TA . ION:--Cities are not exempt from paying state gasoline tax on gasoline purchased; occupation taxes upon gasoline dealers levied by cities apply to purchases made by state and its political subdivisions.

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October 21, 1933.

Shell Petroleum Corporation,
Shell Building,
St. Louis, Missouri.

Gentlemen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Will you please advise if the state gasoline tax is applicable to sales of gasoline to a municipality for use by it in its governmental functions, and whether or not a municipal gasoline tax is applicable to sales made to the state or its political subdivisions.

We understand that these questions have not been definitely settled, but are being considered at the present time.

We are requesting the information for use in connection with bids which we are submitting both to the state and to several municipalities."

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

"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 as follows:

"Every dealer shall for the year 1935, 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; Provided, however, that no motor vehicle fuels sold or distributed by such dealer and which were refined, manufactured, produced or compounded and sold by a distributor in this state, and no motor vehicle fuels sold by such dealer which when purchased by him were contained in containers or packages, other than the original containers or packages in which the same was shipped, transported or imported into this state shall be included or considered in determining the amount to be paid by such dealer, but only such motor vehicle fuels as were shipped, transported or imported into this state and purchased by such dealer in the original packages in which they were so shipped, transported or imported into this state and then resold by such dealer after the breaking of such original package by him shall be included or considered for the purpose of computing said amount."

Section 7805, R. S. Mo. 1929, provides 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 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 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 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 on invoice."

Section 7794 above provides expressly that the funds arising under this Act shall be used to complete the construction and the maintenance of the state highway system of this state. Section 7795 provides for a tax of two (2¢) cents a gallon on each gallon of motor fuel refined, manufactured, sold, etc., by the distributor. Section 7796 applies the same tax to every dealer who shall or distribute motor fuel in the state. Section 7805 provides for the exemption of fuels from the tax when used for certain purposes and under certain circumstances. We find no exemption in Section 7805 which would exempt gasoline sold to a municipality, whether it be used in a governmental function or otherwise.

You inquire whether the state gasoline tax, under chapter 41, R. S. Mo. 1929, of which the above sections are a part, is applicable to sales of gasoline to municipalities when used by them in their governmental functions.

The municipalities and political subdivisions of the state are subject to be taxed by the State of Missouri, unless the State has in some way exempted them. The only exemption contained in the Constitution in favor of municipalities is found in Section 6 of Article X of the Constitution, which provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real and personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

We call your attention particularly to the fact that the above section exempts the real and personal property of municipal corporations from taxation. The Constitution does not exempt municipal corporations from taxes other than taxes upon real and personal property. The tax levied under chapter 41 above is not a real or personal tax, but is a tax levied upon the dealer or distributor. It is true that the tax is added to the price of the gasoline sold, but it is equally as true that all state taxes levied upon all dealers and distributors in other lines of business are reflected in the price of the product sold, whether it be to municipalities or to individuals. The question as to whether or not a municipality is liable for a gasoline tax suchas we have in

this state is a complicated one and the courts are divided in their opinions concerning it, depending a great deal upon the wording of the statutes and the constitution of the state involved.

There is one line of cases of which the case of O'Berry v. Mecklenburg County, 67 A. L. R. 1304, is typical, to the effect that cities and counties are impliedly exempt from such a tax. The theory of these cases is found in the following quotation from page 1308:

> "Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the Constitution or a statute."

There is another line of authorities upholding the validity of such tax, as exemplified by the case of Crockett v. Salt Lake County, 60 A. L. R. page 867, where it is said: at page 872:

> "The court pointed out that undoubtedly the amount of the tax finally falls upon the purchaser, as it would be natural for the seller to add the amount of the tax to the price of the commodity. In the course of the opinion, the court uses this language: '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."

We therefore have two lines of decisions dealing with this question. The determination of your inquiry, however, with the aid of those decisions, must depend upon the constitution and statutes of this state. Section 6 of Article X above quoted does

unquestionably exempt from taxation the real and personal property of municipal corporations. The tax levied under this statute, however, is not a tax upon the property of a municipal corporation in any sense of the word. Under Section 7795 the distributor must pay the tax and under Section 7796 the dealer must pay the tax. It is what is commonly known as an excise tax. It is true that the excise tax is, in all probability, always passed on to the ultimate consumer, but such is true of all taxes, whether they be excise, property or otherwise, because all taxes are included in the expense of doing business and ultimately are passed on to the consumer. We therefore conclude that it would not be in violation of Section 6 of Article X, were this tax to be exacted from dealers who sell to municipal corporations, because under such circumstances the gasoline tax is not a tax upon the property, real or personal, of a municipal corporation.

Section 7805, R. S. Mo. 1929, provides that certain gasoline sold by dealers and distributors should be exempt from the tax and provides for refunds in favor of the persons named in said Section. The Section does not exempt gasoline sold to municipalities by said dealers. It, therefore, must be assumed that when the Legislature passed a law exempting certain persons from the paying of the tax under certain conditions, that it impliedly expected all other persons not exempted to pay the tax. The tax itself is levied not for general revenue purposes but under Section 7794 for the completion and maintenance of the state highway system.

In Crockett v. Salt Lake County above, at page 871, it is said:

> "It thus appears that the tax is not for the purpose of raising revenue for the payment of the usual and ordinary expenses of state government, but for the construction and maintenance of public highways. These highways are open, not only for the use of the citizens of the state, but for others traveling within the state and for the counties and cities in the discharge of their public duties. While it is true the statute does not expressly provide that the municipalities of the state shall be subject to the tax, nevertheless there is no provision or language found in the act which indicates the intent of the Legislature to exempt or relieve counties or cities from paying the tax imposed upon all who use motor vehicle fuels for vehicles, engines, or machines, movable or immovable, within the state. On the contrary the admitted purpose of the legislation and the directions contained in the act as to the disposition of the funds so raised not only fail to indicate an intention on the part of the Legislature not to exempt municipalities from payment of the tax, but negative any inference that such municipalities were intended to be relieved from the payment of the tax.
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> The tax levied is by the statute designated an excise tax; that is, it is a tax for the privilege of selling

motor vehicle fuels and likewise for the use of such fuels when purchased outside of the state and brought within the state for use. It is in no sense a general tax upon the property of the municipality, but is a tax charged against the municipality for the privileges included within the terms of the act and which are made subject to the tax. It does not purport to be a tax against any specific property, real or personal."

While there is authority to the contrary, we are inclined to adopt the position taken by the court in the Crockett case above, so far as deciding the question raised in your inquiry. Our statutes do not impose a property tax as would be exempted under Section 6 of Article X of the Constitution. It lays an excise tax on the dealer or the distributor. The revenue derived from the tax is not for the usual and ordinary expense of the state government, but is for the particular purpose of the construction and maintenance of the state highways. No good reason appears why municipalities whose motor vehicles use the public highways should not bear their just portion of the expense of maintaining and constructing them. Our statutes provide for specific exemptions and fail to exempt municipal corporations from the payment of this tax. Considering the Constitution and the statutes involved, we are inclined to the view that the Legislature did not intend to exempt cities from the payment of this state gasoline tax.

We are therefore of the opinion that regardless of the decisions of other states, that the cities of Missouri are not exempted from the payment of the gasoline tax levied by our statutes against the dealers and distributors of this State.

You next inquire whether a municipal gasoline tax would apply to purchases made by the state or its political subdivisions. Whether or not purchases made by the state are subject to the municipal gasoline tax depends upon the nature of the tax. The cities are creatures of the state and only have such powers as are expressly designated to them by the state. The cities would have no right to levy any tax upon the real or personal property belonging to the State of Missouri, or to levy any direct tax against the state. Whether the purchases made by the state are subject to municipal gasoline taxes, therefore, depends, we believe, upon whether the gasoline tax is to be construed as a tax against the state, or whether it is a tax against the dealer and incidentally increases the price of the articles sold to the state.

The ordinary tax levied by municipalities upon gasoline dealers is at the rate of one (1¢) cent per gallon sold. These municipal gasoline taxes are occupation taxes levied upon the dealer or distributor, the amount of tax measured at the rate of so much per gallon. This tax is the charge made by the city upon the dealer for the privilege of carrying on the business of selling gasoline within the limits of the city. It is true

that in many instances the amount of the tax is added to the price per gallon and that the purchaser, whether it be the state or an individual, if such tax applies, would have to pay the enhanced price. This is true, however, of all taxes, which eventually reflects in the purchase price of the commodity sold.

In Viquesney v. Kansas City, 366 S. W. 700, the Supreme Court of Missouri in banc had for construction an ordinance of the City of Kansas City requiring every person engaged in the business of selling and offering for sale gasoline, to take out a license and requiring that for the privilege of doing such business the licensee should pay the license collector the sum of one (1¢) cent for each gallon of gasoline sold, transported or stored by such person. In discussing the nature of the tax the court says on page 702 as follows:

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"The first question for determination is whether the tax of 1¢ a gallon on gasoline sold by the dealer is a property tax, or an excise tax or an 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 the taxpayer irrespective of the value of his assets, it is an excise tax. (Citations omitted).

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. In case of Bowman et al. v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, it was held by the Federal Supreme Court that such a tax was consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution." "

Under the foregoing decision, it is settled in this state that the tax similar to the Kansas City tax is an occupation tax levied upon the dealer for the privilege of doing business. The amount of the tax exacted from the dealer being measured at the rate of one (1¢) cent per gallon. It is not a property tax in any sense of the word; it is not a direct tax against the purchaser. The purchaser, under no circumstances, can be made to pay the tax, and if the dealer does not pay the tax the city has no way of collecting it. The tax might be included in the price of the article sold so as to enhance the price of the gasoline to the purchaser, but it is in no way a tax against the purchaser.

If, instead of levying an occupation tax at the rate of one (1¢) cent per gallon, a flat fee of $1,000.00 was required that also would enhance the price of gasoline in the hands of the purchaser, but no one would contend that if the State of Missouri bought an article from such a merchant that the State would be entitled to buy it less that portion of the tax which, according to the merchant's volume, should be allocated to the article. It is easier to determine how much the article is enhanced in value when the occupation tax is figured on the basis of one (1¢) cent per gallon than it is were the occupation tax to be fixed at a flat sum. Yet, whether or not the State is to be excused from paying the tax should not be made to depend upon the facility in arriving at the amount of tax to be refunded. If the state would not be entitled to a refund where a gasoline occupation tax was a thousand dollars on the merchant, then by the same token it should not be entitled to a refund because the occupation tax is measured at the rate of one (1¢) cent per gallon for gasoline sold.

The manufacturer engaged in the business of manufacturing road machinery might be required in St. Louis to pay a very high license tax as well as other municipal and state taxes. All of these taxes are reflected in the price of the machinery which the state buys from the manufacturer, yet, no one would contend that the state would be entitled to buy such machinery cheaper than any other person, or obtain any refund of taxes, nor would the manufacturer himself be excused from paying the full amount of all taxes simply because he sold to the State.

If the tax imposed by the cities is construed as a tax upon the article sold, then purchases made by the state of Missouri might be said to result in a direct tax against the state of Missouri which the city would have no right to levy. However, we are of the opinion that under the law of this state, the tax imposed upon gasoline dealers by the cities of this state is an occupation tax levied upon the dealer and measured at the rate of one (1¢) cent per gallon. This is the view taken in the Vicuesney case above. Adopting the theory of the Vicuesney case, the city gasoline ordinances levied a tax upon the dealer and not against the purchaser, which in this case would be the state. It is true that the value of the gasoline when purchased is enhanced by reason of tax, but this does not change the nature of the tax. Being a tax upon a merchant for the privilege of doing business, it is in the same category as other taxes levied upon merchants for the privilege of doing business which enhanced the value of various articles purchased by the State of Missouri.

We are therefore of the opinion that municipal gasoline taxes, when they are in the form of an occupation tax, apply to purchases made by the State of Missouri and its political subdivisions the same as it does to individuals.

Very truly yours,

Frank W. Hayes

Assistant Attorney General.

APPROVED:

Attorney General.

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