STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

However, the instructors, being licensed Dental Hygienists, must have general supervision by a licensed dentist when performing any operation in a patient's mouth.

GARTH K. CHANDLER
Assistant Attorney General

May 19, 1969

To: Ernest H. Johnson, State Tax Assessor, Bureau of Taxation

Subject: Insurance Premium Tax

SYLLABUS:

THE INSURANCE PREMIUM TAX APPLIES TO AN INSURANCE COMPANY THAT SELLS INSURANCE SOLELY THROUGH THE MAIL ON RISKS LOCATED OR RESIDENT IN MAINE; IS NOT LICENSED; AND HAS NO AGENTS, REPRESENTATIVES, EMPLOYEES OR PLACE OF BUSINESS IN THE STATE OF MAINE.

ASSESSMENT MAY BE MADE FOR PREMIUMS COLLECTED AND NOT TAXED IN PRIOR YEARS.

FACTS:

The insurance premium tax is administered under sections 2511 through 2522 of Title 36 of the Revised Statutes. Imposition of the tax is provided in 36 M.R.S.A. § 2513:

> Every insurance company or association which does business or collects premiums or assessments including annuity considerations in the State . . . shall, for the privilege of doing business in the State, and in addition to any other taxes imposed for such privilege annually pay a tax upon all gross direct premiums including annuity considerations, whether in cash or otherwise, on contracts written on risks located or resident in the State for insurance of life, annuity, fire, casualty and other risks at the rate of 2% a year.

A question has arisen regarding the taxation of unlicensed insurance companies and more particularly unlicensed companies that are doing business from locations outside the State solely by mail.

QUESTIONS:

1. Does the insurance premium tax apply to an insurance company if it is not licensed by the Insurance Department, has no agents, representatives, or place of business in the State of Maine, but sells insurance solely through the mail on risks located or resident in Maine?
2. If such a company is liable for the insurance premium tax, can assessment now be made for premiums collected in prior years?

ANSWERS:

1. Yes.
2. Yes.

REASONS:

1. An insurance company need not be licensed by the Insurance Department for the company to be liable for the insurance premium tax. The tax is imposed for the privilege of doing business in this State. Section 2513, which imposes the tax, requires only that the company must be one which "does business or collects premiums or assessments . . . in the State . . . on risks located or resident in the State."

Although insurance is "commerce" within the concept of the interstate commerce clause, the McCarren Act, 15 U.S.C.A. § § 1011-1015, has expressly provided that the "business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business", (§ 1012). Therefore, the only constitutional objection to taxation of insurance business would be due process.

If there are absolutely no contacts with the State by the insurance company, even if the insured risk is located here, there can be no regulation or taxation. *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). However, the conduct of mail order insurance, whereby minimal contacts such as solicitation, offer, acceptance, and payment of premiums, occurs by mail, has been held to be "doing business" sufficient to subject a company to the regulatory jurisdiction of the State. *Opinion of the Attorney General,* March 3, 1969. See also *People v. United Nat'l Life Ins. Co.*, 58 Cal. Rptr. 599, 427 P 2d 199 (1967).

For purposes of the insurance premium tax, if minimal contacts can be found which would justify subjecting the company to the licensing requirements of the Insurance Department, under state law, whether or not such company was in fact licensed, liability for the tax exists.

When the insured risk is located or resident in Maine and there are some business contacts with this state the insurance company is subject to the taxing jurisdiction of Maine. The question now arises whether this is consistent with constitutional due process.

If jurisdiction to tax is based upon the same criteria as jurisdiction to regulate, there appears to be no problem. See "*Ministers Life & Casualty Union v. Haase: The new Trend in State Regulation of Unauthorized Mail Order Insurance Companies*", 43 Notre Dame L. 157 (1967).

Whether the taxation of mail order insurance companies violates due process is a question which has yet to be answered specifically by the Supreme Court of the United States, or the highest court of any state. The Supreme Court of the United States, has held that there is no due process deprivation of property by the taxation of premiums paid outside the taxing state by residents of the taxing state to a company which maintained an office or agents in the taxing state. *Equitable Life Society v. Penna.*, 238 U. S. 143 (1945). This result can be extended to mail order companies doing business in Maine.

Giving aid to this conclusion is the following language of the Supreme Court:

> Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event," "jurisdiction to tax," "business situs," "extraterritorialty," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. *That test is whether property*

was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business . . . which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a (privilege) tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. (Emphasis supplied) *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940).

The types of "protection, opportunities and benefits given by the state" are discussed in *People v. United Nat'l Life Ins. Co.*, supra. One primary protection or benefit afforded by the State is the availability of the courts to resolve disputes arising out of the contracts of insurance. Certainly the income derived from Maine risks is a substantial benefit.

The tax exacted for the privilege of doing business in this State, therefore, does not deprive the insurance company of property without due process.

2. When the State Tax Assessor learns that an insurance company has been conducting business in Maine without license and without payment of tax, the question arises whether he can assess insurance premium taxes for any or all years prior to the current year.

To determine the answer it becomes necessary to interpret the language of the insurance premium tax statute in conjunction with what the legislature intended to be the result.

First, there is the language of 36 M.R.S.A. § 2516 which requires every company doing business in Maine to file an annual return:

"Every company or association which by sections 2511 and 2513 is required to pay a tax shall on or before the first day of each March, make a return under oath to the State Tax Assessor, stating the amount of all gross direct premiums written by said company, either in cash or otherwise, on risks located or resident in this State during the year ending on the 31st day of December previous, the amount of direct return premiums thereon and dividends paid to the policyholders on direct premiums during said year." 36 M.R.S.A. § 2516.

Section 2516 refers back to § 2513 which is quoted in the FACTS. The tax is computed by the company on the return and may be paid with the return by March 1.

If a company does not pay its obligation with the return, the State Tax Assessor routinely assesses the privilege tax before April 15, which becomes due and payable on May 1.

"The taxes imposed by sections 2513 . . . shall be assessed by the State Tax Assessor on or before the 15th day of April annually, and the same shall be paid to the State Tax Assessor on or before the first day of May following." 36 M.R.S.A. § 2522.

If a company fails to make a return the State Tax Assessor is directed to make an assessment and demand payment.

"If any insurance company or association refuses or neglects to make the return required by sections 2516 . . . the State Tax Assessor shall make such assessment on such company or association as he deems just, and unless the same is paid on demand, the State Tax Assessor shall certify to the Insurance Commissioner that payment of such tax has not been made and such company or association shall do no more business in the State, and the Insurance

Commissioner shall give notice accordingly." 36 M.R.S.A. § 2518.

Under ordinary circumstances an insurance company is licensed to do business in Maine and the State Tax Assessor is aware of its existence. If such a company fails to file a return for the current year the State Tax Assessor will assess the tax on the basis of prior returns. The problem arises when neither the Insurance Department nor the State Tax Assessor knows that an insurance company has been doing business in the State.

The legislature certainly did not intend to exempt such companies from taxation. Section 2518, which authorizes an assessment upon failure of a company to "make the return required" does not itself set a limitation of time. Referral back to § 2516 indicates that an annual return is to be filed. It might be argued by implication that the assessment made pursuant to § 2518 is limited to one year. However, the language does not specifically limit the State Tax Assessor. An extension of case law would indicate that unless there is a specific limitation against the State by statute, there is no restraint on the State in the assessment or collection of taxes. See generally *Cape Elizabeth v. Skillin,* 79 Me. 593, 595, *State v. Crommet,* 151 Me 188, 193. By itself, § 2518 does not limit the action of the State Tax Assessor.

California upheld an assessment in a succeeding year without clear statutory permission.

> "It is contended by respondent that, if a tax might be validly assessed, the only proper time was in March, 1932, and that, such time having passed, it was no longer possible to make a valid assessment. The authorities . . . . are not determinative of the question whether in a subsequent year, at the regular time for making assessments, an omitted assessment may be made, and on this question we have found no authority squarely in point. Despite the lack of authority, however, we believe the circumstances of this case indicate clearly the proper decision. Respondent's position is, in substance, that by violation of its statutory duty to report, and thus accomplishing a concealment of its liability for the tax, the company or its representative has acquired a complete exemption therefrom. We cannot subscribe to this view, which would not only permit the company to profit by its own wrong, but would deprive the state of its legal claim for taxes in a wholly arbitrary manner. We are in accord with the contention of the state that the tax liability is imposed by the constitutional and statutory provisions (Cal. Const., art. 13, § 14, as amended in 1930; Pol. Code, § 3664b), and is an obligation of the taxpayer irrespective of the assessment thereof by the board. If the delayed assessment in the present case were an error caused by the board's own neglect, to the substantial injury of the taxpayer, it might be that a different conclusion would be indicated; but in the instant case the error was a direct result of the taxpayer's violation of its statutory duty, and there is no showing that the delay in assessment has operated unfairly to its prejudice. And these facts which disprove any prejudice or injury to the taxpayer likewise make out a case of an estoppel against the company and its representative to deny the validity thereof.
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> While we are satisfied that the conclusion reached herein is sound in principle, we may observe that the situation is one which called for legislative action, and in 1937 the Political Code was amended by the addition of section 3669 (St. 1937, pp. 80, 340) which authorizes assessment in a subsequent year after discovery of failure to make it in a prior year." *Carpenter v. Pacific Coast Ins. Ass'n.* 74 P 2d 511 (1937).

It might be noted that there exists a general two year limitation after the original assessment for the assessment of supplemental taxes. This section is inapplicable to the present situation since no original assessment was made.

There are no Maine cases on point, but the statute of limitation cases cited supra do give aid to the conclusion reached. The authority of the State Tax Assessor to make an assessment upon failure of the taxpayer to file a return is granted by statute and is not limited by that statute.

JAMES M. COHEN
Assistant Attorney General

May 22, 1969
Mental Health and Corrections

William F. Kearns, Jr., Commissioner

Appointment of Director of Mental Health to Office of Director of Mental Retardation

SYLLABUS:

It is inconsistent with the intent and purpose of the Legislature to appoint the Director of Mental Health to the position of the Director of Mental Retardation, in addition to his current duties in the first capacity.

FACTS:

The 103rd Legislature enacted § 2061 and § 2062 of Title 34 of the Revised Statutes creating the Bureau of Mental Retardation and the position of Director of Mental Retardation, which statutes become effective on July 1, 1969. The Legislature did not, at that time, and has not since, funded the Bureau of Mental Retardation or the position of Director of Mental Retardation.

QUESTION:

Can the Director of Mental Health be appointed by the Commissioner of Mental Health and Corrections to the position of Director of Mental Retardation, which latter position would be in addition to the current function as the Director of Mental Health?

ANSWER:

No.

REASON:

Legislative intent appears clear here, that there be established two separate bureaus – the Bureau of Mental Health and the Bureau of Mental Retardation. It is also specifically provided that there shall be appointed two officials – the Director of Mental Health and the Director of Mental Retardation. It is our opinion that the Legislature expressed in these separate enactments its view that, the needs of the State demand two separate bureaus and two separate directors in the areas of mental health and mental retardation. The statute creating the position of Director of Mental Retardation requires that the appointment thereto be subject to the Personnel Law. It would, therefore, appear that the Commissioner could not just arbitrarily appoint the Director of Mental Health to this