

# MAINE STATE LEGISLATURE

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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04330

December 21, 1973

Honorable Wakine Tanous  
Senate Chambers  
State House  
Augusta, Maine

Dear Wakine:

You have asked our opinion as to whether and how the State of Maine might constitutionally impose a tax on oil which is imported into Maine for trans-shipment to Canada. Since you have requested a rapid answer to the question, our answer does not purport to be a definitive treatment of the question. We have, however, undertaken a preliminary analysis of this issue.

Taxation of any activity involves a multitude of constitutional considerations including the Due Process Clause, U. S. Const., Amend. 14 and Me. Const., Art. I, Sec. 6 and 6-A, the Import-Export Clause; U. S. Const., Art. I, Sec. 10, Cl. 2, the Commerce Clause; U. S. Const., Art. I, Sec. 8, Cl. 3, and the Equal Protection Clause, U. S. Const., Amend. 14 and Me. Const., Art. I, Sec. 1 and 6-A. In addition, taxation of petroleum products involves the Maine Constitutional provision relating to use of revenues derived from taxes, fees or licenses for motor vehicle fuels. Me. Const., Art. IX, Sec. 19. A complete and definitive discussion of all these constitutional provisions as they relate to the Maine Oil Discharge Prevention and Pollution Control Act, 38 M.R.S.A. § 541, et seq., was recently rendered by the Maine Law Court in Portland Pipe Line Corp. v. Environmental Improvement Commission, Me., 307 A.2d 1 (1973), appeal dismissed (Nov. 19, 1973). In that decision the Law Court concluded that the imposition of a 1/2 cent per barrel license fee on the transfer of oil in Maine coastal waters was not inconsistent with any of the above-cited constitutional provisions.

Without restating in detail the rationale of the Court in arriving at that decision, we believe that it might well be possible for the State to impose additional tax burdens on the importation of oil within these constitutional limitations. Any tax structure must bear in mind several limitations, however.

Since all oil received in Maine for shipment to Canada is foreign oil and is held in bond while in the United States, the prohibition of the Import-Export Clause is of particular importance. That Clause provides that:

"No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. . . . "

The Law Court has interpreted this to mean that a fee such as that imposed under the Oil Discharge Prevention and Pollution Control Act does not constitute a duty on imports since (1) it falls not on the product itself, i.e., oil, but on the activity of transferring that oil, and (2) the fee structure of the aforementioned Act is part of an overall regulatory scheme for controlling oil pollution. Portland Pipe Line, supra. Presumably any statute such as that contemplated by you must qualify under one of these two exceptions in order to avoid the constitutional prohibition of the Export-Import Clause.

The Commerce Clause provides that:

"Congress shall have power. . . to regulate commerce with foreign Nations and among the several states. . . . "

This has been judicially construed to mean that States may not unreasonably burden interstate commerce. As noted in Portland Pipe Line, however, those engaged in interstate commerce are not exempt from taxation by the States. This test was easily satisfied by the license fees imposed by the Act in question in Portland Pipe Line.


Since time constraints are of some importance in drafting a statute to meet your needs and the constitutional considerations, particularly the Import-Export Clause, are so complicated and delicate, we suggest that you consider the imposition of (1) an increased fee under the Oil Discharge Prevention and Pollution Control Act, or (2) a fee or tax for storage or movement of oil in or through Maine. The size of the fee would depend on the purpose for the fee. The first alternative necessitates an increase in the Maine Coastal Conveyance Fund which is statutorily limited to \$4,000,000. 38 M.R.S.A. § 551 (4). Recent developments, including testimony before the Board of Environmental Protection, on the pending application of the Pittston Company for a marine terminal and refinery in Eastport, has indicated that cleanup costs and damages associated with major oil spills could easily surpass the limit of the fund by several fold.

The second alternative does not have the advantage of having withstood a constitutional challenge. It could, however, provide an alternate vehicle to achieve your goal and could be defended on the grounds that a fee for trans-shipment through or storage in Maine was imposed on the activity and not the product.

One final consideration must be mentioned. Any such fee or tax must, under the Equal Protection Clause, be imposed on all persons similarly situated. That is, if distinctions are to be drawn between persons on whom the fee is imposed or not imposed, those distinctions must be based on "actual differences bearing a substantial relation to the public purpose sought to be advanced by such discrimination." Portland Pipe Line, supra. On first blush it would appear, therefore, that any fee or tax must be imposed on all oil importers. The practical effect of such a scheme would be to impose a financial burden on oil companies importing oil into Maine to be consumed in the State. The effect of such fee or tax might well be mitigated by granting a rebate or tax credit, via Maine's corporate income tax, for all oil imported into Maine and actually consumed here, in an amount equal to the size of the fees imposed by the fee or tax structure.

I trust it is understood that this letter does not constitute an opinion that any of the above proposals would be constitutional. Our judgment on that could only be rendered after reviewing some actual legislation. Rather, it is the intent of this letter to assist you in evaluating possible legislation as outlined in the opening paragraph of this letter.

Very truly yours,

  
JON A. LUND  
Attorney General

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