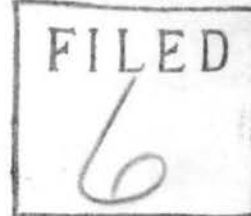


TAXATION: Agencies of State Government required to pay both State municipal gasoline taxes.

September 7, 1934



Hon. W. W. Bennett, Steward
State Hospital No. 2
St. Joseph, Missouri

My Dear Sir:

We are in receipt of a communication executed by the Honorable John S. Lucas, requesting an opinion of this office on the following matters:

"Will you kindly inform us what taxes we are supposed to pay on gasoline?

The Standard Oil Company are charging us 2¢ for the Missouri State Highway on gasoline delivered outside the city limits.

We have an ordinance in this city which calls for a tax of 1¢ a gallon on gasoline. The other taxes you are familiar with. On our oils purchased they make no charge for taxes."

I.

STATE INSTITUTIONS REQUIRED TO
PAY MISSOURI STATE GASOLINE TAX.

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

"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, 1925."

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

"Every distributor shall for the year 1925, 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 in part as follows:

"Every dealer shall for the year 1925, 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:" * * * "

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

"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 extended 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" * * * ."

From the foregoing quoted sections it appears that the Motor Vehicle Fuel Tax Act is a privilege tax based upon the number of gallons of fuel sold, and providing for an exemption or refund of the tax in case the fuel is used for purposes other than propelling motor vehicles upon the highways of the state. It is pertinent to note that the exemptions are not allowed or remitted to any class of persons or corporations, but refund is allowed only on condition that the motor vehicle fuels were not used to propel motor vehicles upon the highways of the State. The tax is levied upon the use of gasoline and upon the privilege of selling it. Clearly, it is an excise tax. 26 R. C. L. 236 refers to an excise tax as

"an excise tax is a tax imposed upon the performance of an act, the engaging in the occupation, and the enjoyment of a privilege. Every form of tax not imposed directly upon polls or property must constitute an excise if it is a valid tax of any description."

Excise taxes and their distinctive features are further discussed by Cooley on Taxation, Volume 4, 4th Edition, page 3374 et seq. and 26 R. C. L. p. 35.

The power of the state in the matter of taxation is unlimited so long as the exercise of the power does not conflict with the Federal or State Constitutions. American Mfg. Co. vs. St. Louis, 270 Mo. 40, 1. c. 44:

"* * * as is said by Judge Cooley (1 Cooley on Taxation, 25), 'the power of taxation, however vast in its character, and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State.' On the other hand the State may exercise this sovereign right with respect to all persons, things and business activities which exist under the protection of its laws, and, as is said by the same distinguished author (Ibid.), 'Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.' These propositions have ceased to be subjects of discussion or argument.* * *"

This decision was affirmed in the United States Supreme Court and is reported at 63 Law Ed. 1084. The limitations upon the power to tax prescribed by the state constitution respecting the property of the State and the minor political governmental subdivisions are found in Section 6 of Article X, part of which provides:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation.* * *"

As heretofore stated, an excise tax cannot in any sense be construed as a tax on property, and as the foregoing constitutional provision applies to property, either real or personal, it cannot be construed as extending to effect a tax upon a privilege. This is true although the tax may be indirectly paid by a county, city or other governmental subdivision. *City of Portland vs. Kozer*, 108 Oregon, 375, 217 Pac. 833. In this case the City of Portland sought to enjoin the Secretary of State of Oregon from the collection of the gasoline tax imposed upon gasoline used by the City. The Court held the charge to be against the dealer and dismissed the action. In the course of the opinion the Court stated:

"* * *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.'* * *"

From the foregoing provisions of the Motor Vehicle Fuel Act it is apparent that the tax is primarily one upon distributors and dealers in motor vehicle fuels. The Act has been so construed in the case of *Central Transfer Company vs. Commercial Oil Company*, 45 Fed. (2d) 400, 1. c. 402:

"* * *Here in the case at bar the gasoline was purchased in Missouri, and under the law attacked was subject to an excise tax payable by the dealer in Missouri* * *In other words, the party who there attempted to raise the alleged constitutional invalidity of the California law was, as here, a consumer and not a distributor or a dealer; and there as here the tax was directly laid upon the distributor and the dealer, and not upon the consumer.* * *"

In view of these similarities it would seem that the ruling in the Oregon case is on all fours with the instant problem. The tax is primarily laid upon dealers and distributors and it is no concern of the party that buys the gasoline as to what portion is a tax upon the dealer or distributor and what portion is the consideration for the commodity itself. The fact that the tax is based upon a gallonage or volume basis in no way changes the nature of the tax. In *Viquesney vs. Kansas City et al.* 366 S. W. 700, the Supreme Court passed upon the gasoline tax ordinance of Kansas City which imposed a tax of one cent a gallon on dealers of gasoline. In the course of the discussion the Court stated, l. c. 702:

"* * *The first question for determination is whether the tax of 1 cent a gallon on the gasoline sold by the dealer is a property tax or an excise or occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by a taxpayer, irrespective of the value of his assets, it is an "excise tax."
* * * * *

Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is 'occupation tax'--one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. In re *Opinion of the Justices (Me.)* 121 A. 902; *State v. Hart*, 125 Wash. 520, 217 P. 45; *Altitude Oil Co. v. People*, 70 Colo. 452, 202 P. 180.* * * * *

It is therefore the opinion of this office that your institution is not entitled to any refund of the two cent state gasoline tax paid by you as part of the purchase price of gasoline bought for use in motor vehicles to be propelled upon the highways of the State.

II.

CITY OF ST. JOSEPH EMPOWERED TO
LEVY GASOLINE TAX.

The City of St. Joseph, Missouri, is a city of the first class, operating under the provisions of Article II, Chapter 38 R. S. Mo. 1929, which was Article II of Chapter 72 R. S. Mo. 1919. Roach vs. Landis, 1. S. W. (2d) 203:

"The City of St. Joseph is a city of the first class governed by provisions of Article II, Chapter 72, R. S. Mo. 1919, relating to charters of cities of the first class."

Under the provisions of Subdivision 17, Section 6171 of said Article and Chapter of the 1929 revision, cities of the first class are authorized:

"* * * to license, tax and regulate, manufacturers, merchants, * * * dealers * * * oil companies * * * and to license, tax and regulate all occupations, professions, trades, pursuits, corporations and other institutions and establishments, articles, utilities and commodities, not heretofore enumerated by whatever name or character, like or unlike * * * and to fix the license tax to be paid thereon or therefor; and in the exercise of the foregoing powers to divide the various occupations, professions, trades, pursuits and corporations * * * articles, utilities and commodities into different classes. * * *"

It therefore appears that it would be within the delegated powers of the City of St. Joseph to exact an occupation tax of one cent per gallon upon gasoline sold or used or stored in the City.

In the Viquesney case supra, the issue before the Court was the power of the City of Kansas City to exact a tax of one cent from merchants and dealers in gasoline. Although it was a special city charter thereunder consideration, still it authorized the licensing of "merchants" just as the statute in the instant case does. The Court stated, 1. c. 703:

"* * * Evidently it was the understanding of the framers of the charter that "merchant" should cover all dealers that might be included in the term, be-

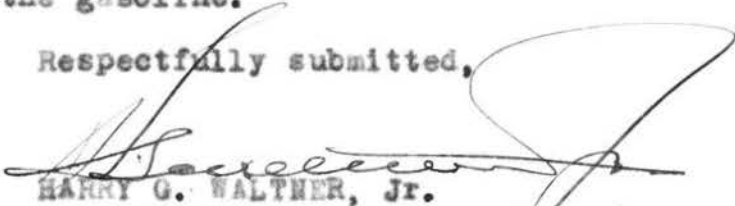
cause the specific dealers mentioned in that section do not include retail merchants of many kinds. Appellant is hardly in position in this case to say the term "merchant" does not cover the case, because he points out that the Appellant was otherwise taxed, without objection from him, as a merchant. He paid an ad valorem merchant's general tax on his property, as shown by evidence introduced by the plaintiff. See, also, St. Louis v. Baskowitz, 373 Mo. loc. cit. 565, 201 S. W. 870.

Thus it appears that the city authorities, as well as the plaintiff, interpreted the charter to include callings like that pursued by the appellant, as that of a merchant. * * * *

It being clearly within the power of the City to lay an occupation tax upon dealers in gasoline, and the Viquesney case supra, definitely determined among other things the right to assess such tax on a gallonage basis, we find ourselves in the same position relative to this city tax as arises under the State Tax, to-wit, that the tax is laid upon the dealer and the State is in no position to object to the passing on of the tax by the dealers by means of an increase in the price of gasoline sold.

We deem it unnecessary to here recite the applicable law referred to under Section 1 of this opinion, and hold that, providing the St. Joseph gasoline tax is one laid upon the dealer as an occupation tax, your institution would be required to pay the same as a part of the purchase price of the gasoline.

Respectfully submitted,


HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY MCKITTRICK,
Attorney General