MOTOR VEHICLE FUEL TAX: Agents and employees of federal government exempt when -

GASOLINE: Sales at Jefferson Barracks taxable when -

March 8, 1939

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Honorable Roy H. Cherry
State Oil Inspector
Jefferson City, Missouri

Dear Mr. Cherry:

This will acknowledge receipt of your letter of March 3, 1939, in which you request our opinion on the following:

"It has been the policy of this department since the enactment of the Missouri Motor Vehicle Fuel Tax Act to allow distributors upon whom the motor vehicle fuel tax is levied to deduct from their reports each month the number of gallons of motor vehicle fuels sold to agents and employees of the United States government. These deductions must be substantiated by an exemption certificate, form No. 1094, which is supplied by the federal government to its agents and employees entitled to exemption. This certificate No. 1094 is executed by the person in the employ of the government and delivered to the service station attendant at the time of the purchase.

On numerous occasions, service station attendants have refused to accept this exemption certificate in lieu of the tax and the federal government has at various times filed with this department claims for refund of the tax paid on such purchases. This department has heretofore included the government claims in the list of relief claims recommended to the appropriations committee of the House of Representatives and in the past an appropriation has been made for the

payment of the claims. We have on file at the present time two claims by the federal government for a total of $186.14. These claims are supported by several hundred of the above mentioned certificates. Some of these certificates are dated as far back as 1932.

During the 1936 session of Congress, there was passed what is known as the Haden-Cartwright Bill. (H.R. 11687)

In the state of Missouri, we have only one military reservation on which a post exchange is operated and since the enactment of the above mentioned resolution, the Jefferson Barracks Post Exchange has made no reports and paid no tax to the State of Missouri on gasoline sold for private use on the highways of this state. It seems that the War Department regulations hold that the Missouri motor vehicle fuel tax is not a sales tax and that for this reason the provisions of the Haden-Cartwright Act do not apply.

Assuming that the War Department is correct in that the Missouri motor vehicle fuel tax is not a sales tax, then it must be a tax for the privilege of doing business in the state of Missouri and the tax applies to the distributors of motor vehicle fuels. If the tax is a tax on the distributor for the privilege of operating a business in the state of Missouri, then it would seem that the federal government has paid no tax to the state of Missouri and would be entitled neither to exemption or refund."

I.

First, we will consider your question relative to the agents and employees referred to in your letter, who claim

exemptions, or apply for refunds on form certificate No. 1094. In order to have a legal proposition, we assume that those involved are engaged in an essential function of government and not a business on which the federal government has embarked, which normally would be taxable. Allen v. Regents of University of Georgia 58 S. Ct. 980.

With that question behind us, we find that in Central Transfer Company vs. Commercial Oil Co. 45 Fed 2nd 400, it is held that the gasoline tax levied by Sections 7795 and 7796 R. S. Missouri 1929, is an excise tax levied on the right to engage in the business of selling the gasoline. It is further held that the fact said tax is, as a matter of business, passed on to the buyer does not make it a tax levied against him, even though the seller is required to post notice to the effect that a tax is included in the purchase price. Section 7821 R. S. 1929.

With this holding we agree in that the statutes above mentioned levy the tax on the seller, not the buyer and as such is an excise tax. Under this construction, these federal agents and employees pay no tax levied against them, but only purchase gasoline and pay a stipulated price per gallon, to be fixed solely by the seller, which price happens to include the tax because the seller has elected to pass the same on to the purchaser.

If we could adhere to the strict rule that the tax must be levied against the buyer before these federal agents and employees are exempt, this question would be settled now, but that does not seem to be the case.

In Panhandle Oil Company vs. Mississippi 277 U. S. 218, 72 L. Ed. 857, it appears that the State of Mississippi by its laws imposes an excise tax of one cent per gallon on the privilege of engaging in the business of selling gasoline. The Panhandle Oil Company was engaged in said business in that state and in the course of said business sold large quantities of gasoline to the Coast Guard Fleet and Veterans Hospital at Gulfport. In denying the right of the state to collect the tax from the Panhandle Oil Company, on that gasoline sold those agents, the Supreme Court of the United States said (citations omitted):

"The United States is empowered by the

Constitution to maintain and operate the fleet and hospital. Art. 1, Sec. 8. That authorization and laws enacted pursuant thereto are supreme (art. 6); and, in case of conflict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions. The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales of the government. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons.

> The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the Unit d States, of its constitutional powers to operate the fleet and hospital. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. And that is to tax the United States--to exact tribute on its transactions and apply the same to the support of the state.
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> The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled."

The above case was followed in Graves vs. Texas Company 298 U. S. 393, 80 L. Ed. 1236. It is interesting to note the dissenting opinions in these cases to the effect that if the majority opinions be the law, then the United States government is a privileged customer, who must receive a special reduction in price for commodities it purchases if anywhere in the processing of said commodity a tax has been imposed on one of the processors and that processor has increased the price of the product in order to compensate himself for the tax levied against him and which he paid.

We would have thought the rule as above announced, to be reciprocal, that is, the federal government could not collect the one cent tax on gasoline levied by 48 Statutes 764 on the producer who, in turn, passes the same on to the seller and thence to the buyer, when the buyer is an agency of the State of Missouri. At least, this immunity due to the dual sovereignty was recognized in Allen vs. Regents of the University of Georgia, supra, and Indian Motorcycle Co. vs. U. S. 283 U. S. 570, 75 L. Ed. 1277. It seems, however, that this rule has been seriously questioned in Helvering vs. Gerhardt 58 S. Ct. 969, 304 U. S. 405, if not overturned. At any rate, Congress, perhaps foreseeing the rule laid down the Gerhardt case, expressly provided that this federal tax on gasoline was not to apply on sales made to a state or political subdivision thereof for use in the exercise of an essential governmental function. 49 Statutes 1025, 26 U.S.C.A. 1420.

On this question, it is our opinion that these agents and

employees of the federal government, when so engaged, are not liable to pay the state tax on gasoline. Where, however, the tax has been paid by one of these agents or employees, there is no authorization in our law by which it can be returned.

The Missouri Constitution, Article IV, Section 43, provides that "all revenue collected and money received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law." (See also Art. X, Sec. 19). The Legislature, in Laws of 1937, page 108, appropriated funds "To pay the claims for refunds of taxes paid on motor vehicle fuels as provided by law." The refunds contemplated by this Appropriation Act are those authorized by Section 7805 R. S. Mo. 1929. A casual reference to this statute is sufficient to show that the only time a refund may be paid is when the gasoline on which it is claimed was not used to propel a motor vehicle over the highways of this state. We think it will be conceded that these agents and employees of the federal government did not so use the gasoline on which they claim refunds.

II.

Your next question concerns Jefferson Barracks, an area which the State of Missouri ceded to the federal government, and the liability for tax of those within its confines selling gasoline.

This territory was ceded by the State of Missouri to the United States in 1892 (Extra Session Acts 1892, page 16). This Act reserved to the state, among other things, "the right to tax and regulate railroad, bridge and other corporations, their franchises and property on said reservation." (This has been a military post since 1826, City of St. Louis vs. U. S. 92 U. S. 462).

In Standard Oil Company vs. California 291 U. S. 242, 78 L. Ed. 775, it is said on this:

"In three recent cases--Arlington Hotel

> Co. v. Fant, 278 U. S. 439, 73 L. ed. 447, 49 S. Ct. 227; United States v. Unzeuta, 281 U. S. 138, 74 L. ed. 1091, 50 S. Ct. 455--we have pointed out the consequences of cession by a State to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio--put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein."

An exception to this rule, however, is when the state makes certain reservations in the ceding act which do not interfere with essential governmental functions on the reservation. Fort Leavenworth R. R. Co. v. Lowe 114 U. S. 525, 29 L. Ed. 264.

We see by the Missouri ceding act that no reservation was made as to the right of the State to tax sales of gasoline made on the reservation.

The Bill mentioned in your opinion request appears in 23 U.S.C.A. 55a, and provides as follows:

> "(a) All taxes levied by any State, Territory or the District of Co umbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Terri-

> tory or the District of Columbia, within whose borders the reservation affected may be located.
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> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month."

Prior to 1892, the State of Missouri had the right to legislate concerning this reservation on any subject so long as it did not interfere with essential governmental functions in doing so. Thus, at that time, it could have imposed any tax it saw fit on property or transactions taking place on said reservation, if within the above limitation. By the Act of 1892, the state released this area from its control, except for the reservations designated in the Act. Under the Haden-Cartwright Bill 23 U.S.C.A. 55a Congress returned a certain portion of that which the state released by the Act of 1892, that is, the right to collect the tax upon "sales of gasoline" made on the reservation.

You state that it is contended that Congress used the phrase, "tax upon the sales of gasoline", in a technical sense, meaning that before the State of Missouri can collect the tax upon gasoline sold on the reservation, said tax must be a sales tax. Circular No. 58 issued by the War Department over the signature of the Honorable Malin Craig on September 8, 1936, in para. 5, seems to indicate that that is the War Department's contention.

We can not agree to this construction. Congress, when it passed the Haden-Cartwright Bill, presumably knew that military and other reservations were located throughout the United States and that all states do not levy their gasoline tax in the same manner. Due to this, Congress must have intended the Act to apply to all states alike, irrespective of any particular mode in which a state might levy its gasoline tax. Neither does the Honorable Homer Cummings, in his

opinions (38 Atty. Gen. Op. 519-522) apply any such strict construction. That officer also remarked at page 521:

> "It lies with the territorial government and its appropriate officers to construe its laws and to determine whether or not under them taxes are to be levied upon sales by or through such agencies located on such reservations of motor vehicle fuels which are not for the exclusive use of the United States."

Notwithstanding the contention of the War Department, we are now advising you, as the taxing authority of gasoline in this state, that as construed by the Supreme Court of the United States, the tax on gasoline as levied by the State of Missouri is a "tax upon the sales of gasoline". As pointed out in Part I of this opinion, the gasoline tax in Missouri is strictly speaking an excise tax, but this rule does not obtain when applied to agencies and instrumentalities of the federal government.

In Panhandle Oil Company vs. Mississippi, supra, the court in construing the law of Mississippi, which levied that state's gasoline tax in almost the identical language as does Missouri said:

> "To use the number of gallons sold * * * * as a measure of the privilege tax is in substance and legal effect to tax the sale".

As was said in Gregg Dyeing Co. vs. Query 286 U. S. 472, 76 L. Ed. 1232 the Supreme Court regards substance and effect rather than form in determining what kind of tax has been levied.

It is, therefore, our opinion that all gasoline sold within the confines of Jefferson Barracks, when not sold for the exclusive use of the United States, is subject to the

tax levied on gasoline by this state to be paid as Congress directed in the Haden-Cartwright Bill.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

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