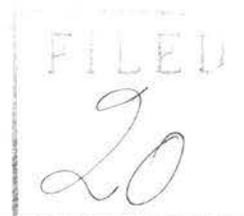


MUNICIPAL CORPORATION'S:-
GASOLINE TAX.

Municipal corporation is not entitled to
refund of gasoline tax on purchases made
for the use of the city.

11-13
November 3, 1933.



Mr. Elliott M. Dampf,
Prosecuting Attorney,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you
inquire as follows:

"Will you kindly advise me if the city is entitled
to a refund of the two cents gas tax on cars and
motor-cycles operated by city on official business
and within the city limits."

Section 7794, R. S. Mo. 1929, provides as follows:

"For the purpose of providing funds to complete the
construction of and for the maintenance of the state
highway system of this state as designated by law,
there is hereby provided a license tax equal to two
cents per gallon of motor vehicle fuels as defined
in this article used in motor vehicles of the public
highways of the state, which license tax shall apply
and become effective January 1, 1935."

Section 7795, R. S. Mo. 1929, provides as follows:

"Every distributor shall for the year 1935, and each
year thereafter, when engaged in such business in this
state, pay to the state treasurer an amount equal to
two (2¢) cents for each gallon of motor vehicle fuels
refined, manufactured, produced or compounded by such
distributor and sold by him in this state, or shipped,
transported or imported by such distributor into and
distributed or sold by him within this state during
such year."

Section 7796, R. S. Mo. 1929, provides as follows:

"Every dealer shall for the year 1935, and each year
thereafter, when engaged in such business in this
state, pay to the state treasurer an amount equal to
two (2¢) cents for each gallon of motor vehicle fuels
sold or distributed by such dealer in this state during
such year: Provided, however, that no motor vehicle

fuels sold or distributed by such dealer and which were refined, manufactured, produced or compounded and sold by a distributor in this state, and no motor vehicle fuels sold by such dealer which when purchased by him were contained in containers or packages, other than the original containers or packages in which the same was shipped, transported or imported into this state shall be included or considered in determining the amount to be paid by such dealer, but only such motor vehicle fuels as were shipped, transported or imported into this state and purchased by such dealer in the original packages in which they were so shipped, transported or imported into this state and then resold by such dealer after the breaking of such original package by him shall be included or considered for the purpose of computing said amount."

Section 7805, R. S. Mo. 1929, provides as follows:

"All motor vehicle fuels, as herein defined, distributed or sold in the state of Missouri by any distributor or dealer, shall be deemed to have been sold for use in operating motor vehicles upon the public highways of this state: Provided, however, that any person who shall buy and use any motor vehicle fuels, as defined in this article, for the purpose of operating or propelling stationary gas engines, farm tractors or motor boats, or who shall purchase or use any of such fuels for cleaning, dyeing, or other commercial use of the same, or who shall buy and use such motor vehicle fuels for any purpose whatever, except in motor vehicles operated, or intended to be operated, upon any of the public highways of the state of Missouri, as defined in section 7759, and who shall have paid any license tax required by this article to be paid, either directly or indirectly through the amount of such tax being included in the price of such fuel, shall be reimbursed and repaid the amount of such tax directly or indirectly paid by him, upon presenting to the inspector an affidavit accompanied by the original invoice showing such purchase, which affidavit shall state the total amount of such fuels so purchased and used by such consumer, other than in motor vehicles operated or intended to be operated upon any of the public highways of the state of Missouri, as hereinbefore defined, and shall state for what purpose used. Upon the receipt of such affidavit and invoice, the inspector shall cause to be repaid the amount of such tax to the consumer aforesaid, by a warrant drawn by said inspector on the state road fund which shall be audited and allowed by the state auditor and shall be paid by the state treasurer: Provided further, that application for refunds, as provided herein, must be filed with the inspector within ninety (90) days from the date of purchase on invoice."

Section 7794 above provides expressly that the funds arising under this Act shall be used to complete the construction and the

the maintenance of the state highway system of this state. Section 7795 provides for a tax of two (2¢) cents a gallon on each gallon of motor fuel refined, manufactured, sold, etc., by the distributor. Section 7796 applies the same tax to every dealer who shall sell or distribute motor fuel in the state. Section 7805 provides for the exemption of fuels from the tax when used for certain purposes and under certain circumstances. We find no exemption in Section 7805 which would exempt gasoline sold to a municipality, whether it be used in a governmental function or otherwise.

You inquire whether a municipal corporation is entitled to a refund of two (2¢) cents state gas tax on cars and motorcycles operated by the city on official business and within the limits of the city.

The municipalities and political subdivisions of the state are subject to be taxed by the State of Missouri, unless the State has in some way exempted them. The only exemption contained in the Constitution in favor of municipalities is found in Section 6 of Article X of the Constitution, which provides as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

We call your attention particularly to the fact that the above section exempts the real and personal property of municipal corporations from taxation. The Constitution does not exempt municipal corporations from taxes other than taxes upon real and personal property. The tax levied under Chapter 41 above is not a real or personal tax, but is a tax levied upon the dealer or distributor. It is true that the tax is added to the price of the gasoline sold, but it is equally true that all state taxes levied upon all dealers and distributors in other lines of business are reflected in the price of the product sold, whether it be to municipalities or to individuals. The question as to whether or not a municipality is liable for a gasoline tax such as we have in this state is a complicated one and the courts are divided in their opinions concerning it, depending a great deal upon the wording of the statutes and the constitution of the state involved.

There is one line of cases of which the case of O'Berry v. Macklenburg County, 67 A. L. R. 1304, is typical, to the effect that cities and counties are impliedly exempt from such a tax. The theory of these cases is found in the following quotation from page 1308:

"Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the Constitution or a statute."

There is another line of authorities upholding the validity of such tax, as exemplified by the case of *Crockett v. Salt Lake County*, 60 A. L. R. page 867, where it is said at page 872:

"The court pointed out that undoubtedly the amount of the tax finally falls upon the purchaser, as it would be natural for the seller to add the amount of the tax to the price of the commodity. In the course of the opinion, the court uses this language: 'The language of the later statute is definite as to the persons who are required to pay the tax therein provided. The municipalities are in no way relieved from the burden of paying any addition that may be added to the price of motor fuels which may be occasioned by the tax. There is no indication in the language of either of the statutes in question that it was the intention of the lawmakers to relieve municipalities from the burden of paying any such enhanced price.'"

We therefore have two lines of decisions dealing with this question. The determination of your inquiry, however, with the aid of those decisions, must depend upon the Constitution and statutes of this state. Section 6 of Article X above quoted does unquestionably exempt from taxation the real and personal property of municipal corporations. The tax levied under this statute is not a tax upon the property of a municipal corporation in any sense of the word. Under Section 7795 the distributor must pay the tax, and under Section 7796 the dealer must pay the tax. It is what is commonly known as an excise tax. It is true that the excise tax is, in all cases, always passed on to the ultimate consumer, but such is true of all taxes, whether they be excise, property or otherwise, because all taxes are included in the expense of doing business and ultimately are

passed on to the consumer. We therefore conclude that it would not be in violation of Section 6 of Article X for dealers who sell to municipal corporations to add the tax in question because under such circumstances the gasoline tax is not a tax upon the property, real or personal, of a municipal corporation.

Section 7805, R. S. Mo. 1929, provides that certain gasoline sold by dealers and distributors should be exempt from the tax and provides for refunds in favor of the persons named in said Section. The section does not exempt gasoline sold to municipalities by said dealers. It therefore must be assumed that when the Legislature passed a law exempting certain persons from the paying of the tax under certain conditions, that it impliedly expected all other persons not exempted to pay the tax. The tax itself is levied not for general revenue purposes but under Section 7794 for the completion and maintenance of the State highway system.

In *Crockett v. Salt Lake County* above, at page 571, it is said:

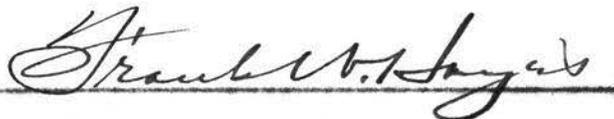
"It thus appears that the tax is not for the purpose of raising revenue for the payment of the usual and ordinary expenses of state government, but for the construction and maintenance of public highways. These highways are open, not only for the use of the citizens of the state, but for others traveling within the state and for the counties and cities in the discharge of their public duties. While it is true the statute does not expressly provide that the municipalities of the state shall be subject to the tax, nevertheless there is no provision or language found in the act which indicates the intent of the Legislature to exempt or relieve counties or cities from paying the tax imposed upon all who use motor vehicle fuels for vehicles, engines, or machines, movable or immovable, within the state. On the contrary the admitted purpose of the legislation and the directions contained in the Act as to the disposition of the funds so raised not only fail to indicate an intention on the part of the Legislature not to exempt municipalities from payment of the tax, but negative any inference that such municipalities were intended to be relieved from the payment of the tax.

The tax levied is by the statute designated an excise tax; that is, it is a tax for the privilege of selling motor vehicle fuels and likewise for the use of such fuels when purchased outside of the state and brought within the state for use. It is in no sense a general tax upon the property of the municipality, but is a tax charged against the municipality for the privileges included within the terms of the act and which are made subject to the tax. It does not purport to be a tax against any specific property, real or personal."

While there is authority to the contrary, we are inclined to adopt the position taken by the court in the Crockett case above, so far as deciding the question raised in your inquiry. Our statutes do not impose a property tax as would be exempted under Section 6 of Article X of the Constitution. It lays an excise tax on the dealer or the distributor. The revenue derived from the tax is not for the usual and ordinary expense of the state government, but is for the particular purpose of the construction and maintenance of the state highways. Our statutes provide for specific exemptions and fail to exempt municipal corporations from the payment of the tax. Considering the Constitution and the statutes involved, we are inclined to the view that the Legislature did not intend to exempt cities from the payment of this state gasoline tax, and such being true they would not be entitled to a refund of the tax after it had been paid.

It is therefore the opinion of this Department that municipal corporations are not entitled to a refund of the state gasoline tax paid by them in purchasing gasoline from dealers who pay the tax under the above Sections.

Very truly yours,



Assistant Attorney General.

APPROVED:

Attorney General.