MOTOR FUEL USE TAX: Counties are not liable for payment of
TAXES: the Motor Fuel Use Tax for fuel consumed by motor vehicles used in repairing and maintaining county roads.

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October 24, 1949

11/8/49

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Mr. Duncan R. Jennings
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Jennings:

We have your recent letter requesting an opinion regarding the liability of a county of the third class under the Motor Fuel Use Tax, Sections 8442.1 to 8442.15, inclusive, Mo. R.S.A., as amended by Laws of 1943, page 657. The pertinent part of your opinion request is as follows:

> "Request your ruling as to whether or not a County of the Third Class such as the County of Montgomery is required to pay the 'Motor Fuel Use Tax' under Sections 8442.1 to 8442.15, inclusive, Mo. R.S.A., as amended Laws 1943, p. 657.
>
> "The only fuel oil used by Montgomery County is in two tractors and one maintainer. This machinery is used only for repair and maintenance of county roads and when moved from one site to another they are transported on a trailer."

Your opinion request presents the following question: Is a county required to pay the Motor Fuel Use Tax on fuel consumed by motor vehicles used solely for the repair and maintenance of county roads?

In order to answer the question directly presented by your opinion request it becomes necessary for us to construe the statute here involved, keeping in mind the intent of the Legislature at the time it enacted the said statute. A primary rule in the construction of statutes was stated by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S.W. (2d) 12, l.c. 15, as follows:

> "'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, * * *'"

Following the above-quoted rule, we refer to the act as a whole and find that the Legislature expressed its intent and the purpose of the act in plain and unequivocal language in Section 8442.2, Mo. R. S. A., to be for the "purpose of providing revenue to be used by this state to defray in whole or in part, the cost of constructing, widening, reconstructing, maintaining, resurfacing, and repairing the public highways, roads, and streets of this state and the cost and expense incurred in the administration and enforcement of this Act and for no other purpose whatsoever."

Section 8442.3, supra, designates the classes of persons who shall pay the said tax and the circumstances which must exist before such persons become liable for the payment of said tax. We quote therefrom:

> "There is hereby levied and imposed an excise tax * * * on all users of fuel upon the use of such fuel by any person within this state only when such fuels are used in an internal combustion engine for the generation of power to propel motor vehicles upon the public highways of this state, * * *"

Hence, before any "person or persons" become liable for payment of the said tax it must be shown that said person or persons are "users" of fuel and that such fuel is "used" in an internal combustion engine for the purpose of power to propel motor vehicles upon the public highways of this state. Section 8442.1, as amended by Laws of 1943, page 657, states the following definitions:

> "'Person' shall mean and include natural persons * * * firms * * * counties * * * The use of the singular number shall include the plural number.
>
> "'Use' shall mean and include the consumption of fuel by any person in a motor

> vehicle for the propulsion thereof upon the public highways of this State.
>
> "'User' shall mean any person who uses or consumes fuel within this state in an internal combustion engine for the generation of power to propel motor vehicles upon the public highways of this state."

The meaning of these parts when construed as a whole is that all of those designated by the statutes, including counties of all classes, using fuel to propel motor vehicles over the public highways of this state shall pay the Motor Fuel Use Tax.

Section 39(10) of Article III of the Constitution of Missouri provides:

> "The general assembly shall not have power:
>
> "(10) To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision."

This provision of the Constitution, however, does not prohibit the imposition of a Fuel Use Tax upon political subdivisions because such a tax is not upon the property of a county or the use of such property, but rather upon the privilege of using the highways. This contention is supported by an opinion previously rendered by this office to Mr. George Metzger, State Inspector of Oils, dated June 6, 1945.

Having then determined that the Motor Fuel Use Tax as applied to counties is constitutional, we will proceed to the construction of this statute and similar ones of other states. Said statute has not, in such a way as to answer your question, been construed by the courts of this state, so an examination of the decisions of other states will prove most helpful in answering the question.

In People v. Board of County Commissioners of Weld County, 90 Colo. 592, the statute in question provided for an Excise Tax on all fuel used in propelling motor vehicles on public streets or highways. That statute is in many respects similar to our own. It is set out on page 489 of the 1929 Session Laws of Colorado, and provides, in part, as follows:

> "An excise tax of four cents per gallon is hereby imposed and shall be collected on all motor fuel sold, offered for sale or used in this state for any purpose whatsoever; * * *
>
> "Every person who shall use in this state for propelling a motor vehicle on the public streets or highways, any motor fuel * * *"

The word "person" is defined in said statute, and the definition specifically includes counties. The court, in construing the above statute, said, in part, as follows:

> " * * * the questions for determination here are: (1) * * * whether the county is liable to the state for gasoline which it uses for propelling trucks and tractors in construction and maintenance of highways * * *
>
> "We think the county is right in its contention. * * * that is, gasoline used by a county or municipality in the construction, maintenance and repair of its highways to fit them for use as such, * * * or, to use the language of our statute, 'is not being used in propelling motor vehicles upon a highway.' All of the gasoline so consumed was used directly or indirectly, and exclusively for, and in aid of, construction, maintenance and repair of public highways, and the use is not a taxable one."

In Allen v. Jones, 47 S. D. 603, the court, in construing a South Dakota Fuel Tax statute, stated, in part, as follows:

> "The meaning of this section is that a purchaser of gasoline who has paid the two-cent tax thereon is entitled to a return thereof on all gasoline used for 'commercial purposes,' except such as is used in motor vehicles 'operated or intended to be operated in whole or in part upon any of the public highways of the state.' The only question then to be

> determined is whether a traction engine used in the construction, repair, or maintenance of a highway is being 'operated' upon a highway within the meaning of this statute."

The court concluded:

> " * * * A tractor being used in the construction of a highway is not being 'operated upon' a highway in any proper sense whatever."

In Oswald v. Johnson, 210 Cal. 321, the court construed the California statute as follows:

> "The Gasoline Tax Act was intended to provide for a license tax on motor vehicle fuel used on public highways of the state * * * When, as here, the rollers and tractors are being used in such construction, the public highway is not being 'operated upon' in the sense intended by the statute."

In Hallett Const. Co. v. Spaeth, 4 N.W. (2d) 337 (Minn.), the following language appears:

> " * * * it would be absurd to conclude that it (the Legislature) intended to single out gasoline used in road-building machinery as the only subject outside of motor vehicles upon which a tax should be imposed. Since the tax is imposed on the theory that it is compensation to the state for the use of its highways, the reason for exempting machinery used to improve or construct highways from a tax levied on vehicles which wear out the highways is apparent and logical. * * *"

Section 8442.1, supra, defines "public highways" as follows:

> "'Public Highways' shall mean and include every way or place, of whatever nature, generally open to the use of the public as a matter of right for the purpose of

> vehicular travel and notwithstanding that the same may be temporarily closed for the purpose of construction, reconstruction, maintenance or repair."

The sole purpose of this broad and inclusive definition of a public highway appears to be to make it quite clear that none of the contemplated users of fuel should escape the tax because some portion of the highway over which they pass might be undergoing repair at some near by or even remote point. The Legislature undoubtedly foresaw that if the law were not explicit in this respect that many users of the highway would claim that, since they were unable to traverse the whole distance of the highway because at some point it was temporarily closed for repairs, said road had lost its character as a public highway. That the Legislature intended by this definition to tax those who repair and construct a highway, so as to raise funds for the repair and construction of highways, would be an irrational and strained interpretation and totally out of harmony with the stated purpose of the taxing act and clearly in violation of the rule stressed in American Bridge Co. v. Smith, supra.

To sum up, then, the statute imposing a tax on users of fuel upon the use of such fuel for the purpose of propelling vehicles upon the public highways was not intended to include fuel used in vehicles employed in the repair and maintenance of public highways, and the cases from other states are explicit upon this point. The broad definition given to public highways does not lead to the conclusion that repair and maintenance vehicles were intended by the act, but on the contrary, and following the trend of leading cases on statutory construction, we must deduce from reading the whole act, including the stated purpose thereof, that the Legislature meant that vehicles used in repair and maintenance were to be excluded.

CONCLUSION

It is, therefore, the opinion of this department that a county of the third class is not required to pay the Motor Fuel Use Tax for fuel used or consumed by an internal combustion engine in the repair and maintenance of county roads.

Respectfully submitted,

APPROVED:

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