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SYLLABUS:

A separately incorporated pipeline company, whose sole business is the transportation of crude oil to another company, the primary business of which consists of producing, refining or marketing petroleum or its products, and of which the pipeline company is a wholly-owned subsidiary, falls within the general classification of a public utility and is not excluded therefrom by any provision of Section 5727.02, Revised Code. Opinion No. 2478, Opinions of the Attorney General for 1961, approved and followed.

Columbus, Ohio, May 8, 1963

Honorable Louis J. Schneider, Jr.
Tax Commissioner of Ohio
Department of Taxation
Columbus 15, Ohio

Dear Sir:

Your predessor requested my opinion which reads as follows:

"Under date of August 24, 1961, an opinion was issued by the then Attorney General of Ohio in response to my request for such opinion concerning the public utility property and excise taxes provided in Chapter 5727 of the Revised Code. I am resubmitting the request because the earlier opinion, while going into depth on one phase of the question, did not do so on another phase. Therefore, your opinion is respectfully requested on the following situation.

"In recent years a number of integrated oil companies, engaged in production, transportation, refining and marketing of petroleum or its products, have adopted the practice of separately incorporating certain phases or operations of their business, such as pipe line operations, which heretofore had been divisional or departmental operations of the business entity.

"Of course, such pipe line operations, while operated as a division or department of the corporate entity whose primary business was that of producing, refining or marketing petroleum or its products, were excluded from taxation as a public utility under the provisions of Section 5727.02 of the Revised Code. The questions arise, however, as to whether the separately incorporated pipe line operations serving only the parent corporation fall within the definition contained in Section 5727.01 (E) (10) and whether the exclusion provided in Section 5727.02 of the

Revised Code applies when pipe line operations are separately incorporated and operated as a wholly owned subsidiary of the parent petroleum company.

"Specifically then, your opinion is requested in regard to the following questions:

> "Is a separately incorporated pipe line company transporting crude oil only within this state to be considered as a public utility and taxed as such under the provisions of Section 5727.01 (E) (10) and 5727.02 of the Revised Code when such pipe line company is a wholly owned subsidiary of a parent corporation whose primary business in this state consists of producing, refining or marketing petroleum or its products and when said pipe line company serves only the parent corporation?"

I also have at hand a citation of cases which you submitted for consideration in connection with this request.

The pertinent part of Section 5727.01, Revised Code, provides:

"As used in sections 5727.01 to 5727.62, inclusive, of the Revised Code:

"(A) 'Public utility' includes each corporation, firm, individual, and association, its leasees, trustees, or receivers elected or appointed by any authority, and referred to as an express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, water works company, messenger company, union depot company, water transportation company, heating company, cooling company, street railroad company, or railroad company. Public utility includes any plant or property owned or operated by any such company, corporation, firm, individual, or association.

"* * * * * * * * *

"(E) Any person, firm, partnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated:

"* * * * * * * * *

"(10) Is a pipe line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing either wholly or partially within this state;"

Section 5727.02, Revised Code, provides:

> "As used in sections 5727.01 to 5727.62, inclusive, of the Revised Code, 'public utility,' 'electric light company,' 'gas company,' 'natural gas company,' 'pipe line company,' 'water works company,' 'water transportation company,' 'heating company,' or 'cooling company' does not include any person, firm, partnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, which is engaged in some other primary business to which the supplying of electricity, power, heat, artificial gas, natural gas, water, water transportation, steam, or air to others is incidental, or which supplies electricity, power, heat, gas, water, water transportation, steam or air to its tenants, whether for a separate charge or otherwise, or whose primary business in this state consists of producing, refining, or marketing petroleum or its products."

The opinion of August 24, 1961 (Opinion No. 2478, Opinions of the Attorney General for 1961) dealt primarily with the exception in Section 5727.02, Revised Code. I therefore presume that your request for an examination "in depth" of "another phase" is directed to the basic character of public utility rather than application of the exception, once that basic character is established.

It may be conceded that the problem can be considered ternately, that is, by interpreting the definitive character of the term public utility as set forth by the legislature in Section 5727.01, Revised Code, and the breadth of the exemptions in Section 5727.02, Revised Code; or in the alternative, by considering the problem "in depth" as you put it.

To consider the problem "in depth," the point of analysis would not be the statutory definition, but rather the nature of the pipeline operation of the subsidiary company in terms of common law or traditional concepts of business enterprises which by their character are vested with a sufficient degree of the public interest and classed as public utilities. This determination would in turn govern the applicability of Section 5727.01, Revised Code, the presumption being that the legislature did not intend to extend the term public utility therein beyond the common law or traditional concepts of public utility status.

This would, of course, require an appraisal of such concepts as devotion of the property to public service, the duty to serve

indiscriminately, amenability to regulation of service standards, amenability to regulation of rates for the service, etc., and under such "in depth" appraisal the subsidiary here may fail to meet these traditional incidents of public utility status. An example of such an "in depth" analysis appears in the case of *The Southern Ohio Power Co.* v. *Public Utilities Commission of Ohio,* 110 Ohio St., 246, which holds as a general principal that:

> "To constitute a 'public utility,' the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state."

However, that case did not involve the construction of a tax statute, but, on the contrary, considered governmental regulation under the police power. Governmental intervention through regulation of the operation of private enterprise differs fundamentally from legislative classification for purposes of exercising the power to tax.

It is my considered opinion that since the question you pose involves the construction of a tax statute and a legislative classification for purposes of exercising the governmental power to tax and not the exercise of the governmental police power to regulate the operation of public utilities, there is no need to establish the character of the subsidiary in the light of traditional public utility concepts by an "in depth" analysis. If the legislature has by its enactment defined this subsidiary as a public utility for purposes of taxation, under Section 5727.01, Revised Code, and has not exempted it under Section 5727.02, Revised Code, our inquiry is at an end, and any relief from the application of the statute should be by resort to the legislature. This is borne out by the case of *Akron Transportation Co.* v. *Glander,* 155 Ohio St., 471, involving a set of facts in which the taxing authority urged reference to the public utility statutes to assess taxability of a motor transportation company as a "street railroad" as defined in the tax statute. The Supreme Court in its opinion recognized that only the tax statutes were involved and that definitions of similar entities under different sections are not always quantitatively equivalent. At page 474 of the opinion, the court stated as follows:

> "Although it is not controlling in these cases, since we are applying the tax statutes, public utilities are similarly defined in Section 614.2, General Code, wherein 'street railroad' is again defined as a company. * * *"

At page 476 the following appears:

> "The decision of this question by the court is limited to an interpretation of the statutes involved. The court may not so construe the statutes, which are in effect taxing statutes, as to bring within the classifications established taxpayers not covered by the language thereof. * * *"

The court makes the following observation at page 480:

> "The remedy for such situation is legislative. It is not the function of courts, by judicial interpretation, to create a classification of property for tax purposes. * * *"

The subject of the taxability of a pipeline operation as a public utility is a matter which has been considered in a series of early opinions of this office. Opinions No. 455, 456, and 464, Opinions of the Attorney General for 1913, and Opinion No. 398, Opinions of the Attorney General for 1915. In connection with these it is worthy of note that: (1) the definitive provisions of the statutes upon which those opinions were based are substantially the same as those of the present Revised Code; and (2) said opinions cover six different factual situations, at least one of which appears closely analogous to the present problem. Without reviewing them in detail, they may be summarized as setting forth the following as a test of what, in the area of pipeline operations and taxation thereof, constitutes a public utility under the law at that time:

> The business is that of a public utility when it is found doing any of the acts enumerated by the statute (in this instance, transportation of natural gas, oil or coal or its derivatives, through pipes or tubing, either wholly or partially within this state), as a continual or habitual activity, whether as a principal pursuit, or as an independent, though subordinate, activity, or as a purely incidental undertaking. (The purely incidental undertaking may, under the present law, be the subject of the exception of Section 5727.02, Revised Code.) And, with respect to taxes, the activities must be separable, by means appropriate to the taxes involved, from other activities to which it may be incidental.

I am inclined to adopt this test for two reasons. First, I find

no defect in the logic of the opinions from which it is derived. Second, I am constrained to the view that opinions from this office should be consistent and harmonious with previous opinions therefrom, unless the contrary is required by statutory changes, judicial decisions or clearly demonstrated errors in the previous opinions. Applying this test to your present question, it is clear that the subject corporation is doing the acts enumerated in the statute and that its activities are readily separable. I must therefore conclude that the corporation in question is a public utility under the provisions of Section 5727.01, Revised Code, there being no authority to require a different conclusion.

I allude to the public utility laws, Title 49 of the Revised Code, to demonstrate that there are variations in legislative definitions and classifications of even seemingly identical entities depending upon the legislative will. Sections 4905.02 and 4905.03 (A)(7), Revised Code, define a public utility under the public utility statutes as

> "Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:
>
> "* * * * * * * * *
>
> "A pipeline company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing either wholly or partly within this state;"

I note that this definition is identical to that in Section 5727.01, Revised Code. Under the former corporate arrangement, the operation of the subsidiary company was included as a department of the present parent company. Such principal enterprise would, by definition, be a public utility under the public utility sections, 4905.02 and 4905.03, Revised Code, as well as under the taxation section, Section 5727.01, Revised Code. However, the grant of exemption in Section 5727.02, Revised Code, where the pipeline operation *as a department of the company* is incidental to the "primary business of producing, refining or marketing petroleum or its products" eliminates the identity and status of the company as a public utility for taxation purposes.

Conversely, where a subsidiary corporation is formed, the

subsidiary corporation comes within the definition of a public utility, both under the public utility statutes and the taxation statutes. Since the legislature has *not exemped a separate corporation,* even though the pipeline function of the subsidiary is still incidental to the primary business of the parent of "producing, refining, and marketing petroleum or its products" the pipeline operation does not lose its identity or status as a public utility as defined in Section 5727.01, Revised Code.

A further example of legislative differentiation in classification is found in comparing Section 4905.03, Revised Code, which includes a motor transportation company, and a sewage disposal company as public utilities for purposes of regulation, and Section 5727.01, Revised Code, which does *not* include either of these as a public utility for purposes of taxation thereunder.

While tax statutes are construed strictly against the state as observed by the court in the *Akron Transportation* case, *supra,* exemptions from taxation are construed strictly against the taxpayer. Numerous authorities in this regard are cited in 51 Ohio Jurisprudence 2d, Taxation, Sections 90-93, at page 112 et seq.

It appears that prior to recent action taken by your department, pursuant to Opinion No. 2478, Opinions of the Attorney General for 1961, companies situated as you describe may not have been required to file reports as public utilities. Whether this is true of all companies so situated and was the result of a positive policy by your department or merely from acquiescence in the taxpayer's determination of which returns it should file I am not advised In any event it suggests some consideration should be given to the effect of prior administrative procedure. *The State, ex rel. Automobile Machine Co.,* v. *Brown, Secy. of State,* 121 Ohio St., 73, is a leading case on this subject. It states:

> "It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do.' *Industrial Commission* v. *Brown,* 92 Ohio St., 309, 311, 110 N. E., 744, 745 * * *"

The principle set forth is well recognized in the area of sta-

tutory construction; however, I am unable to conclude that it may be applied with such rigidity as to place upon administrative agencies the power to nullify legislative acts. References may be found, as in 12 Ohio Jurisprudence 2d, Corporations, Section 131, to the effect that the principle of the separate corporate entity is subject, as all other fictions are, to the rule that equity will look through the form of things to their substance where the ends of justice cannot be served in any other way. However, the full test of the section indicates this to be an exception rather than the general rule. Arguments favoring application of this exception lack persuasivences in this instance, for it appears that the separate incorporation of a pipeline operation by an oil company carries with it certain advantages, notable among which is the legislative grant of the power of eminent domain to pipeline utilities from the standpoint of common law concepts and their true character as public utilities. I refer to Section 1723.01, Revised Code, which grants the power to appropriate private property to a "company * * * organized for the purpose of * * * transporting * * * petroleum * * * through tubing, pipes, or conduits * * *," although the power of eminent domain is ordinarily reserved to enterprises which are vested with a public interest, i.e., possessing common law characteristics of public utilities whose property is dedicated to the public service. Your attention is again referred to Opinion No. 398, Opinions of the Attorney General for 1915, wherein this same feature was discussed.

Having obtained those advantages it seems inappropriate to involve equity to eliminate the accompanying disadvantages. The fact that the pipeline would not qualify as a public utility if operated as a part of a producing or refining company rather than as a separate corporation is significant only in that it makes clear that either method may be employed, at the election of the parties involved, in accordance with their conclusion as to the method most advantageous to their particular circumstances.

Although the 1961 opinion may not have been "in depth" on all "phases" I find no basis for arriving at a conclusion inconsistent with it or the other previous opinions from this office.

All of these opinions are sufficient in depth to resolve the basic question of public utility status for purposes of taxation and

the legislative definition under a tax statute.

Accordingly, it is my opinion, and you are advised, that a separately incorporated pipeline company, whose sole business is the transportation of crude oil to another company, the primary business of which consists of producing, refining or marketing petroleum or its products, and of which the pipeline company is a wholly-owned subsidiary, falls within the general classification of a public utility and is not excluded therefrom by any provision of Section 5727.02, Revised Code.

Respectfully,

WILLIAM B. SAXBE

Attorney General