

MOTOR VEHICLE FUEL) No refund of tax on gasoline exported in
TAX:GASOLINE) tanks of automobiles.

December 2, 1937

12-3



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of November 3, 1937, in which you request an opinion as follows:

"The state of Kansas has recently passed a law which prohibits busses and trucks entering the state having more than twenty gallons of gasoline in the fuel tanks.

"The Southwestern Greyhound Lines have had storage tanks in Kansas City and their busses would be refueled there, the storage tanks holding about 150 gallons on trips that led through Kansas to Colorado. The Greyhound Lines has been paying the state tax of 2¢ a gallon on that gasoline and the 1¢ per gallon to Kansas City on the gas which propelled these busses over the roads in Kansas.

"We are in receipt of a claim of \$116.00 for refund on the gasoline tax, from the Southwestern Greyhound Lines. We would like an opinion from your department as to whether this refund is a just claim against the state and whether we can legally pay the Southwestern Greyhound Lines this claim.

"Similar claims to the above will amount to approximately \$50,000 per year."

Section 7794, R.S. Missouri 1929, is 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 on the public highways of this state, which license tax shall apply and become effective January 1, 1925."

Section 7805, R.S. Missouri 1929, is 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 7795, 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 or invoice."

For a proper determination of this question, we think it is necessary to determine whether or not the tax provided for in section 7794, supra, is a charge as compensation for the use of the highways of this state.

In *Schevenell v. Blackwood*, 35 Fed. 2nd 1.c. 425, the court said concerning the fuel tax law of Arkansas on this subject:

"Section 1 of Act No. 606, 1921 (Arkansas), provides:

"That all persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this State, shall collect from such

purchaser, in addition to the usual charge, the sum of one cent (1¢) per gallon for each gallon so sold.'

'In *Standard Oil Co. v. Brodie*, supra, sustaining the tax, the court said (153 Ark. 119, 239 S.W. 754):

'The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of the gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured.

'If it had been intended merely to tax the gasoline or its use, it would have been wholly unnecessary to describe the character of the use or the place where it was to be used, and the fact that the lawmakers incorporated these elements in laying the bases of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller nor upon the gasoline while in his hands, and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline nor upon the gasoline itself."

The Brodie case referred to, supra, is a well reasoned decision and has been cited as authority by the courts in many jurisdictions. The Arkansas act levying the tax is very much similar to Missouri's act in that the tax is placed upon the fuel used in motor vehicles on the highways of the state.

In *State ex rel. v. Hackman*, 314 Mo. 33, 282 S.W. 1007, 1011, a mandamus action to compel respondent, the state auditor, to issue a warrant to pay for certain printing and stationery furnished the State Highway Commission, drawn upon the highway fund. The court, in passing upon this question, determined what character of tax the motor vehicle tax of this state was, and said:

"Whether it is called motor vehicle registration fees, license fees, or a tax (all of which designations are used in Section 44a of Article IV of the Constitution, Vide Laws of 1921, 1st Ex. Sess. p. 196), or by any other name, it is a tax levied by the state upon the right of motor vehicles to use the public streets and highways of the state."

The tax on the sale or use of motor vehicle fuels is also mentioned in the constitutional provisions referred to in the Hackman case, supra. We make the preliminary statement concerning this case in order to illustrate that although the court did determine the character of our tax, this was not essential to the determination of the question before them, and for that reason, is obiter dictum. However, it is persuasive upon the question.

It is to be noticed that all through our motor vehicle tax law the tax is restricted to that fuel which is used to propel motor vehicles on our highways, and further, there is a section (7805) which authorizes refunds to purchasers of gasoline who pay the tax thereon, but do not use said fuel in motor vehicles operated upon the highways of the state.

In view of the above it is clear, we think, that the tax on motor vehicle fuels in Missouri is a charge as compensation for the use of our highways. The tax is not imposed on the seller, or the gasoline itself, but is paid by the consumer, and as said in the Brodie case, referred to supra, "it would have been wholly unnecessary to describe the character of the use or the place where it was to be used" if this tax is not a charge for the use of our highways. This conclusion, if there was nothing further to be considered, would seem to indicate that the refund applied for here is allowable. However, we do not think this conclusion in itself decides the question before us. The Oil Inspector is authorized and required by law to collect the two cents per gallon tax. He is only given certain employees or deputies and permitted to collect the tax in the manner prescribed. The tax must be collected on each gallon sold, and then if the gasoline is used for a non-taxable purpose, the purchaser may apply and make affidavit for a refund under Section 7805, R.S. Missouri 1929. This section provides that all gasoline sold in this state "shall be deemed to have been sold for use in operating motor vehicles upon the public highways of this state". It further enumerates in what specific instances a refund will be allowed, and then provides "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".

We find no precedent upon this question, either in our own courts or the courts of other jurisdictions. Therefore, we must construe the Motor Vehicle Fuel Tax Law to ascertain if the legislative intent as expressed in said act is broad enough in its scope to cover the refund applied for here.

If the Southwestern Greyhound Lines is entitled to a refund, it must be under the above quoted part of Section 7805 or not at all. This section raises the presumption that all motor vehicle fuel sold in this state is used on the highways of this state.

Section 7805, supra, provides a refund for those who purchase gasoline and use it for any purpose except when that use is in motor vehicles operated or intended to be operated on the highways of this state. In other words,

literally speaking, only gasoline used in motor vehicles operated or intended to be operated on the highways of this state is subject to taxation (because when not used for this purpose, the tax collected is refunded).

This section does not contemplate that gasoline purchased in this state, in order to be taxable, must be wholly consumed in a motor vehicle while that vehicle is operating on the highways of this state, but only that it be purchased for use in a motor vehicle which is intended to be operated or is actually operated on said highways, regardless of the amount of fuel consumed.

The fuel purchased by the Southwestern Greyhound Lines was purchased for, and used in, a motor vehicle intended to be and actually operated on the highways of this state, and as such does not fall within the provisions of Section 7805, notwithstanding the fact that all of said fuel was not actually consumed while said vehicle was on our highways.

In State ex rel. v. Gehner, 320 Mo. l.c. 1182, it is said:

"An exemption from taxation must be clear and unambiguous and should not be created by implication." (Scotland County Railroad Co., 65 Mo. l.c. 135; State ex rel. v. Arnold, 136 Mo. l.c. 450.)

* * * * *

"If any doubt arises as to the exemption claimed it must operate most strongly against the party claiming the exemption." (Flitterer v. Crawford, 157 Mo. l.c. 58).

* * * * *

"Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption."

* * * * *

"The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation." (State ex rel. Globe-Democrat Pub. Co. v. Gehner, 294 S.W. 1.c. 1018.)"

In Barber Asphalt Paving Co. v. Hayward, 154 S.W. 140, 141 (Mo.), the courts have said:

"Appellants' construction would be bound to result in distress and injury. But the law does not stand puzzle-headed and helpless before such difficulty. The inconvenience arising from such construction of the statute precludes adopting it, provided any other course be open in reason."

In Bragg City Special Road District v. Johnson, 20 S.W. 2nd 22, 23 (Mo.), the court said:

"It has been ruled by this court many times that in the construction of statutes which are not clear in meaning, the results and consequences of any proposed interpretation of the statute may properly be considered as a guide as to the probable intent of the lawmaker from the language used."

In State ex rel. v. St. Louis-San Francisco Ry. Co., 300 S.W. 274, 277 (Mo.), it is said:

"A construction should never be given to a statute * * * * * which would work * * * confusion and mischief unless no other reasonable construction is possible."

In Gam v. St. Louis and S.F. Ry. Co., 198 S.W. 494, 496 (Mo. App.), it is said:

"We recognize the rule in the construction of statutes that hardships and inconveniences are not to control; but we also recognize that these burdens should not be ignored."

With these rules in mind, as laid down by our courts, it is to be observed that if this refund is allowable under our laws, then it naturally follows that all gasoline purchased by said companies outside our state and transported into this state is subject to taxation. How is the Inspector of Oils to determine these amounts? The legislature has not provided him with ports of entry as in other states, nor a sufficient number of deputies and agents to keep a check on such importation or exportation. To construe the law to permit such a refund would be to attempt to make it apply to an impossible situation, and would place a tremendous burden on those charged with the administration of our Motor Fuel Tax Law. It would result in evil consequences and lay refund appropriations made by the legislature open to be depleted by those who cared to make a false affidavit for a refund, and which the Inspector of Oils would have no way of checking, other than to accept the affidavit as true on its face and trust to the honesty of the person making it, though we do not mean to infer that the claim in question is other than what it purports to be.

We do not think the legislature intended to place the Inspector of Oils in such a helpless position, and would not do so without providing by law a means by which all exporting fuel must comply, so that each such refund might be checked in accordance with such law to ascertain if said refund was correct and allowable in every detail. Exemption from taxation by implication is not favored or permitted, and any doubt must be resolved against the person claiming said exemption.

In Garfill v. Brocken, 145 N.E. 1.c. 316 (Ind.), it is said:

"It is complained that persons who buy gasoline in Indiana for the operation of automobiles must pay the tax,

although they may drive at once to the state line and cross into another state. But the law does not require such a person to purchase in Indiana more than sufficient gasoline to carry him to the state line. If he prefers, he may reach that point with an empty tank and replenish his supply in the other state without paying the Indiana tax."

The same is true in this instance. The tax in Missouri is a charge for the use of our highways - that charge is measured on fuel purchased for consumption. The person buying said fuel buys the privilege to use our highways to the extent his fuel will permit. If he does not avail himself of this privilege, it is of no concern of this state.

CONCLUSION

Therefore, it is the opinion of this department that the refund applied for in this instance is not such a refund as would be payable under the laws of this state and should not be allowed.

Respectfully submitted,

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APPROVED By:

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