

Opinion No. 62-22

January 30, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Marvin Baggett, Jr., Assistant Attorney General

TO: Mr. Philip T. Manly, New Mexico, Legislative Council, Room 201 /- State Capitol, Santa Fe, New Mexico

QUESTION

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Are state agencies liable to assessment and collection of the municipal gasoline license tax authorized under Sec. 14-43-1, et seq., N.M.S.A., 1953 Comp.?

CONCLUSION

See analysis.

OPINION

ANALYSIS

In Attorney General's Opinion No. 686, dated November 16, 1933, we concluded that state agencies must, when purchasing gasoline within a municipality which has enacted a gasoline tax, pay the full amount per gallon charged including such tax.

We pointed out that there was no statutory exemption granted state agencies. In the nearly 30 years since that opinion, the Legislature has not seen fit to modify our interpretation of the law.

Actually, we must, in the absence of a New Mexico Supreme Court decision, decide whether the burden of the tax falls exclusively on the seller or that, in spite of the fact that the seller is responsible for the tax, the incidence of the tax actually falls upon the purchaser.

By provisions of Sec. 14-43-1, such a tax is entitled a "license tax" and is imposed in lieu of any other license or occupation tax which a municipality may be authorized to "assess and collect against such dealers in gasoline and oils". (Sec. 14-43-7).

Under present circumstances, we are of the opinion that the words of Justice Holmes, as cited in **Texas Co. v. Harold**, 228 Ala. 350, 153 So. 442, are applicable:

". . . 'The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 56 App. D. C. 213, 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. . . The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price. . . .'"

The fact that the dealer might indicate by posted signs or decals on the pumps that there is a municipal tax on his gasoline is of no legal significance, in our opinion. He might just as well list his operating overhead, federal income tax, and state income tax per gallon. The tax is imposed by our statutes upon him alone, is in lieu of any other occupational or license tax, and although he may readily ascertain the cost to him of such taxes, it remains simply an additional cost of doing business.

Authority may be found that such a tax indirectly acts to tax the state on its purchases of items necessary for the performance of its governmental functions, but we are not persuaded that such views are applicable in this case.

We conclude, then, that the state and its agencies are not actually being assessed nor do they pay the municipal gasoline license tax, and that a purchase by the state of gasoline at any price is simply the usual "arm's length" transaction with the state being free to decline to purchase at the vendor's asking price.