FEDERALLY POSSESSED PROPERTIES: Immunity of governmental agencies and instrumentalities from paying motor fuel tax.

May 2, 1945

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Honorable George Metzger
Inspector of Oil Inspection
Jefferson City, Missouri

Dear Mr. Metzger:

Your letter of April 25, to General Taylor, requesting an opinion on the matter of the United States Government and its agencies and instrumentalities being liable for motor fuel tax, and in which letter you quote a letter to you dated March 12, 1945, from Mr. Ellis T. Longenecker, has been received.

Your letter states:

> "I am in receipt of letter dated March 12, 1945, as set out below, from Ellis T. Longenecker, Federal Manager of Motor Carrier Transportation Systems and Properties, 324 Hodgson Building, Minneapolis, Minnesota.
>
> "'Mr. George Metzger, State Inspector of Oils
> Jefferson City, Missouri
>
> "'Following is a list of Federally possessed properties in the operation of which United States Government Tax Exemption Certificates on Treasury Department Form No. 1094 will be executed, together with the name of the Federal Operating Manager who is authorized to execute such certificates:

"'Federally Possessed Properties	Federal Operating Manager
Century Motor Freight	Lloyd P. Davis
Healzer Cartage Company	Nels Goeson
Janke Transfer Company	Harry C. Thornton
Matthews Freight Service, Inc.	Lloyd P. Davis
Midnite Express, Inc.	James F. Ahearn
R-B Freight Lines, Inc.	Harold L. Jones
Toedebusch Transfer, Inc.	Jack Otterson
Wilson Storage and Transfer Co.	Norman Nold

"'Tax Exemption Certificates pertaining to Missouri taxes will be filed principally by the Federal Operating Managers of the Properties of Healzer Cartage Company and Toedebusch Transfer, Inc. Photostatic copies of the authority of each of these Federal Operating Managers to execute Tax Exemption Certificates are enclosed herewith. The signature of the authorized person appears on each such photostatic copy.

(Signed) Ellis T. Longenecker, Federal Manager.'"

"In line with our telephone conversation today, pertaining to this subject, I respectfully request your written opinion regarding the question of exemption of the Missouri Motor Fuel Tax, in connection with the operation of Federally possessed properties, as named in Mr. Longenecker's letter."

The matter out of which your request for this opinion grew is Presidential Executive Order #9462, issued by the President of the United States on August 11, 1944, whereby the Director of the Office of Defense Transportation through or with the aid of public officers, Federal Agencies or other governmental instrumentalities, that he may designate, to take possession, assume control of, and operate or arrange for the operation of the Motor Carrier Transportation Systems named in a list thereto attached, the names of individual units of such Motor Carrier Transportation Systems which are contained in Mr. Longenecker's letter to you, and as copied on page 1 of your letter to this Department, being included in the list of Motor Carrier Transportation Systems attached to said Presidential Executive Order #9462.

Said Presidential Executive Order #9462 is as follows:

"No. 9462

"9 F.R. 10071

"POSSESSION AND OPERATION OF CERTAIN MOTOR CARRIER TRANSPORTATION SYSTEMS.

"WHEREAS after investigation I find and proclaim that the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof are equipped for the transportation of materials of war and supplies that are required for the war effort, or useful in connection therewith, and are now engaged in such transportation; that there are threatened interruptions of the operation of the said transportation systems as a result of a labor disturbance; that the war effort will be unduly impeded or delayed by such interruptions; that it has become necessary in the national defense to take possession and assume control of the said transportation systems for needful and desirable purposes connected with the prosecution of the war and that they be operated by or for the United States; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure, in the interest of the war effort, the operation of the said systems:

"NOW, THEREFORE, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the act of August 29, 1916, 39 Stat. 645, (17) the First War Powers Act, 1941, (18) and section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act, (19) as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows:

1. The Director of the Office of Defense Transportation is authorized and directed, through or with the aid of any public officers, Federal agencies, or other Government instrumentalities, that he may designate, to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to carry out the provisions and purposes of this order.

2. Subject to applicable provisions of existing law, including the orders of the Office of Defense Transportation issued pursuant to Executive Orders 8989, as amended, (20) 9156, (21) and 9294, (22) the said transportation systems shall be managed and operated under the terms and conditions of employment in effect between the carriers and the collective bargaining agents at the time possession is taken under this order. During his operation of said transportation systems the Director shall observe the terms and conditions of the directive order of the National War Labor Board, dated February 7, 1944; provided, however, that in the case of each said transportation system the Director is authorized to pay the wage increases provided for by the said directive order of the National War Labor Board, which accrued

prior to the taking of possession of the said system under this order, only out of the net operating revenue of the said system.

3. Except with the prior written consent of the Director, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets, tangible or intangible, in the possession of the Director hereunder.

4. Possession, control, and operation of any transportation system, or any part thereof, or any real or personal property, taken under this order shall be terminated by the Director when he determines that such possession, control, and operation are no longer necessary for the successful prosecution of the war.

5. For the purposes of paragraphs 1 to 4, inclusive, of this order, there are hereby transferred to the Director the functions, powers, and duties vested in the Secretary of War by that part of section 1 of the said act of August 26, 1916, (23) reading as follows:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes in connection with the emergency as may be needed or desirable.

6. Upon the request of the Director of the Office of Defense Transportation the Secretary of War is authorized to take any action that may be necessary to enable the Director to carry out the provisions and purposes of this order.

FRANKLIN D. ROOSEVELT.

The White House
August 11, 1944."

It will be observed that said Presidential Executive Order #9462, recites that it is made pursuant to the prosecution of the war effort, and that such Order is based upon the authority given the President of the United States to exercise such powers as are in said Order set forth in Section 1361, Title 10, U.S.C.A, passed August 29, 1916, and the amendment thereof by the Act of February 28, 1920.

Section 1361, supra, appears at page 233 of said Volume or Title 10, and is as follows:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Section 1361 was amended by the Act of February 28, 1920, with the further additional proviso found in the Pocket Part at page 151 in Volume or Title 10, and is as follows:

> "* * * 'nothing in this act shall be construed as affecting or limiting the power of the President in time of war * * * to take possession and assume control of any system of transportation and utilize the same' under section 1 of Act Aug. 29, 1916, cited to text."

The above quoted amendment of February 28, 1920, is contained in U. S. Statutes at Large, Volume 41, Part 1, Public Laws, page 456, Chapter 91.

That the President in the exercise of his constitutional war powers has the power of requisitioning private property in the interest of the war effort, is well stated in 67 C.J. 373, in Sections 62 and 63. That text states the rule as follows:

> "The power to requisition private property for war purposes is an essential attribute of sovereignty; * * *"
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> * * * * *
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> "In time of war, by virtue of the constitution, and usually by statutory enactments of congress, comprehensive powers reside in the president, as commander in chief of the army and navy, to requisition and appropriate property needed for the prosecution of the war or the maintenance or transportation of troops and munitions of war, and every presumption is in favor of the legality of his acts, or the acts of those exercising his authority. * * * "

> "Under Statutes. In time of war statutes have usually been enacted which provide for the requisition of private property for war purposes, the authority of the congress to enact such statutes not being confined to property directly needed in war, but extending to other property needed or useful in connection with war activities. * * * "

Executive Order #9462 is identical in purpose and authority and identical in the right so to do, with the Order of the President of the United States in taking over the railroads of the country in 1917, under the Act of August 29, 1916.

Both text authorities and court decisions hold that in so taking over the railroad systems, as stated, the United States acted in its sovereign capacity, and that during its tenure of control its property rights in the instrumentality and agency of the systems was equivalent to ownership. The same rule is applicable to Executive Order #9462.

51 C.J. 448 and 449 in Sections 76, 77 and 78, states the rule as follows:

> "Basis of Control. By the act of congress approved August 29, 1916, the president was given power 'in time of war' to take possession and assume control of systems of transportation within the boundaries of the continental United States, and in pursuance thereof issued his proclamation declaring that he took possession and assumed control of each and every system of transportation within such boundaries, consisting of railroads engaged in general transportation, including terminals and all other equipment and appurtenances commonly used upon or operated as a part of such rail systems of transportation. By a subsequent statute rights and liabilities under the federal control were defined and the manner of such control prescribed. In taking over the control and operation of such railroads the United

States acted in its sovereign capacity, under a right in the nature of eminent domain, and the statute providing therefor was not unconstitutional.

"Scope and Extent. During the period of federal control of railroads complete possession by the United States replaced the ordinary incidents of private ownership, and its control extended not merely to the physical property but to the entire organization, including officers, directors, and employees, who thereupon became agents and employees of the government rather than of the respective railroad companies. So the railroads became mere agencies or instrumentalities of the government, and it was a bailee of property being transported thereby, * * ** * The relations between the companies and the United States being analogous to those of lessor and lessee. * * * "

"In Whom Vested. By the president's proclamation assuming possession and control of the railroads a director general of railroads was appointed and authorized to take possession and control of the systems of transportation embraced by the proclamation and to operate and administer them. Such appointment and delegation of authority were within the power conferred upon the president, and by virtue of it the possession, control, and management of such railroads became completely and exclusively vested in the director general, who was not a carrier, but rather an operator of carriers, * * * "

The creation of properties such as the Transportation Systems here as governmental agencies and instrumentalities may be either by requisition or contract, such as a lease.

This rule of law is stated in 67 C.J., pages 374, 375, Section 65, as follows:

"A mandatory order for, or requisition of,

> private property by the government or a governmental agency for war purposes need not be in any particular form, in the absence of statutory requirement, and may be couched in the form or terms of a mere request, or may be in the form of a contract between the parties; * * * "

It will not be controverted, we believe, when it is said that Article 6 of the Constitution of the United States and the Laws of the United States made in pursuance thereof, and all treaties made shall be supreme over State law.

That part of Article 6 of the Constitution of the United States so stating, is as follows:

> "Supreme Law of the land.-- This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The case of Gibbons vs. Ogden, 22 U.S. (9 Wheat.) 1, was a case where a State law conflicted with an Act of Congress regarding the use of navigable waters in the State of New York. The Supreme Court of the United States, in an opinion delivered by Chief Justice John Marshall, holding the New York Act invalid and that the State laws must yield to the Constitution of the United States, and the laws of the United States enacted under the Constitution, l.c. 209, 210, said:

> "Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application to this case, come into

> collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New-York must yield to the law of Congress; * * * "

The Supreme Court of Missouri has expressed itself respecting the right of the United States Government, under the Constitution and the Laws of the United States, to prevent any interference with its free exercise of its governmental functions by and through its agencies and instrumentalities. In the case of Preston vs. Union Pacific Railroad, 239 S.W. 1080, l.c. 1085, in speaking of the scope and extent of control over railroads under a Presidential Order, the Court said:

> "The power of the President under the act of 1916 to take over the railroads cannot be denied, and the fact that they were taken over and went into the control and possession of the Director General at 12 o'clock noon, on December 28, 1917, is established by the explicit language of the proclamation by which they were taken over. Respondent's injury, therefore, occurred during federal control. The result of federal control was absolute exclusion of the railroad companies, as owners, from the use and management of their property, * * *"

2 C.J. 419, contains the following definition of "agency", to-wit:

> "'Agency' in its broadest sense includes every relation in which one person acts for or represents another by his authority. In the more restricted sense in which the term is used in the law of principal and agent, agency

> may be defined as the relation which results where one person, called the principal, authorizes another, called the agent, to act for him, with more or less discretionary power, in business dealings with third persons."

The same volume of Corpus Juris, on page 420, further states:

> "* * * The term is also used in the sense of the 'instrumentality' by which a certain act is done."

Webster's New International Dictionary on page 48, defines "agency" in definition 1, as: "faculty or state of acting or of exerting power; action; instrumentality".

The same authority, page 1288, defines the noun "instrumentality" as: "Quality or state of being instrumental; that which is instrumental; means, medium; agency."

Consistently, since the case of McCulloch vs. Maryland, et all, 17 U.S. Rep. (4 Wheat.) 316, it has been held by both Federal and State Courts that the States have no right to tax any of the constitutional means employed by the United States in the execution of its constitutional powers, or otherwise, to burden the operation of its agencies or instrumentalities used to carry into effect its governmental functions. On this subject the McCulloch Case, supra, l.c. 426, said:

> "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. * * * "

And again, l.c. 430, said:

> "We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise."

And again, l.c. 432, said:

> "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

There are numerous decisions by the Supreme Court of the United States and other Federal Courts, holding that Congress must give its express consent by legislation, for any agency or instrumentality of the United States, to be regulated or taxed before any such regulation or the imposition of a tax may be imposed by any of the several states. The case of Posey vs. T.V.A., 93 Fed. Rep. (2d) 726, is a case announcing that rule, where, l.c. 727, the Court held:

> "* * * The great functions of the Authority are governmental in nature and might have been performed directly by the officers of government. But a corporation consisting of three publicly appointed officials was created, and by section 4(b) of the act, 16 U.S.C.A. Sec. 831c(b), it was given power to sue and be sued in its corporate name. Notwithstanding the corporate entity and its subjection to suit, the Authority is plainly a governmental agency of the United States, and except as Congress may otherwise consent, is free from state regulation or control. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Johnson v. Maryland, 254 U.S. 51, 41 S. Ct. 16, 65 L. Ed. 126. * * * "

The same rule was stated in the case of Owansboro National Bank vs. Owensboro, 173 U.S. Rep. 664, l.c. 668, where the Court said:

> "It follows then necessarily from these conclusions that the respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

The Supreme Court of the United States in the case of Mayo et al. vs. United States, 319 U.S. Rep. 441, a case involving the identical principle and question here involved, whether the States could require an inspection fee or stamp tax to be paid by an instrumentality or agency of the United States in operating such agency or instrumentality, was before the Court. The Supreme Court of the United States held that such agencies, instrumentalities and property of the United States used by it in governmental activities were immune from State taxation. The Court, l.c. 445, said:

> "Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible."

Again the opinion, l.c. 446, states:

> "It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities. No such permission is granted here. * * * "

The case of United States Spruce Production Corporation vs. Lincoln County, et al., 285 Fed. Rep. 388, was a case where Lincoln County, in the State of Oregon, passed an Act levying a tax upon property of the Government, including lands, timber, saw mills, rights of way, and manufacturing plants operated by the United States for war purposes. In holding that the tax was invalid for lack of State authority to tax governmental agencies, and holding that the enterprise was a governmental agency, l.c. 390, the Court said:

> "By the celebrated case of McCulloch v. State of Maryland, 4 Wheat. 316, 4 L. Ed. 579, it was held that the state of Maryland could not lawfully, in view of the federal Constitution, levy a tax upon the currency of a bank incorporated by act of Congress, but that it might tax the real property of the bank. The same doctrine was held and applied in Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787, where a tax upon the railroad was upheld. The cases seem to be uniform in support of the principle, which is concretely stated in Thomson v. Union Pacific Railroad, 9 Wall. 579, 591 (19 L. Ed. 792), in the following language: * * * "
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> "'The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power.'"

The Courts of the several States have recognized, as they must, the rule that the States have no authority to levy

a tax of any character upon any instrumentality or agency of the United States Government. There were three cases involving almost the identical facts here involved, decided by the Supreme Court of South Carolina, 173 S. E. 284. There a tax was levied for license plates to be attached to automobiles used by the United States Government. Here the question is whether the United States Government shall pay for the motor fuel used by the Transportation Systems now being operated by it under said Presidential Executive Order #9462. The three South Carolina cases were consolidated and heard together by the Supreme Court of that State, because they involved the same question. The Court, in pronouncing said tax invalid, l.c. 289, said:

> "It is clear that the state may not tax the instrumentalities of the general government. But it is urged by the highway department that the license fee for automobiles is not a tax, but is a valid exercise of the police power of the state. If the force of that argument be admitted, that does not save the situation. It would still be a burden imposed by the state upon an instrumentality of the general government."

The Constitution of the United States, the Laws of the United States, the decisions of the Supreme Court of the United States, and other Federal Courts, the decisions by State Supreme Courts, and text writers, are all in harmony upon the subject matter here being considered, in stating the law to be that the United States Government is immune from paying State imposed taxes for the operation of its agencies and instrumentalities, used in carrying out its constitutional authority. No case, statute, or text authority holding to the contrary has been found.

The State of Missouri, however, has gone directly to the problem, and insofar as motor vehicle fuel taxes are concerned, Laws of Missouri, 1943, page 675, expressly exempts the United States Government from paying such fuel tax, in sub-section (f) of Section 3 and in Section 2, where it is said:

> "(f) No tax shall be imposed, charged or collected with respect to the following: * * * "

"(2) Motor fuel sold to the United States of America or any agency or instrumentality thereof."

The authorities cited and quoted herein, including our own statute just quoted, effectively establishing the law that the United States Government and its agencies and instrumentalities are immune from paying State levied taxes, are all binding upon and admonitory to all Departments of the State of Missouri, and persons administering or executing the laws of the State to act in obedience thereto.

CONCLUSION.

It is, therefore, the opinion of this Department that the United States Government and its agencies and instrumentalities are immune and exempt from the payment of the Missouri Motor Vehicle Tax in connection with the operation of the Federally possessed properties referred to in your letter.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

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