

## **Opinion No. 64-03**

January 9, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Joel M. Carson, Assistant Attorney General

**TO:** Charles E. Bassett, Director, Gasoline Tax Division Bureau of Revenue, Santa Fe, New Mexico

### **QUESTION**

#### **FACTS**

The New Mexico Special Fuels Act requires the users of special fuel to obtain a permit from the Gasoline Tax Division of the Bureau of Revenue as a prerequisite to using special fuels to propel a vehicle on the highways of this state. The temporary special fuel users permit entitles the holder thereof to use special fuel in his vehicle for a period of twenty days. The fee for this permit is \$ 5.00. Special fuel dealers are authorized to sell temporary special fuel users permits and are required to remit the proceeds from the sale of these permits to the Bureau of Revenue. The permits are issued to the special fuel dealer in books of fifty permits. It is the policy of the Gasoline Tax Division to require the special fuel dealer to account for all books which are assigned to him. For each book issued to the special fuel dealer the dealer is required to remit to the Bureau \$ 250.00 or return the book or the unused portion thereof. When the dealer is unable to account for the permit sold or the permit book, the Bureau holds the dealer responsible for the amount represented by the permits which are unaccounted for and for which no remittance has been made.

#### **QUESTIONS**

1. May the Gasoline Tax Division hold a special fuel dealer liable for all permits which he cannot account for?
2. May the bonding company for the special fuel dealer be held liable on the bond for the permits which are unaccounted for?

#### **CONCLUSION**

1. Yes.
2. No, but see Analysis.

### **OPINION**

#### **ANALYSIS**

N.M.S.A., 64-26-71(c) provides in part:

"The bureau of revenue and such other agency or agent as the bureau of revenue may specifically authorize may issue special fuel user temporary permits upon forms prescribed and furnished by the bureau of revenue, and collect for the bureau of revenue the five dollars (\$ 5.00) temporary permit filing fee required to be paid by the special fuel user for each such permit. The temporary special fuel user permit fee so collected for each said permit shall be forwarded to the bureau of revenue at the time and in the manner prescribed by regulations to be issued by the bureau of revenue . . ."

We have been unable to find any formal Gasoline Tax Division rule or regulation governing the collection and remittance of special fuel user permit fees. We are, however, informed that when a special fuel dealer is issued special fuel user permits for sale, the number of the permits is noted in the Gasoline Tax Division, and the dealer is informed that he will be held liable for any unaccounted for permits. In addition to being so informed, the book containing the special fuel user permits has printed on it that the person to whom the books are assigned will be responsible for the return of the unused permits and will make remittances for those permits which are sold or are unaccounted for.

No citation of authority is needed to reach the conclusion that the special fuel dealer is bound to account for the books which the Gasoline Tax Division issues him under the agreement which is reached when the books are issued. If the dealer cannot account for the books which are issued him, he must remit to the Bureau of Revenue the fee for each unaccounted for permit. Such are the terms of the agreement under which he undertook the sale of permits.

N.M.S.A., 64-26-73 (1963 P.S.) provides that every special dealer shall file with the Bureau of Revenue upon a form approved by the Attorney General a surety bond conditioned upon the prompt filing of reports and payment of all special fuel taxes. Section 64-26-73 also provides that in computing the amount of the bond the Bureau shall require the special fuel dealer to post bond in the amount of twice the special fuel dealer's estimated monthly special fuel tax.

N.M.S.A., 64-26-71 (1963 P.S.) provides that the special fuel user may deduct the temporary special fuel user permit fees from any special fuel tax which is subsequently due and owing by the special fuel user.

The special fuel dealer bonds which we have seen are drafted in conformity with the statutory language of N.M.S.A., 64-26-73. If a temporary special fuel user's permit is to be considered a tax it is covered by the special fuel dealer's bond. If it is not a tax, it is not within the coverage of the special fuel dealer's bond.

A tax is an enforced contribution of money or other property by authority of a sovereign state from persons or property within its jurisdiction for the purpose of defraying public expenses. A tax is distinguishable from a fee. See **Garrett Freight Lines v. State Tax**

**Commission**, 135 P.2d 323 (1943). A fee is a charge fixed by law for services of public officers or for use of a privilege under control of government. See Black's Law Dictionary page 740.

N.M.S.A., 64-26-71(B) characterizes the five dollar fee charged for a temporary special fuel user's permit as a "filing fee." It is apparent from this usage of the word "fee" that the legislature did not intend the temporary special fuel user's permit to be considered a tax within the meaning of the customary definitions cited above. Since the fee is not a tax it is readily apparent that it is not covered by the special fuel dealer's bond. The bonding company may not, therefore, be held liable for the failure of a special fuel dealer to remit temporary special fuel user permit fees.