JAMES E. TIERNEY
ATTORNEY GENERAL

83-2

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 10, 1983

R. L. Halperin, State Tax Assessor
Department of Finance and Administration
State Office Building
Station 24
Augusta, ME 04333

Dear Mr. Halperin:

You have sought the advice of this office as to the constitutionality of Section 611 of Title 36 of the Maine Revised Statutes, as applied to the taxation of certain vessels owned by nonresidents and brought into Maine after April 1st in any year.

Section 611 provides:

> Machinery and other personal property brought into this State, after April 1st and prior to December 31st by any person upon whom no personal property tax was assessed on April 1st in the State of Maine, shall be taxed as other personal property in the town in which it is used for the first time in this State.

You correctly observe that vessels owned by Maine residents are subject to taxation in Maine whether such vessels are located within or without the State on April 1st, and that vessels owned by nonresidents but located in Maine on April 1st may also be subjected to taxation in Maine as property situated in this State. Your inquiry concerns the taxability, pursuant to 36 M.R.S.A. § 611, of vessels which are owned by nonresidents

and which are not located in Maine on April 1st, but which are brought into Maine after that date. For the reasons which follow, it is the opinion of this office that Section 611 is not, on its face, unconstitutional and is susceptible of application to vessels owned by nonresidents in a manner consistent with the requirements of the Constitutions of the United States and the State of Maine.

You have raised three specific questions as to the constitutionality of Section 611, each of which we have reviewed and now discuss. First, you have noted the concern that Section 611 levies a tax only upon persons not assessed a personal property tax on April 1st. If this provision is read literally, the taxability of a particular vessel would depend upon whether the owner had been assessed a tax as of April 1st with respect to any other property. Such a distinction might, on its face, appear to violate the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Article IX, Section 8 of the Maine Constitution. However, as noted by Assistant Attorney General Stephen C. Clarkin in a memorandum dated December 16, 1976, to which you refer, such a literal reading is neither reasonable nor required, and the words "upon whom no personal property tax was assessed on April 1st" should be construed as imposing a tax upon persons not assessed a tax on April 1st with respect to the particular property in question. When so read, Section 611 simply avoids double taxation of specific property, and does not discriminate impermissibly on unrelated grounds in the imposition of the property tax.

Second, you have noted that Section 611 would levy a tax only upon property "brought into this State" after April 1st, and not upon property manufactured in Maine or removed from a business inventory in Maine after April 1st. As also noted in the above referenced memorandum by Assistant Attorney General Clarkin, however, property manufactured or removed from inventory in Maine after April 1st was in most cases located in Maine on April 1st, either as inventory or as materials, and consequently, unless exempted, was already taxed to its then-owner. Again, the result is not discrimination against any particular class of owners, but merely avoidance of double taxation of property already taxed in Maine on April 1st.

Third, you note that enforcement of Section 611 may result in taxation in Maine of personal property already taxed in another jurisdiction (i.e. the nonresident's domicile) for the

year in question, in possible violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1/] Taxation in Maine of vessels owned by nonresidents is not, however, precluded by reason of the possibility, or even the fact, of such "multiple taxation," provided that the State of Maine has stayed within the constitutional limits upon taxation of vessels and similar objects of movable personal property as set forth by the United States Supreme Court. See: Citizens National Bank v. Durr, 257 U.S. 99 (1921); Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917).

Taxation of items of personal property which are inherently mobile, such as vessels, has long presented particular problems to courts reviewing attempts to tax such property by states other than the state of the owner's domicile. In an early case, the United States Supreme Court ruled that a vessel engaged in interstate commerce was not taxable in jurisdictions in which it happened to stop during the course of such commerce, but was properly taxable only in its home port.

1/ In many cases, nonresident taxpayers have challenged taxes imposed on movable personal property, such as vessels or aircraft, under the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3. The Supreme Court has treated the Commerce Clause argument as inappropriate, and has decided such cases on due process grounds. In Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954), Braniff Airways challenged on Commerce Clause grounds the imposition in Nebraska of taxes upon its aircraft engaged in interstate commerce, including regular but nonexclusive stops in Nebraska. The Supreme Court stated:

> The argument upon which [Braniff] depends ultimately . . . is that its aircraft never "attained a tax situs within Nebraska" from which it argues that the Nebraska tax imposes a burden on interstate commerce. In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, [Braniff] names the wrong constitutional clause to support its position . . . [T]he bare question whether an instrumentality of commerce has a tax situs in a state for the purpose of subjection to a property tax is one of due process.

347 U.S. at 598-599.

Hays v. Pacific Mail S. S. Co., 58 U.S. (17 How.) 596 (1854). The Court, however, has long since discarded this "home port" doctrine, referring to it recently as "anachronistic" and "abandoned," Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 443 (1979), and has substituted therefor a rule permitting taxation of such personal property, on an apportioned basis, by states other than the state of the owner's domicile. Under this rule, which recognizes that a vessel or other similar object has a "situs of its own for the purpose of taxation ..." Wheeling Steel Corp. v. Fox, 298 U.S. 193, 210 (1936), a personal property tax may be imposed by a taxing jurisdiction upon such property only if it has acquired such a "tax situs" in the jurisdiction, and, if so, only on an apportioned basis, such that the actual tax imposed has "relation to opportunities, benefits, or protection conferred or afforded by the taxing State." Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949).2/

2/ In the Ott case, Louisiana and New Orleans imposed taxes on barges owned by foreign corporations and operated both within and without Louisiana, but made assessments based upon the ratio of miles traveled in Louisiana to total miles traveled. As noted above, the Supreme Court upheld the tax, stating:

> So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

336 U.S. at 174 (emphasis added; citation omitted). See also: Flying Tiger Line v. County of Los Angeles, 51 Cal. 2d 314, 333 P.2d 323 (1958), wherein the California Supreme Court stated:

> A taxpayer resisting an ad valorem tax on personal property based on an unapportioned assessment does not have the burden of showing that other states have actually imposed a tax on such property. He is entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state.

51 Cal. 2d at 319, 333 P.2d at 326.

Thus, whether personal property may permissibly be subject to taxation depends on the quantity and quality of contacts between the taxing jurisdiction and the property sought to be taxed. In applying this standard, a taxing official must determine first whether such contacts, often referred to as the "nexus" between the jurisdiction and the property, are sufficient to indicate fairly that the property has received the benefits and protections conferred by the taxing jurisdiction and has thereby attained a "tax situs" in the jurisdiction; and second, whether the tax is properly apportioned, which means that it is imposed only in an amount which is fairly related to the benefits and protection conferred upon the property by the jurisdiction.3/

It should be clear, therefore, that each case must be decided upon the facts presented, and that because of the multitude of potential factual situations, no test or rule can be easily formulated. Some situations, of course, are clear.

3/ It should be noted that, under this standard, it is possible that taxes imposed in the domicile of the owner of the property, not the taxes imposed in the jurisdiction where the property is located, run afoul of the constitutional standard. In reviewing an attempt by Kentucky officials to impose property taxes upon rolling stock owned by a Kentucky corporation but maintained elsewhere, the United States Supreme Court held the imposition of the tax in the state of domicile to be unconstitutional:

> The power of taxation . . . is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares ... If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State . . ., the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law.

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905) (emphasis added).

If a vessel is used solely within a single taxing jurisdiction, it will have a "tax situs" in that jurisdiction, and may there be taxed without violation of the due process standard. For example, in Old Dominion S. S. Co. v. Virginia, 198 U.S. 299 (1905), steamships owned by a Delaware corporation were found to have a tax situs in Virginia because they operated wholly within the State of Virginia. Conversely, if a vessel is only temporarily and irregularly within a taxing jurisdiction, such as a pleasure vessel in Maine waters only during an owner's week-long vacation, its presence would not be sufficient to establish a constitutional nexus between the vessel and the taxing jurisdiction, and taxation by a municipality in Maine would be unconstitutional.4/

In cases involving a presence in Maine that is neither so clearly permanent nor so clearly transitory, however, the taxing authorities must make an independent judgment of the sufficiency of the contacts under the due process standard. As noted above, no simple test or rule has been devised, and in making such a determination a municipal taxing officer must review all of the facts, including the domicile of the owner, the frequency and length of contacts in Maine, the nature of contacts in Maine, and the extent and nature of contacts with other jurisdictions.

In the particular case of fishing vessels operating seasonally within one jurisdiction, liability to taxation in the jurisdiction may depend on whether the vessel may fairly be said to have established a "base of operations" in the jurisdiction. Such a base of operations in a taxing jurisdiction, although not necessarily dispositive of the question, may be evidence that the vessel has established a tax situs by availing itself of the opportunities and benefits of doing business in that jurisdiction. Among the factors identifying the base of operations of a fishing vessel are the locations at which the vessel prepares for expeditions and hires a crew, and to which it regularly returns for repairs,

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4/ The property tax laws also create a specific exemption from taxation applicable to pleasure vessels located in Maine for longer periods of time but for the specific purpose of repair or storage. See 36 M.R.S.A. § 655(1)(I). The Maine Supreme Judicial Court has recently applied this exemption to preclude taxation of a vessel located in Maine from early 1979 until after April 1, 1980, even though it had been used for occasional pleasure trips while otherwise in Maine for repairs. See: Roberta v. Inhabitants of Southwest Harbor, 449 A.2d 1138 (Me. 1982).

supplies, and disposition of its catch. See: United States Whaling Co. v. King County, 96 Wash. 434, 165 P. 70 (1917).

It is hoped that the foregoing will be useful to you in making determinations as to the taxation of specific vessels based on the particular facts presented in each individual case. If I can offer any further assistance to you, please feel free to contact me.

Sincerely,

James E. Tierney

JAMES E. TIERNEY
Attorney General

JET/gm