose of re-export within the state of New York, does not constitute an 'import' [an import subject to New York laws] into the state and sale of such goods is not subject to local regulations."

The merchandise in the proposed zone will be under strict federal customs control for the purpose of re-export to foreign countries or to customs areas of the United States. Such merchandise would still appear to be "imports" immune from Hawaii tax laws.

Furthermore, the very purpose of establishing these zones is to permit foreign merchandise to enter the United States and to be exported to foreign countries without the payment of any duties or tax and without being subject to any quota restrictions. 3/ To Subject these goods within the zone to state taxation would serve to defeat a primary purpose of Congress in creating these zones. It would interfere with the powers of Congress to insure that these foreign goods may be brought into this country and be manufactured, processed, and manipulated without the necessity of customs intervention and other such imposition.

In view of the foregoing, we are of the view that neither the general excise tax nor the consumption tax would apply on account of sales made within the zone or on account of goods imported into the zone.

QUESTION 3

Would state taxes apply to sales made within Hawaii?

ASSUMPTION OF FACTS

We shall consider three different factual situations:

(a) A corporation engaged in business within the zone sells goods to a purchaser in this state.

3/ In the course of Congressional debate on the bill to establish foreign trade zones, Congressman Cullen quoted portions of the report of the United States Tariff Commission as follows:

> "The purpose of the free zone is to encourage and expedite that part of a nation's foreign trade which its government wishes to free from the restrictions necessitated by customs duties. In other words, it aims to foster the dealing in foreign goods that are imported, not for domestic consumption but for re-export to foreign markets, and for conditioning or for combining with domestic products previous to export." Proceedings and Debates of the Second Session of the Seventy-Third Congress of the United States, Vol. 78, Part 9, p. 9761.

The seller does not maintain an office in the state nor is it otherwise engaged in business in the state. The sales are completed within the zone premises, the title to the goods passes within the zone, and delivery and possession are made in the zone. The purchaser purchases these goods for resale in the state. The question is whether the general excise tax applies on account of such sale.

(b) Assuming the same fact situation in (a) above, the purchaser, after taking possession and taking the goods out of the zone, then sells the goods in the normal course of his business, to another purchaser in this state. The question is whether the general excise tax applies on account of such sales made within this state.

(c) A purchaser in Hawaii purchases goods from a corporation engaged in business in the zone for the purpose of using or consuming these goods for his own use or consumption within this state. The question is whether the consumption tax applies on account of such goods imported.

CONCLUSION

We answer question 3(a) in the negative, question 3(b) in the affirmative, subject to an important limitation under certain conditions as more fully explained in footnote 6 in the discussion and question 3(c) in the affirmative.

DISCUSSION

Since the questions concern the status of the goods leaving the foreign trade zone and entering the customs territory or the general jurisdiction of the state, it is well to examine this area. Commenting on the question of federal immunity and state taxation, Chief Justice Marshall in Brown v. Maryland, supra, stated as follows:

> "[T]here must be a point of time when the prohibition ceases and the power of the state to tax commences; . . . It is

> sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; . . ." (12 Wheat. 441-442).

In the analogous area of property which is held and stored in bonded warehouses subject to the strict regulatory control of the federal government, [4]/ the Court in McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940) held that goods kept "in bond" do not become a part of the common mass of property in the state. In that case, the Comptroller of the city of New York determined that respondent was subject to a New York City tax laid upon the sales of fuel oil manufactured in the respondent's bonded warehouse in New York from crude petroleum that had been imported from Venezuela, and had been sold and delivered to foreign vessels in the port of New York as part of the ship's stores. The Court held that the Congressional action was tantamount to a declaration that imported merchandise in bond shall not become a part of the common mass of taxable property within the state subject to state taxing power and concluded that the state tax must fail as an infringement on the Congressional power to regulate commerce. [5]/

Although the Gulf Oil Corp. decision limited itself to the determination of tax immunity while the merchandise was held in bond under federal control, a logical extension thereof would be that once the merchandise loses its preferred status and enters the state, it would become a part

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4/ 19 U.S.C.A. §§ 1551-1565.

5/ However, compare West India Oil Co. v. Domenech, 311 U.S. 20 (1940) where a sales tax by Puerto Rico upon oil in the Plaintiff's bonded warehouse in Puerto Rico was permitted. However, this case is distinguishable from Gulf Oil since there was express Congressional authorization for the levy and collection of internal revenue taxes by Puerto Rico.

of the common mass of taxable property in the state and would be treated like any other property coming into the state. Or, as the Court said, "had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation." (p. 423). The same analogy would apply to goods leaving the foreign trade zone and entering the state. Once it leaves the federally-controlled area set aside by Congress under its constitutional powers and enters the general jurisdiction of the state, it sheds its cloak of immunity and becomes subject to the same regulatory and taxing powers of the state as does any other property entering the state. It becomes commingled with the common mass of taxable property within the state.

(a) Hawaii's general excise tax is a privilege tax on the privilege of engaging in business and other activities in the State of Hawaii. The tax is measured by the gross income received from the business and other activities engaged in. Since the tax is imposed on the seller doing business in the state where the sale of property is involved, the state cannot extend its taxing power to subject a person to taxes operating within the zone. Although the facts here are slightly different from the facts presented in questions 1 and 2 above in that in the latter cases, the goods are to be re-exported to foreign countries, whereas in the case here, the goods are to be consumed domestically, we do not feel that this difference should be determinative of the tax liability. The conclusions and discussion regarding questions 1 and 2 above are applicable here and are dispositive of question 3(a).

(b) In answer to question 3(b) where the purchaser, in the normal course of his business, makes a subsequent sale of the imported merchandise to another purchaser in the state, there arises a taxable transaction under the general excise tax. [6] The seller-purchaser would be in the same position as any other person engaged in the business of selling goods to another in the state and the tax consequences arising therefrom should be no different. Hence, if in the normal course of his business activities, he sells the imported merchandise to a licensed seller for purposes of resale, to a licensed manufacturer who incorporates such merchandise into a finished saleable product, to a licensed contractor who incorporates such merchandise into a finished work, or to a licensed producer or cooperative association, all as more fully set forth in section 117-5, R.L.H. 1955 as amended, then such sales shall be considered wholesale sales and he shall be taxable at the rate of 1/2 of 1% of the gross income so received. If, in the normal course of his business activities, he sells the imported merchandise to a person who uses or consumes such product, to an organization which qualifies for exemption under § 117-20, R.L.H. 1955 as amended, to a person engaged in a service business, or to the state or its political subdivisions thereof, then such sales shall be considered retail sales and he shall be taxable at the rate of 3 1/2% of the gross income so received.

6/ Without specifically passing on the question, we would like to caution here that the original package doctrine as first enunciated in *Brown v. Maryland,* supra, might be a limitation to the state's taxing power. The application of this doctrine would be limited to foreign merchandise imported and sold in their original package.

Moreover, references in the Act and in the regulations adopted by the Foreign Trade Zones Board to the term "original package" would seem to indicate that the doctrine heretofore mentioned would be equally valid and subsisting to foreign merchandise imported from the foreign trade zone. 19 U.S.C.A. § 81c; 15 C.F.R. §§ 400.101 and 400.802.

(c) Chapter 119, Revised Laws of Hawaii 1955, as amended, imposes a consumption tax for the use or consumption of property in the state as to which the excise tax on retailers has not been paid. The consumption tax is designed to complement the general excise tax. The taxable incidence is the use or consumption of property in this state. These terms are defined in the statute in the following manner:

> ". . . 'use' or 'consumption' (and any verbal, adjective, adverbial and other equivalent form of any of these terms), herein used interchangeably, means any use, whether such use is of such nature as to cause the property to be appreciably consumed or not, or the keeping of such property for such use or consumption;" (Section 119-2, R.L.H. 1955 as amended.)

Since the taxable incidence is on the use of the property within the state, the contention that the tax must fail as being offensive to the commerce clause, since the property is moving in interstate or foreign commerce, cannot be sustained. Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934). The taxable event is the exercise of the property right in the state of use. Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939). The tax is not upon the operations of commerce but upon the privilege of use after the commerce is at an end. Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937). Moreover the statute is designed to recognize these constitutional limitations by providing that the tax arises after the commerce has ended. [7/] The statute provides that the tax shall be payable:

7/ Although the statute purports to "beg the question" by providing, in effect, that the use tax applies to any use or consumption of property in this state which is constitutionally permissible, such statutory provisions serve a useful purpose. It indicates the intent of the "(a) In the case of property imported in foreign commerce, at the time such property loses its character as an import and its immunity as such from taxation by the State;

"(b) In the case of property imported in interstate commerce, at the time such property comes to rest in the State and ceases to have its character as an article in interstate commerce;

* * * * *

"(d) In the event that the tax may not legally be levied in respect of the property concerned at the time and under the circumstances provided in paragraphs (a), (b) or (c) of this section, then the tax shall be levied and become payable at the commencement by the taxpayer of any use or consumption of the property which is taxable by the State." (§ 119-5, R.L.H. 1955 as amended.)

Since the consumer is to import the goods for his own use or consumption within this state, we are not confronted with the problem that the Court faced in a series of cases where the property in question was transported in commerce for consumption in an interstate business. Nashville C. & St. L. RY. v. Walface, 288 U.S. 249 (1933); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933); Southern Pacific Co. v. Gallagher, supra: Pacific

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7/ cont'd
Legislature to tax to the limits of its taxing power, and wherever the power is expanded or contracted by court decisions or Congressional legislation, the applicable statute is expanded or contracted accordingly, thus eliminating the need for legislation to reflect the effect of these changes.

Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182 (1939). However, even in these cases, the Court sustained the validity of the local use tax on the basis that there was a taxable moment, brief though it may have been, when the article reached the end of an interstate trip and did not begin to be consumed or used in an interstate operation. Since the storage or withdrawal from storage was an event preliminary to interstate movement, even though the articles involved were intended for subsequent use in interstate commerce and even if the articles had just completed an interstate journey, there was sufficient nexus to justify the imposition of the local tax. Where the article was imported in foreign commerce and sold in the taxing state to purchaser for use in foreign commerce, [8/] the Court found the local use tax not invalidated by the commerce clause. McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430 (1940). [9/]

Even where the tax was applied to articles present in the taxing state during a pause in an interstate journey, the Court found sufficient justification to sustain the validity of the storage tax. Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947).

None of these peculiar features found in the

8/ Fuel oil was imported from a foreign country, refined in the United States, and sold to purchaser in the taxing state who used the oil to propel his vessels moving in foreign commerce.

9/ It must be pointed out here, however, that in view of the failure of the taxpayer in the lower court to urge the invalidity of the tax on the basis that it imposed a prohibited impost or duty on imports and exports, the Supreme Court refused to consider this argument on its merits.

above quoted cases will be present in the facts before us. The consumer will purchase the material from the zone and use or consume it here in this state. On this basis, we conclude that such a purchaser under question 3(c) will be subject to the consumption tax under Chapter 119, R.L.H. 1955 as amended.

QUESTIONS 4 AND 5

4. Would state taxes apply to sales made in a foreign country?

5. Would state taxes apply to sales made in another state?

ASSUMPTION OF FACTS

For purposes of questions 4 and 5, we shall assume that a corporation engaged in business within the foreign trade zone sells goods to a purchaser in a foreign country or in another state. Title to these goods passes in the foreign country or state and purchaser accepts these goods in the foreign country or state. The question is whether the general excise tax applies on account of such sales.

CONCLUSION

We answer these two questions in the negative.

DISCUSSION

Generally, it may be said that the taxing power of a state is limited to persons and property within, and subject to, its jurisdiction. 84 C.J.S. Taxation § 11. It has been said that a state may not lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. 51 Am.Jur. Taxation § 58. The due process clause of the constitution also serves to limit the taxing power of the state so that there must be shown some definite link, some minimum connection or sufficient nexus between the state and the persons, property, or transactions it seeks to tax.

In Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), the taxpayer, an Indiana corporation, was engaged in the business of manufacturing road machinery and equipment. Its home office and principal place of business and factory were in Indiana. Eighty per cent of its products were sold to customers in other states and foreign countries upon orders taken subject to the approval in the home office. Shipments were made from the factory and payments were remitted to the home office. Indiana imposed its tax on the gross income derived from these sales. The Court held that the tax must fail under the commerce clause since it attempts to tax sales from interstate and foreign commerce. See also Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939).

Where sales were made in foreign commerce, the Court in Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292 (1917), reached the same result. There the taxpayer sold merchandise to customers in foreign countries either through the activities of agents abroad who took the orders and transmitted them to the taxpayer at its office in Pennsylvania, subject to its approval, or through the orders sent directly by the customers in foreign countries. Pennsylvania imposed a mercantile license tax on the taxpayer based upon the amount of its gross annual receipts. The Court struck down the tax as amounting to a regulation of foreign commerce and an impost upon exports within the meaning of the pertinent clauses of the Federal Constitution. See also Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946).

In the instant case, since the sale of property is to be consummated in another state or foreign country so that title and possession pass beyond the state's borders, there is no sufficient nexus to support the imposition of a privilege tax like our general excise tax on account of the sales made. It would amount to an attempt by the state to tax a transaction beyond its jurisdiction.

Therefore, in answer to questions 4 and 5, the general excise tax would not apply on account of such sales. [10/]

10/ It should be pointed out here that the general excise

We trust that the foregoing is satisfactory of your request.

Very truly yours,

/s/ Allen I. Marutani

ALLEN I. MARUTANI
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

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tax is also applicable to persons who are engaged in a manufacturing or producing activity within the state. § 117-14, R.L.H. 1955 as amended. Hence, if, in our example, the seller was also a manufacturer or producer of the goods sold, it can be argued that although the tax does not apply to the sales made in another state or foreign country, the tax would apply on account of the manufacturing or producing activity of the person even though measured by the sales price. This contention is supported by American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919) (The city of St. Louis imposed a tax on the manufacturing activity of the taxpayer measured by the sales price of these manufactured goods. Most of these goods were sold in other states); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923) (Minnesota imposed an occupation tax on the business of mining ores within the state measured by the value of ore mined or produced. Much of the ore was sold to consumers in other states); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (West Virginia imposed a privilege tax on the business of producing natural gas in the state, computed on the value of the gas produced as shown by the gross proceeds derived from

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10/ cont'd
the sale thereof by the producer, regardless of the place of sale or the fact that deliveries may be made to points outside the state); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (Idaho levied a license tax on the manufacture, operation, or production of electricity within the state. Much of the electricity was sold to consumers out of state.)

Our statute also embodies this concept by providing that a manufacturer or producer who sells his products for delivery outside of the state shall not be required to pay the tax for the privilege of so selling his products, but he shall be taxed as a manufacturer or producer measured by the sale price. § 117-14(b)(3), R.L.H. 1955 as amended.

However, unlike the above cases, Congress here has specifically acted and has expressed its policy of promoting and encouraging foreign commerce through the operations of these zones. We think this additional fact is a crucial and significant distinguishing factor.