



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

March 4, 1960

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. WW-810

Re: Applicability of the
Gross Receipts Tax pro-
vided for by Art. 11.03,
Title 122A, R.C.S., to
certain operations of
the Industrial Gas Supply
Corporation.

Dear Sir:

By letter dated January 5, 1960, you advise that the Industrial Gas Supply Corporation is a distributor of gas to a number of customers within the incorporated area of Houston, Texas, and that one of their customers is the City of Houston's Magnolia Park Gas Distribution System, the latter being the final distributor of the gas it receives. In reference to these facts, you ask whether the gross receipts tax provided for by Article 11.03, Title 122A, Taxation-General, Tex.Rev. Civ.Stat. (1925) (formerly codified as Art. 7060, V.A.C.S.) is due on the receipts from the sales by Industrial to the City of Houston.

The pertinent provisions of the Article in question are as follows:

"(1) Each individual, company, corporation, or association owning, operating, managing or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric lights, electric power, or water, shall make quarterly, on the first day of January, April, July and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer or superintendent of such company, or corporation, or association showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water

for the quarter next preceding . . . Nothing herein shall apply to any such gas, electric light, power or water works, or water and light plant, within this State, owned and operated by any city or town, nor to any county or water improvement or conservation district. . . ."

"(2) Nothing herein shall be construed to require payment of the tax on gross receipts herein levied more than once on the same commodity, and where the commodity is produced by one individual, company, corporation, or association, and distributed by another, the tax shall be paid by the distributor alone."

Note that the article imposes the tax on gas works used for local sale and distribution, and is measured by the gross amount received from such business "in the payment of charges for such gas." The terms "local sale" and "distribution" are not alternative, but cumulative. See Utilities Natural Gas Company v. State, 133 Tex. 313, 128 S.W.2d 1153 (1939). In the case just mentioned, "distribution" was held to require more than an isolated sale within the corporate limits of a city. In so holding, the Court stated at page 1155:

"This term as used does not mean the transfer of the possession of gas, by means of the pipe line, to a single purchaser where such purchaser is the only customer to whom the gas company sells gas in the city. It means the transfer of possession of gas to various individuals or concerned in the city. Any other construction of the term would, in our opinion, involve a departure from the legislative intent."

The definition of "distribution" was added to by Eddins-Walcher Butane Company v. Robert S. Calvert, 156 Tex. 587, 298 S.W.2d 93 (1957). In an opinion by Justice Walker, the Texas Supreme Court held that the term "gas works", as used in Art. 7060, V.A.C.S., meant (1) an establishment in which gas is manufactured, produced or processed, or (2) a distribution system consisting of pipes through which the gas flows and is delivered to the premises of consumers. In light of these two cases, it is submitted that "distribution" means transfer or possession of gas to various consumer individuals or concerns in an incorporated city or town. Therefore, you are advised that the term "charges for such gas", which modifies "gross amount received from such business", which in turn refers to "local sale and distribution," does not include the receipts from the sale of the gas to the City of Houston's Magnolia Park Gas Distribution System.

This conclusion is reinforced by an examination of the meaning and intent of section (2) of Article 11.03. In reference to the same provision in Art. 7060, V.A.C.S., the Court in the Eddins-Walcher case stated (p. 95):

"It is expressly provided that the tax shall be levied only once on the same commodity, and that where the commodity is produced by one person and distributed by another, the tax shall be paid by the distributor alone." (Emphasis added.)

The City of Houston is the actual distributor of the gas in question. The fact that the city is expressly exempted by the Act cannot operate to shift the legal incidence of the tax.

S U M M A R Y

The Industrial Gas Supply Corporation is not required to include receipts from the sale of gas to the City of Houston for distribution by the city's Magnolia Park Gas Distribution System in calculating gross receipts taxable under Article 11.03, Title 122A, Taxation-General, Tex.Rev.Civ.Stat. (1925).

Yours very truly,

WILL WILSON
Attorney General of Texas

By

Jack N. Price

Jack N. Price
Assistant

JNP:cm

APPROVED:
OPINION COMMITTEE:
W. V. Geppert, Chairman

Marietta McGregor Payne
Howard Mays
Jerry H. Roberts

REVIEWED FOR THE ATTORNEY GENERAL
By: Leonard Passmore