



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

November 29, 1960

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

Opinion No. WW-964

Re: Basis upon which tax on
cigars, levied by Art.
8.02(b) and (c). Title
122A, Taxation-General,
R.C.S., should be cal-
culated.

Dear Mr. Calvert:

Your letter requesting an opinion upon the referenced topic sets out pertinent details relating to the question and we therefore quote it in full, as follows:

"Request is hereby made for a formal opinion as to the proper interpretation of Article 8.01, et seq., Taxation-General, V.A.T.S., concerning the measure of the tax to be applied to the sale of cigars and tobacco products in this state.

"As you know, all excise taxes levied in this state are collected by the person making the taxable sale. Thus, a tax imposed on a retail sale is collected by the retailer and a tax levied on the first sale is collected by the distributor.

"The cigar tax is levied on the first sale in Texas and is collected by the distributor. Thus, Article 8.02, Taxation-General, V.A.T.S., provides in part as follows:

"There is hereby levied a tax upon the "first sale" of cigars and tobacco products as those terms are defined by the following schedule:

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"Article 8.03, Taxation-General, V.A.T.S., provides in part as follows:

"The tax levied herein shall be paid only once to the State Treasurer by the person making the "first sale" in this State."

"The language of the foregoing statutes is clear and there is no difficulty in determining that the taxable event with respect to the cigar and tobacco products tax is the first sale in Texas, and that the distributor is the party obligated to collect same and pay it over to the State.

"The problem arises, however, as to the measure of the tax so payable. In all other statutes, the tax is measured by the amount of the sale which is considered the taxable event. In the case of first sales, the measure is the amount of the first sale -- either by quantity or by price. In the case of retail sales, the measure is the price of the sale.

"With respect to the cigar and tobacco products tax the language is not clear as to the measure of the tax. In the usual situation, cigars are shipped into this state by the manufacturer to a distributor who sells them to a retailer. The words of the statute are as follows:

"

"(b) Upon cigars of all descriptions weighing more than three (3) pounds per one thousand (1,000) retailing for not more than three and three-tenths cents (3.3¢) each, seven dollars and fifty cents (\$7.50) per one thousand (1,000).

"(c) Upon cigars of all descriptions weighing more than three (3) pounds per one thousand (1,000), retailing for over three and three-tenths cents (3.3¢) each, fifteen dollars (\$15.00) per one thousand (1,000)."

"We have construed the incidence of tax to be imposed upon the distributor based upon the price at which it is anticipated that the retailer will sell the cigars. In other words,

under our present interpretation of the statute the tax is not paid by the distributor based upon the price for which he sells the cigars to the retailer, but upon the price at which he anticipates that the retailer will sell the cigars.

"With regard to our present interpretation, we understand that the distributor or the manufacturer cannot dictate the price at which the cigars should be sold at retail because of our anti-trust laws. Thus, under our present interpretation, the distributor is required to pay the tax only upon an informed guess of what the retail price may be. We are informed by the industry that as a result of our interpretation no cigars fall within the tax prescribed in Article 8.02(b).

"Your opinion is therefore respectfully requested as to whether the tax on cigars should be based upon the price for which the cigars are resold by the distributor to the retailer, or whether it should be based upon the anticipated price for which the cigar is retailed by the retailer."

It is our opinion that the tax described should be based upon the price for which the distributor sells the cigars to the retailer.

The taxable incident here is the "first sale" of cigars within the State. "First sale" is defined by Art. 8.01(h) as follows:

"(h) The words 'First Sale' shall mean and include the first sale or distribution of cigars or tobacco products in intrastate commerce in the State of Texas or the first use or consumption of cigars or tobacco products within this State."

The distributor making this first sale is required to remit the tax due on the transaction (Art. 8.03), and to accompany these remittances with reports to your office on or before the tenth of each month. (Art. 8.04).

Art. 8.03(b) and (c), quoted above in your letter, sets up two classifications of cigars weighing more than three pounds per 1,000 for the purpose of measuring the tax due:

those "retailing" for not more than 3.3¢ each and those "retailing" for over 3.3¢ each. ¹ The term "retailing" is not defined. The normal connotation of the term "retailing" would indicate the amount paid by the ultimate consumer purchasing these cigars from the retail dealer. However, such an interpretation in this case separates the tax base, or the factor upon which the tax is calculated, from the taxable incident, which is the "first sale". If this interpretation were followed, the distributor would be forced to collect a tax measured by the terms of an event which has not occurred; that is, the retail sale to the ultimate consumer. ² He can only guess at what price the cigar will ultimately be sold, and pay the tax accordingly. Because the report and remittance of tax must be made soon after his sale to the retailer, the measuring event (sale at retail) may actually occur after the tax has already been remitted. Further, we understand that the tax is normally "passed on"; that is, that the distributor simply adds the amount of the tax to the price paid him by the retail dealer. Such collection would also of course have to be made upon a projected estimate of the price at which the cigars in question will finally be sold. Such a construction might well render the tax statute so vague as to make it unconstitutional and void. Western Union Telegraph Co. v. State of Texas, 62 Tex. 630, (1884). However, if we interpret the term "retailing" to mean the price at which the cigars are sold to the retail dealer by the distributor, the uncertainty is removed. The measuring base coincides with the taxable incident, and the amount of tax is fixed as of that time. This is obviously the most reasonable, if not the only practical, interpretation of the Article. It is settled that, to enable a reasonable interpretation of legislative intent words in a statute may be given a possible, though unusual, meaning. State v. Pioneer Oil & Refining Co., 292 S.W. 869 (Tex.Com.App. 1927).

As further substantiation of this view, we note your statement that, under the present interpretation basing the tax rate on retail sales price, no cigars fall within the tax prescribed in Art. 8.02(b); that is, the lower of the two tax

¹These are the only two classifications of cigars in which price is a factor in determination of the tax due.

²As you point out, the distributor or manufacturer may not dictate the mandatory retail price of a cigar because of the inhibitions of our anti-trust laws.

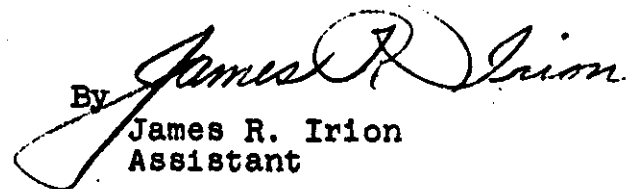
classifications under consideration. This would constitute Art. 8.02(b) worthless legislation and, as has often been said, the Legislature will not be presumed to have done a vain thing. Greene v. Robison, 109 Tex. 367, 210 S.W. 498 (1919). If we measure the tax by the price paid upon the first sale, however, both provisions of the Article come into play in classification for tax purposes and have meaning.

SUMMARY

The tax on cigars levied by Art. 8.02(b) and (c), Title 122A, Taxation-General, R.C.S., should be calculated upon the price received by the distributor or person making the "first sale" of the cigars in intrastate commerce and not upon the price at which such cigars are ultimately sold at retail.

Yours very truly,

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