TAXATION AND REVENUE: - Interstate Commerce under of 1933, Section 9, House Bill No. 5 - Applicability of Act to receipts by newspaper publisher in Missouri from advertising and newspaper service furnished to advertiser outside of Missouri.

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Messrs. Watson, Ess, Groner, Barnett & Whittaker,
Dierks Building,
Kansas City, Missouri.

Gentlemen:

Your letter of February 26, 1934 has been received in which you requested an opinion on the applicability of the Act of the General Assembly of Missouri Special Session 1933, House Bill No. 5 to receipts from newspaper service and newspaper advertising by the publisher of a newspaper published in Missouri from an advertiser outside of Missouri. In order that the facts furnished by you on the basis of which we are rendering this opinion may be clear we deem it advisable to quote your letter above referred to in full, such letter being as follows:

"At the conference which you had with Mr. McCollum and me at Jefferson City on February 24th we informed you of the general course of business followed by the Kansas City Star in handling advertising. It was the purpose of that discussion to acquaint you with the facts so that you might render an opinion as to what portion, if any, of the gross receipts derived from advertising would be returned as a basis for the tax prescribed by House Bill No. 5, enacted by the legislature at the special session held in 1933. So that you may have the facts before you for such purpose this letter is written.

Preliminary to a discussion of the facts and the construction of the Act we wish to repeat what was said at the conference that it was quite clear that the receipts derived from circulation are not within the Act. This is so obvious that we do not discuss it further.

At our conference you inquired as to Mr. McCollum's conception of 'newspaper service.' This term is not defined by the Act. Mr. McCollum's conception of the term, which is based upon familiarity with the service gained from a long experience in the newspaper publishing business, is that it must mean services such as the furnishing of cuts or plates by a newspaper for a stipulated fee or the furnishing of such services by an advertising agent who prepares the copy, cuts and plates and charges the advertiser therefor. In the first instance the newspaper service would be furnished by a newspaper, while in the second instance it would be rendered by the advertising agent. But in both cases the advertiser would pay the fee for this service and the parties receiving the fee, if the service was rendered in Missouri, would pay the tax on the gross receipts derived from furnishing the same, subject to the qualification that the advertising to be printed and distributed was not distributed wholly or partially in interstate commerce. If the advertising was

distributed in interstate commerce then the furnishing of the cuts, plates, and copy is so inseparably connected with the advertising that the gross receipts would not be subject to tax. If the advertising was distributed partially in interstate commerce and partially in intrastate commerce, then the portion of the gross receipts allocable to the distribution made in the state would be subject to the tax. This last applies, of course, only to the case where the contract is entered into in Missouri and the plates and cuts are manufactured and delivered in Missouri.

Having disposed of these preliminary matters which are merely mentioned because of their brief discussion with you, we now pass to a discussion of the methods employed by the Kansas City Star in newspaper advertising.

The aim of the advertiser, of course, is to have his advertising copy read by newspaper subscribers who are potential purchasers of his product, with the hope that better and greater distribution thereof may be made. We will outline the methods by which this result is accomplished by the advertiser and the metropolitan newspaper. These newspapers usually have offices in the large cities such as New York and Chicago, for the purpose of contacting with advertisers whose products have general distribution and who have need for advertising to insure such distribution. When one of these concerns concludes that it is going to advertise in the newspaper it enters into a contract with its advertising agent, probably in Chicago or New York, and authorizes such advertising agent to place the advertising agreed upon at the agreed rates, in the newspaper. After this contract or order is entered into the advertising agent of the advertiser writes the copy and makes the necessary drawings and cuts. The agent then makes the electrotypes or mats from these. The mats or plates are then furnished to the newspaper in which the advertisement is to appear, by the advertiser through his advertising agent, along with the contract or order and such other instructions, information or intelligence as may be given to the newspaper by the advertiser or his agent. When the newspaper receives the electrotypes or the mats it puts them into form and makes a matrix mold and from this form it puts them in a curved casting box. A curved plate which is thereby cast is attached to the press which is then ready to produce the advertisement for distribution to the newspaper subscribers. After the printing is completed the newspaper is then distributed to the subscribers in Missouri, Kansas and the other states where the Star is read.

Newspaper advertising is sold on the basis of circulation and coverage, determined from time to time by an organization known as the Audit Bureau of Circulations. This bureau maintains a staff of auditors who at frequent intervals audit the circulation of all newspapers and furnish advertisers with such audits showing the circulation and coverage of such newspapers. Thus from the bureau's audit the advertiser knows how many subscribers the newspaper had and where those

subscribers are located. This enables the advertiser to cover both the markets and the population within any area in the country. Hence, when a New York advertiser purchases advertising in the Kansas City Star he knows that his advertising will be read by the subscribers of that newspaper who reside in Missouri, Kansas, Oklahoma and other states. The advertiser in using that medium is seeking to advance the sale of his products to those subscribers.

According to Section 2 A. the tax imposed by House Bill 5 is for the privilege of a person engaging in the business, among other things, of newspaper advertising and newspaper service, measured by the gross receipts derived from such business. Under Section 3 there is specifically exempted from the provision of the Act and from the tax levied and imposed thereby, such portion of the gross receipts as may be derived from business conducted in interstate commerce, which the State of Missouri is prohibited from taxing under the Federal Constitution. If the course of business followed by the newspaper in newspaper advertising as above detailed, constitutes interstate commerce, then the gross receipts derived therefrom cannot be made the subject of a tax. A consideration of those facts and the applicable principles of law announced by the Federal and State Courts leads to the conclusion that such business is purely interstate in character and is exempted from the tax.

It must be borne in mind that the ultimate aim of the advertiser is to place the advertising copy in the hands of the newspaper reader. The sequence of acts necessary to accomplish this end commences with the transportation of the copy or plates and other intelligence, to the newspaper in Missouri, to be followed by the printing of the newspaper in Missouri and thereafter with its distribution to the subscriber. It was held by the Supreme Court in Western Union Telegraph Co. v. Pendleton, 122 U. S. 347:

> 'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible; it carries only ideas, wishes, orders, and intelligence.'

The Circuit Court of Appeals for the Eighth Circuit, in Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, held that the transportation or communication of intelligence constitutes interstate commerce just as much as the transportation of goods or merchandise. The Court said:

> 'Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. * * *It is sufficient to say that as new methods of transacting business are devised, if they are found

> to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the one hand, and thepperson who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one state to another, it is interstate commerce, and therefore, subject to be regulated by Congress under the commerce clause of the Constitution.'

This language of Judge Sanborn was approved by the Supreme Court of Missouri in Securities State Bank v. Simmons, 251 Mo. 2, 12.

It has been settled that the circulation and distribution of newspapers between the various states is interstate commerce. In Post Printing & Publishing Co. vs. Brewster, 246 Fed. 321, the Court held that a statute of Kansas which prohibited newspapers from printing and publishing a newspaper containing cigarette advertising was unconstitutional, because the statute was a burden upon interstate commerce. The Court said in part:

> 'That the business of printing and publishing a newspaper such as that printed and published by the plaintiff in the case in the State of Missouri, and causing the copies thereof to be carried into this State and here delivered to subscribers and customers of the plaintiff through its agents and representatives, as alleged in the petition herein, constitutes the doing of interstate commerce business, cannot to my mind be disputed.'

The Supreme Court of Kansas recently in Little v. Smith, 124 Kan. 237, 242, said:

> 'Advertisements of goods in interstate commerce is an aid to the sale and must be regarded as an essential part of the business. * * *
>
> Newspapers and other media of conveying information regarding proper subjects of interstate commerce must be deemed to be engaged in such commerce. Cigarettes transported from other states, sold in original packages, is commerce, and contracts for advertising and the newspapers themselves carrying such information and advertisements, in order to promote sales, are within the protection of the commerce clause of the Constitution. * * * The * * * articles advertised were legal subjects of commerce, * * * publishers of newspapers carrying advertisements of articles were engaged in interstate commerce and * * * prohibition of such advertising and circulation of the newspaper was beyond the power of the state to enact, and constituted a violation of the commerce clause of the Federal Constitution.'

The fact that certain operations are made on the plates so as to conform them to the printing presses and in order that the printing may be done in Missouri, does not in any way alter the character of the interstate transaction.

We call your attention to Caldwell v. North Carolina, 187 U. S. 622, which is the so-called 'picture frame' case. Here the vendor shipped the picture frames and the pictures in separate bundles into the state of North Carolina where the pictures were placed in the frames and were then distributed to the buyer. The Court held that placing the pictures in the frame and selling the picture and frame in the state did not alter the interstate character of the entire transaction and held that a license fee for the conduct of such business could not be imposed.

A leading case upon the proposition is International Text Book Co. v. Pigg, 217 U. S. 91. In this case International Text Book Co., a foreign corporation, maintained an office within the state of Kansas. At this office it had a staff of collectors and instructors who performed services within the state in connection with the Company's business. It was shown that the Text Book Company had entered into contracts with students located in Kansas, after which texts, questionaires, pamphlets and papers were forwarded to the student, who was aided by resident instructors in the course of his studies. The question presented to the Court for determination was whether the business was such that it was subject to the regulation of the state, or whether it was interstate commerce. In holding that the business transacted was interstate commerce, the Court said, l. c. 106-107:

> "It involved, as already suggested, regular and, practically continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode - - looking at the contracts between the Textbook Company and its scholars - - involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states - - particularly when it is an execution of a valid contract between them--is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph - 'a new species of commerce,' to use the words of this court in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 9. In the great case of Gibbons v. Ogden, 9 Wheat. 1, 189, this court, speaking by Chief Justice Marshall, said, 'Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.' Referring to the constitutional power of Congress

> to regulate commerce among the States and with foreign countries, this court said in the Pensacola case, just cited, that 'it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.' This principle has never been modified by any subsequent decision of this court."

The Supreme Court of Missouri in International Text Book Company v. Gillespie, 229 Mo. 397, held to the same effect upon practically an identical statement of facts.

In Star-Chronicle Pub. Co. v. United Press Ass'n., 204 Fed. 217, contracts were entered into between the Missouri publisher and the Press Association operating from Chicago and New York, under which the Press Association furnished news service from Chicago and New York to the publisher in St. Louis. The office of the Press Association was maintained in the publisher's building in St. Louis. From this office the publisher maintained a 'pony' service from St. Louis to smaller towns in the state. The publisher also furnished the St. Louis office of the Press Association with local news gathered in Missouri. The Court held that the contract and all of the service rendered was interstate in character and not subject to separation.

In Lyons v. Federal System of Bakeries, 290 Fed. 792, it was held that lease and mortgage contracts under which equipment is sent into another state for use there and the collection of royalties for such use is an interstate transaction.

The Supreme Court of Utah in State v. Salt Lake Tribune Pub. Co., 249 Pac. 474, held that advertising contracts entered into with out-state advertisers for the publication of cigarette advertising within the state of Utah and the publication of that advertising in the state, all constitute interstate commerce not separable and all subject to the protection of the commerce clause of the constitution.

A case also very much in point in this consideration is that of United States v. United Shoe Machinery Co., 264 Fed., 158, where it appeared that leases for the installation and use of the machines were entered into and the machines shipped into the state. The Court held that the execution of the leases followed by the transportation of the machines constituted interstate commerce.

In Lamke v. Farmers Grain Company, 258 U. S. 50, the state sought to tax and regulate a grain elevator which stored grain bought and stored entirely within the state and which was then loaded out of the elevator and shipped entirely without the state. The Court held that the entire business was interstate and that the state in which the buying and storage took place could not tax or regulate the business or the privilege of engaging in the business, or the receipts derived from the business.

We recognize that the tax imposed by House Bill 5 is not levied upon the advertising contracts, but is levied upon the advertising services. The act of merely entering into the advertising contracts, of course, does not constitute interstate commerce.

In Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436, the advertising contract did not involve any movement of intelligence, but the Court did say that the execution of the contract, coupled with the furnishing of intelligence did constitute interstate commerce. There was no interstate transmission of intelligence involved in this case. See the opinion of the Court, page 442. Upon this ground alone the Court distinguished the case from International Text Book Co. vs. Pigg.

We concede that merely the execution of an advertising contract would not constitute interstate commerce of itself, but where the execution of the contract is followed by the transmission of intelligence in interstate commerce, such as is done under the method by which advertising is handled for the outstate advertiser, the transaction is wholly interstate commerce. The newspaper merely uses the plate and prints the copy in its newspapers, after which the copy moves to the subscriber. The newspaper distributes the advertiser's copy to the subscriber and in so doing it is merely passing on to the subscriber the intelligence which it received by the instrumentality of interstate commerce.

Your attention is directed to Bowman v. Continental Oil Co., 256 U. S. 642, where the Supreme Court held a privilege tax void because the act imposing the tax did not segregate intrastate business from interstate business. It appears here that the legislature had the foregoing principles well in mind when it enacted House Bill No. 5, for Section 3 of the Act provides for the exclusion or exemption of transactions in interstate commerce as being subject to the tax and thus enables the state to tax transactions which involve intrastate commerce and to exempt transactions which affect interstate commerce.

Applying the principles stated in the foregoing authorities and many others which we could cite upon this academic principle, it seems conclusive to us that the first method of handling advertising is wholly interstate from its inception to the end and that no part of the receipts derived from such advertising is subject to the tax under House Bill No. 5.

The other method of handling newspaper advertising is where the copy or plates may be delivered by a Missouri advertiser at the newspaper's place of business in Missouri, or where the Missouri newspaper may manufacture the cuts or plates in Missouri and where instrumentalities of interstate commerce are not utilized for the transportation of the plates, copy, or any other intelligence relating to such copy, cuts or plates. It would seem clear that as to such of the advertising as may be distributed in Missouri the gross receipts derived from such distribution would

be subject to the tax. Likewise it is equally clear that the tax could not be imposed upon the gross receipts derived from such advertising as to the distribution made of the advertising in states other than Missouri, because this would be interstate commerce.

After you have given consideration to the facts and conclusions herein stated it would be appreciated if you would give us your opinion relative thereto."

As we understand your position the claim on behalf of your client for exemption from tax on account of receipts derived from out-of-state advertisers in payment for newspaper service and newspaper advertising rests on two bases, I because certain things used by the newspaper in furnishing the service or advertising have come to the newspaper in interstate commerce, such things being either tangible, such as cuts, plates, etc., or intangible, such as intelligence or ideas (as to written matter, this classification of tangibles or intangibles will cover it) whether it be regarded as the intelligence which is the valuable part of that which is sent in interstate commerce, or the physical substance upon which it is written, and II because the newspaper in which the advertising matter appears is sent or sold in interstate commerce. We shall take up these two considerations separately and in order.

I.

The tax imposed with respect to the sale of "newspaper advertising" would be measured by the receipts of the newspaper from the advertiser because it is the newspaper which is selling the advertising service, and the advertiser which is paying for it. No payment is made by the newspaper to the advertiser for shipping any plates, cuts or other tangible property for use in connection with printing or for the sending in by the advertiser of intelligence or any sort of copy for publication and, therefore, there could be no sale of anything so sent from the advertiser to the newspaper or any receipts on account of such transmission. If the newspaper were buying such information or intelligence from a person outside the state then the case of Star-Chronicle Publishing Co. v. United Press Associations, 204 Fed. 217 (C. C. A. 8th, 1913) might become relevant as nothing tangible need pass in an interstate transmission to make such transmission interstate commerce. Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 (1903), International Text Book Co. v. Pigg, 217 U. S. 91 (1910). Likewise, if a person outside the state were selling or furnishing for some consideration plates, cuts or other tangible personal property to the newspaper and sending such property in to the newspaper in interstate commerce as a part of a sale or lease thereof, it might well be that this would be a sale in interstate commerce and no tax could be levied with respect to receipts from such a sale. Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887); Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925). However, there is no sale of any kind of either the intelligence or the tangible property from the advertiser to the newspaper. The advertiser pays the newspaper a certain sum for printing upon a certain portion of the newspaper material furnished by the advertiser. The newspaper sells nothing tangible to the advertiser,

the only sale of tangible property by the newspaper being a sale of the newspapers themselves, and these are not sold to the advertiser but to subscribers. If the advertiser desires its advertisement to be only printed matter, it may be that nothing tangible will pass in interstate commerce from the advertiser to the newspaper and if the advertiser wishes its own plates, cuts, etc. used in connection with the printing the shipment which it may make in interstate commerce is not a part of any sale or lease of such tangible property, because the sale with respect to which the tax is levied is a sale by the newspaper to the advertiser and not by the advertiser to the newspaper. Aside from the sales of the newspapers themselves, the only sale involved in the transaction is a sale from the newspaper to the advertiser of the advertising service or space, and the fact that the newspaper in supplying such space or service uses cuts, plates or intelligence which have been brought into this state in interstate commerce does not exempt the occupation of making such sales from taxation any more than the occupating of selling personal property in this state is exempted from taxation because the goods sold have been shipped in from outside the state. Woodruff v. Parham, 8 Wallace 123 (1869); Brown v. Houston, 114 U. S. 622 (1885); Machine Co. v. Gage, 100 U. S. 676 (1880). To decide otherwise would logically require exempting the sale of a law book in Missouri printed in this state because it contained the report of a decision by the House of Lords.

II.

As to the fact that the newspaper in which the advertising appears is distributed partially or wholly in interstate commerce, the contention that the advertising service is a transaction in interstate commerce because of such interstate distribution or sale is answered by the case of Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436 (1920). There complainant engaged in the business of acting as agent for the purchase for its principals of advertising space in magazines published by respondent filed his complaint for damages under the Sherman Anti-Trust Act alleging a monopoly by the defendant. The complainant alleged:

> "* * *that the business of editing, publishing, and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising agencies, was interstate commerce;* * *" (252 U. S. 438),

and the Court, in defining the issue in the case, said:

> "It follows that if the dealings with the defendant, which form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act." (252 U. S. 441).

It was held that the declaration stated no case, and the court said:

> "In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration." (252 U. S. 442).

There is no question that the sale of a newspaper by a person in one state to a person in another state as a part of which the newspaper is to be delivered by a movement in interstate commerce is a sale in interstate commerce and that no tax could be imposed on account of such a sale, whether the newspaper be regarded in its physical aspect, The Lottery Case 188 U. S. 321 (1903), or in its non-physical aspect as the transmission of intelligence, International Text Book Co. v. Pigg, supra. This was all that was decided in Post Printing and Publishing Co. v. Brewster, 246 Fed. 321, District Court Kansas, 1917, i. e. that since interstate sales could not be prohibited by prohibiting the sale of the newspaper qua newspaper, so it follows that the same result could not be reached by saying that the sale could be prohibited unless the paper left out a valuable part thereof, for the whole sale was exempt from state interference, because the whole paper was only the sum of its parts.

It is undeniably true that the newspaper acts as the middle link in a chain for transmitting ideas from the advertiser to members of the public, and that ideas pass by such chain from advertisers in one state to members of the public in other states, and that what the advertiser pays for is the service of the newspaper in transmitting such ideas, but these considerations were present with even greater force with the Saturday Evening Post, Blumenstock Bros. Advertising Agency v. Curtis Publishing Company, supra.

A tax is imposed upon the occupation of selling measured by receipts from sales. The sale involved is not the sale of the newspaper containing the advertisements, for the newspapers were sold to subscribers, and the fact that such sales to subscribers are in interstate commerce cannot affect taxes based on receipts from other sales to other persons of something entirely different. If it could, a newspaper by having one out-of-state subscriber could say that carrying a want ad for a cook for a local resident was a transaction of interstate commerce, and the receipts therefrom exempt from taxation.

As to the type of "newspaper service" described in the third paragraph of your letter, the above will answer your question on the effect of interstate circulation on taxability on account of receipts from advertising. As to the last sentence of your third paragraph, the application of the tax to receipts from advertisers is not affected by the place of entering into the contract, as it is the service of publication from which the receipts

are derived and not the entering into of the contract, nor is taxability affected by the place of manufacture or delivery of cuts, plates, etc. because the receipts with respect to which the tax is imposed with which we are concerned are receipts from the sale of the service to the advertiser, and not receipts from the sale of the plates, cuts, etc., to the paper by their manufacturer, or the sale of the plates to the advertiser by a manufacturer or advertising agent. The only receipts which we are considering are the receipts of the newspaper.

In conclusion, it is our opinion that receipts of a newspaper published in Missouri from advertisers outside of Missouri from publishing advertisements in or furnishing services in connection with such publication in such paper subject the publisher of the paper to a tax on account of engaging in the occupation of furnishing such service, and the fact that tangible personal property is sent into the state for use in printing such advertisements or furnishing such services, and the fact that the newspaper containing such advertisements is partially sold in interstate commerce, do not make receipts from such advertisers receipts from business conducted in interstate commerce, and that all of such receipts are taxable under the Act of the 1933 Special Session of the General Assembly of Missouri, House Bill No. 5, and that this would be true regardless of the place at which the advertising contract was entered into.

Yours very truly,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

ATTORNEY GENERAL.