

# MAINE STATE LEGISLATURE

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**STATE OF MAINE**

**REPORT**

**OF THE**

**ATTORNEY GENERAL**

**for the calendar years**

**1957 - 1958**

Therefore, it is my opinion that the State Highway Commission can forbid fishing from bridges if it interferes with the use of the highway.

Of course, this can be a serious public-relations matter.

L. SMITH DUNNACK  
Assistant Attorney General

July 10, 1958

To the Legislative Research Committee

Re: Suggested Amendments of Sales and Use Tax Act as a result of the hearing on June 11, 1958.

Your committee has requested an opinion relating to the suggestions set forth in Attorney Stevenson's letter of June 12, 1958, to Senator Lessard, Chairman of the subcommittee presiding over the hearing on the previous day.

In paragraph 2 of his letter he suggests striking out the sentence beginning on line 9, "retailers . . ." and replacing it with "Retailers, resident and non-resident, who are registered under the provisions of Sections 6 and 8 or who ought to be so registered under these sections, shall collect such tax and make remittance to the Assessor for all years that collections and remittances should have been made." This language inserted into Section 4 might jeopardize the constitutionality of the Sales and Use Tax Act. A Maine statute applying to a non-resident of this State would be deemed unconstitutional by any court of last resort. Section 6 takes care of non-resident sellers in case they come within the constitutional jurisdiction of this State by doing business in this State or having an agent, office, sample room, warehouse, or storage place.

In *California v. West Publishing Company*, 216 P. 441 (1950), the court said, speaking through Justice Spence:

"The nature and range of appellant's local activities establishes it as a 'retailer maintaining a place of business in this State,' and that such 'presence' in this jurisdiction rendered it liable to the service of process under the terms of the Use Tax Act."

Our use tax provisions in Section 6 take care of this situation without referring specifically to non-residents. Our use tax definition is the same as California's, and out-of-state sellers can come within the jurisdiction of this State by certain acts specified in Section 6 of Chapter 17, R. S.

The suggestion of adding to Section 6-II after "aforesaid": "who solicits directly by sending printed catalogs or other types of order booklets and pamphlets to residents within the state," would create a restraint upon out-of-state persons contrary to the Commerce and Due Process clauses of the Federal Constitution. The present Maine law is quite adequate in the taxing of out-of-state sellers who do business in Maine, as you will note under paragraphs I, II, III and IV of said Section 6.

The use tax is assessed for the storage use or other consumption in this State, and the United States Supreme Court has held that there is no violation of the Commerce Clause involved in the requirement that an out-of-state seller of goods collect a use tax on goods sold for use within the State, but in all of these court

decisions the out-of-state seller was brought within the jurisdiction of the use tax law by the provisions thereof . . .

Mr. Stevenson . . . would add to Section 6, after the first paragraph, the following: "For purposes of this section, delivery shall mean transportation of the tangible personal property by means of vehicles owned, leased, or contracted by the seller, or by means of common carrier." This language is inappropriate for insertion in a section relating to registration of sellers. If included, it should be in Section 2 of the Act, under Definitions. However, everyone knows what transportation means, and, as the provisions now stand, it means delivery by any means of transportation. . .

Mr. Stevenson suggests adding the criminal penalties provided in Section 36 of the Act to Section 6.

It is dangerous to add a penalty statute, even by reference, to a tax statute that is enforceable in a civil action. It might possibly change the burden of proof from a fair preponderance of the evidence to the beyond-a-reasonable doubt rule and would cause confusion in the minds of many attorneys and judges in litigated civil actions to collect a sales or use tax or on an appeal from reconsideration by the Assessor. . .

He suggests amending Section 16 to make non-residents of the State amenable to the jurisdiction of our State courts. We have a comity statute under the provisions of Sections 54 and 55 of Chapter 16, R. S. 1954, and some twenty-three States have similar statutes, so it seems to us that it is not necessary to write it into our Sales and Use Tax Law.

The danger in doing this lies in rendering a good law unconstitutional according to some United States Supreme Court decisions based on similar State statutes. If a non-resident is required to register under Section 6 and does so, or if he registers voluntarily under Section 8, we acquire jurisdiction of the registrant in our Maine courts.

In the case of an out-of-state vendor selling from a vehicle, each vehicle shall constitute "a place of business" for the purpose of Section 6 (see last paragraph thereof), which section gives the State authority to serve on the truck driver. This service brings the non-resident seller and his principal within the jurisdiction of our Maine courts.

In the Miller case in Maryland the truck driver was not selling but delivering goods sold in Delaware when the truck was attached by the State of Maryland. The Court held that the State had jurisdiction, but that the assessment was invalid on the ground that it was assessed against a non-resident. The Supreme Court said:

"If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition."

(Citing *St. Louis v. Ferry Co.*, 11 Wall. 423, 430.)

"If there is some jurisdictional fact or event to serve as a conductor, the reach of the state's taxing power may be carried to objects of taxation beyond its borders."

It is our opinion that Section 6 of the Act supplies the conductor to reach non-resident sellers and that an amendment using the term "non-resident" in the Act would not improve the enforcement, but would make it subject to constitutional litigation.

RALPH W. FARRIS  
Assistant Attorney General

July 16, 1958

To Raymond C. Mudge, Finance Commissioner

Re: Purchase of Automobiles by the Department of Education

At your request I have checked the opinions rendered by this office and I am unable to find any opinion concerning the purchase of vehicles for departmental use. Therefore, Section 43 of Chapter 15-A of the Revised Statutes of 1954 controls.

As stated by said section, the State does not provide automobiles for the travel of State employees, with certain exceptions. The Department of Education is not included in these specific exceptions, and to the best of my knowledge that department has not been designated by the Governor and Council to purchase automobiles.

GEORGE A. WATHEN  
Assistant Attorney General

July 16, 1958

To John J. Shea, Director, Probation and Parole

Re: Sentence for Crime Committed by Parolee

This is in response to your memo of June 25, 1958, in which you ask an opinion on Chapter 387, Section 16, Public Laws of 1957, seen on page 455:

"Section 16. Sentence for crime committed by paroled person. A parolee who commits an offense while on parole and is sentenced to a State penal or correctional institution shall serve the second sentence beginning on the date of termination of the first sentence, whether it is served or commuted."

*Question:* Can a parolee of the Men's Reformatory, who commits, while on parole, an offense for which he is sentenced to the Maine State Prison, serve time at the prison on the offense for which he was paroled prior to the beginning of the new prison sentence?

*Answer:* Yes, under conditions as outlined hereafter.

An examination of the history of this section offers little in the way of assistance in arriving at a decision.

The law first appeared in Chapter 60, Section 11, Public Laws of 1913, in the following form:

"Any prisoner committing a crime while at large upon parole or conditional release and being convicted and sentenced therefor shall serve the second sentence to commence from the date of the termination of the first sentence after the sentence is served or annulled."