TAXATION:-Property in interstate commerce may not be taxed while in this State, but grain withdrawn from the carrier and stored for the purpose of cleaning, grading, mixing, etc. loses its interstate connection to the ~~extent~~ that it may be taxed in Missouri.

March 8, 1934. 3-13

FILED 63

State Tax Commission,
Jefferson City, Missouri.

Gentlemen:

We are acknowledging receipt of your letter in which you inquire as follows:

> "Under date of December 16 you gave this Department an opinion in regard to the assessment of grain in elevators in Missouri on the first day of June of each year.
>
> In question No. 4 of our inquiry submitted to you, we asked, 'Is grain temporarily held in an elevator but destined for reshipment out of the State assessable to the elevator company holding same on June 1st?'
>
> In reply to this inquiry you advised us as follows: 'We are of the opinion that grain held by an elevator company on the first day of June is assessable even though it is contemplated that such grain later may be shipped out of the State.'
>
> We are just now in receipt of a letter dated January 31, from Robert E. Gardner, County Assessor, Buchanan County, St. Joseph, Missouri, raising several additional questions about this matter. We are enclosing herewith a copy of this letter and will ask for your opinion of the additional points raised.
>
> If possible, please advise us for the information of the assessing authorities of the State as to just how they can distinguish what grain would be considered as in interstate commerce."

Attached to your letter is a copy of a letter from Mr. Robert E. Gardner, County Assessor, Buchanan County, St. Joseph, Missouri, which is as follows:

> "State Tax Commission, Jefferson City, Missouri.
>
> Gentlemen:
>
> On December 28 we received a copy of ruling by the Attorney General's Office in regard to grain

held in storage in elevators.

I immediately had several copies made and mailed them to the different elevator companies in this county, and the question now has been raised regarding the grain moving from one State to another in interstate commerce.

The attorney for several of the larger elevators, Mr. Orestes Mitchell, brought up this question, and they claim that the grain in the elevators on June 1, was interstate commerce. That the grain had been purchased in Nebraska and Kansas for shipment east and was sold immediately at the time of purchase for delivery in Chicago on a fixed date or dates; that the grain was shipped to stop over in St. Joseph for State Inspection and then has been unloaded at the elevator to get the exact weights and also for cleaning, and then was to move forward to Chicago to fill the contract of sale. And it is the claim of the elevators that the grain had not lost its character as interstate commerce and that it is not subject to local taxation.

Mr. Mitchell was in Jefferson City a few days ago and discussed this particular phase with Mr. Hays, who rendered the opinion, and Mr. Hays said that a request of an opinion regarding this phase of it should come through regular channels and has asked me to write you to get an opinion from the Attorney General's Office on this particular matter."

On December 16, 1933, this Department rendered an opinion to you regarding the taxation of grain in elevators. In that opinion we called your attention to the Constitution, and the statutory provisions which deal with taxation, and the exemption of property from taxation. We shall not again refer to those sections as it would be mere repetition and would have no bearing upon the particular question involved in this opinion.

In question No. 4 of your inquiry to which our opinion of December 16, 1933, was given, you asked, "Is grain temporarily held in an elevator but destined for reshipment out of the State, assessable to the elevator company holding same on June 1st?" In reply thereto we advised you as follows: "We are of the opinion that grain held by an elevator company on the first day of June is assessable even though it is contemplated that such grain later may be shipped out of the State."

You did not advise us that you were referring to grain in interstate commerce. As we understood your inquiry,

it simply referred to grain that was found in the elevators and which was stored there temporarily, even though it might be the intention of the owner of the grain to sell and ship the grain out of the State. The mere intention, at some future date, to withdraw grain from the elevator and ship it out of the State does not bring it within interstate commerce so as to avoid taxation.

In Bacon v. Illinois, 227 U. S. 504, 513, the Supreme Court of the United States says:

> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State."

It is evident from the foregoing quotation that the mere intention or expectation of the owner of grain stored in an elevator to ship it out of the State does not bring that grain within the protection of the commerce clause of the Federal Constitution.

This is what we had in mind when we answered your inquiry as above, and we still adhere to our first opinion upon this question. However, it now appears that some of

the grain temporarily found in the elevator on June 1st is grain shipped from other States and unloaded at St. Joseph for the purpose of weighing, cleaning, inspecting, etc., and then reshipped to other States. The question presented here is different from that which was presented inyour first inquiry and deals with the question of whether or not the grain sought to be taxed was in fact in interstate commerce at the time the assessment was made.

The law determining whether such grain can be taxed or not is plain, but the difficulty arises in applying the well-settled law to the facts of each particular case. The test seems to be whether or not the property is in transit or in a continuous movement in interstate commerce. The general rule is announced in 12 C. J. 98, as follows:

> "A state tax on oil, goods, live stock, or other property in transit from one state to another is void, and it is immaterial whether the tax is laid by the state of origin or the state of destination. In the one case the protection of the commerce clause has attached, and in the other such protection has not ceased. So, too, a state statute requiring all carriers doing business in the state to pay a tax on all merchandise carried, based on the weight of the merchandise, is in conflict with the commerce clause of the constitution, in so far as it relates to interstate traffic. The operation of the rule that articles in transit cannot be taxed is not affected by the fact that the owner of the property is a citizen of the state. While the proposition that property temporarily at rest within a State, for the purpose of separation and assortment or reshipment, or because of other reasons, does not acquire a situs in the state, so as to become subject to state taxation, finds some support in early cases, the weight of authority, as found in later cases, is to the effect that, to entitle an article of commerce to be exempt from state taxation, there must be a continuous movement of it in interstate commerce, and that it may be taxed by the state when it is held at storage or distributing points, with the intention of delivering it to buyers or of transshipping it to other points."

In Bacon v. Illinois, 227 U. S. 504, 515, the Court had before it for determination a situation practically identical with the facts in your inquiry. The case was tried on an agreed statement of facts, as set out on page 515 of

the opinion and which is as follows:

> "The following facts are shown by the agreed statement: The grain has been shipped by the original owners who were residentsof southern and western states, under contracts for its transportation to New York, Philadelphia and other eastern cities which reserved to the owners the right to remove it from the cars at Chicago 'for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination' thereof. While the grain was intransit it was purchased by Bacon, the plaintiff in error, who succeeded to the rights of the vendors under the contracts of shipment. He was represented at the points of destination by agents through whom he disposed of grain and other commodities on the eastern markets, and the grain in question was purchased by him solely for the purpose of being sold in this way and with the intention to forward it according to the shipping contracts; it was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved and removed it from the cars to his private elevator. This removal, it is said in the agreed statement of facts, was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination. It is added that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies and was forwarded by them to the eastern cities in accordance with the original contracts of transportation. No part of the grain was sold or consumed in Illinois. It was while it was in Bacon's elevator in Chicago that it was included in the assessment as a part of his personal property."

The Court,in holding that the grain was taxable by the State of Illinois, says as follows:

> "But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois

is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination. Woodruff v. Parham, supra; Brown v. Houston, supra; Coe v. Errol, supra; Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577; Diamond Match Co. v. Ontonagon, supra; American Steel & Wire Co. v. Speed, supra; General Oil Co. v. Crain, supra.

The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. American Steel & Wire Co. v. Speed, supra, pp. 521, 522. Thus, goods within the State may be made the subject of a non-discriminatory tax though brought from another State and held by the consignee for sale in the original packages. Woodruff v. Parham, supra. In Brown v. Houston, supra, the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the State and from which it was offered for sale. In Pittsburgh & Southern Coal Co. v. Bates, supra, coal had been shipped from Pittsburgh to Baton Rouge

> in barges which, to accomodate the owner's business, had been moored about nine miles above the point of destination. The coal while remaining on the barges under these conditions was held subject to taxation. In General Oil Co. v. Crain, supra, the oil which had been brought from Pennsylvania to Memphis, a distributing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked 'Oil Already Sold in Arkansas, Louisiana and Mississippi.' The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.
>
> In the present case the property was held within the State for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the State, his share of the expenses of the local government."

Under the foregoing decision, we conclude that where a grain dealer or an elevator man withdraws from interstate transportation, grain for the temporary purpose of cleaning, weighing, etc., with the evident intent of thereafter reloading the grain and sending it to another State to fulfill his contract, that such withdrawal of the grain takes it out of interstate commerce to the extent that the State of Missouri may levy a property tax upon the grain. That is the evident holding of the Bacon case above, and while many temporary interruptions of continuous movement in interstate commerce might not actually result in a withdrawal of such freight from the stream of commerce, yet in the face of the Bacon decision it is apparent that the withdrawal and storing of grain for the purpose of weighing, inspecting, etc., under the protection of the State law, gives the State the right to levy a general property tax upon such protection. The same doctrine is announced in Board of Trade v. Olsen, 67 L. Ed. 849, where the Court was passing upon the right to enjoin the enforcement of Grain Futures Act. The Court says:

> "The railroads of the country accomodate themselves to the interstate functions of the

> Chicago market by giving shippers from the western states bills of lading through Chicago to points in the eastern states, with the right to remove the grain at Chicago for temporary purposes of storage, inspecting, weighing, grading or mixing, and in changing the ownership, consignee or destination, and then to continue the shipment under the same contract and at a through rate. Bacon v. Illinois. 227 U. S. 504. Such a contract does not prevent the legal taxing of the grain while in Chicago, but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it, as is plainly indicated in authorities cited at page 16.****".

In Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 669, the Supreme Court in referring to the Bacon case, says as follows:

> "In Bacon v. Illinois, the grain which was taxed had been shipped by the original owners, who were residents of southern and western states, under contracts for its transportation to New York and Philadelphia and other eastern cities, with a reservation to the owners to remove it from the cars at Chicago for certain temporary purposes 'or change the ownership, consignee or destination thereof.' The grain, while in transit, was purchased by Bacon, he succeeding to the rights of the vendors. Upon arrival of the grain at Chicago he exercised the right to remove it from the cars to his private elevator to avail himself of the privilege reserved. The privilege being exercised, he turned the grain over to the railroad companies for transportation in accordance with original contracts. After commenting upon the power he had over the grain while in Chicago, we said (p.516), 'He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.' For this conclusion cases were cited. It was further said (p.517), 'The property was held within the State for purposes deemed by the owner to be beneficial;***."

There are many cases by our Supreme Court which hold upon the facts of the particular case that there was not sufficient withdrawal from the continuous movement in interstate commerce so as to make the freight taxable in the State. A citation of those cases would be of no value here for the reason that the facts in those cases are not similar to the facts involved here. The rule of law in all of these cases is plain, but it is the application of the rule to the facts in dispute that is difficult, and a slight change of facts one way or another often makes the property taxable or not taxable. In as much as the Bacon decision above deals specifically with the question confronting us, what the Supreme Court might have held in other cases involving interstate commerce is not material, because undoubtedly the Supreme Court in the Bacon case has decided that where grain has been withdrawn from the carrier and stored in Missouri under the protection of Missouri laws for the purpose of inspecting, weighing, grading, etc., and then at a later date is forwarded on to another destination, that grain is taxable in Missouri.

We are of the opinion that where a grain dealer buys grain in other states, which he has sold in foreign markets, and has the grain unloaded at St. Joseph for the purpose of inspection, weighing, grading, mixing, etc., that such grain has been withdrawn under the authority of the Bacon decision from the continuous movement in interstate commerce, and that it may be taxed under the general property tax in this State.

Very truly yours,

FRANK W. HAYES,
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S