

## **Opinion No. 65-225**

November 18, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Thomas Overstreet, Assistant Attorney General

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

### **QUESTION**

#### **FACTS**

The taxpayer, an oil operator in Roswell, New Mexico, purchased over one hundred gallons of ordinary automotive gasoline from a New Mexico jobber and paid thereon the New Mexico excise tax imposed by Section 64-26-2, N.M.S.A., 1953 Compilation. The gasoline was not used as a fuel for motor vehicles but employed in oil wells to clean the pump equipment, tubing, valves and flow lines which had become plugged with a number of hydrocarbon and other complex substances. After use, the gasoline was contaminated and no longer useable as a motor fuel. The taxpayer has applied to the Gasoline Tax Division of the Bureau of Revenue pursuant to Section 64-26-32, N.M.S.A., 1953 Compilation, for a permit to obtain refunds equal to the excise tax paid on such gasoline. In the application form for such a permit the taxpayer stated the gasoline was used for "oil well treating" but, in the column for listing the equipment in which the gasoline is used, stated that no equipment is used.

#### **QUESTION**

Assuming the taxpayer's application pursuant to Section 64-26-32, N.M.S.A., 1953 Compilation, is otherwise in order, is the taxpayer entitled to a permit to obtain refunds on motor fuel used in the manner described above when the application does not describe any equipment in which the motor fuel is used as required by such section?

#### **CONCLUSION**

Yes. See analysis.

### **OPINION**

#### **{\*369} ANALYSIS**

Section 64-26-2, N.M.S.A., 1953 Compilation, imposes the excise tax on motor fuel sold or used in New Mexico. The first section of the bill enacting into law the present section 64-26-2 stated:

"In order to provide the funds necessary for the State Highway Commission to meet its pledged obligations in meeting the payments of principal and interest on state highway debentures heretofore issued and sold under authority vested in the state highway commission by law; and to provide the funds, after meeting the payments of interest and principal on such state highway debentures, for the proper and necessary maintenance, improvement, construction, and reconstruction of the highways comprising the system of state highways in New Mexico: . . ." Laws 1949, ch. 42, § 1.

The foregoing preamble clearly indicates the legislature intended the proceeds of the Gasoline Excise Tax to be used for state highway purposes. As can be seen from section 64-26-31, N.M.S.A., 1953 Compilation, the legislature did not intend for the Gasoline Excise Tax to apply to consumers of gasoline not used on the state's highways. It provides:

{\*370} "Any person, firm, partnership, corporation or association purchasing and paying the excise tax on fifty (50) or more gallons of gasoline or motor fuel used or to be used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico and actually so used shall be entitled to a refund equal to the excise tax paid thereon, upon compliance with the provisions of this act (64-26-31 to 62-26-38) and not otherwise; . . ."

The foregoing section clearly shows that the legislature intended to refund the Gasoline Excise Tax to persons who purchase and use gasoline for purposes other than operating motor vehicles upon the public streets or highways of New Mexico. In fact the title of the act originally enacting into law section 64-26-31 stated:

"An act to provide for refunding the excise taxes paid on gasoline or motor fuel purchased and used by consumers other than in motor vehicles operated or intended to be operated on any of the public streets or highways of the State of New Mexico; . . ." Laws 1931, ch 31.

Looking only at the section imposing tax, section 64-26-2, and at the substantive section granting refunds to non-users of the highways, section 62-26-31, supra, it is easy to conclude that the taxpayer should not be subject to the Gasoline Excise Tax on the gasoline purchased and used as a solvent and is entitled to refund on any such taxes paid by him. Section 64-26-32, N.M.S.A., 1953 Compilation, a procedural section, casts some doubt upon the particular taxpayer's right to a refund. This section provides:

"Every person, firm, partnership, corporation or association desiring to qualify for refunds under the provisions of this act (64-26-31 to 62-26-38) and prior to making application on or claim for any such refund shall apply in writing under oath to the bureau of revenue upon a form to be prescribed by it for a permit to obtain refunds in accordance with the provisions hereof. Such application shall contain the name of applicant, his address, his occupation, the uses to which the applicant intends to put gasoline or motor fuel upon which he will claim refund, **the make, horsepower, and**

**other mechanical description of machinery or equipment in which the same is to be used,** and such other information as may be required by the bureau of revenue." (Emphasis added.)

Obviously, the statute contemplated that tax exempt gasoline would be used as motor fuel for such equipment as farm machinery, etc . . . It never contemplated that it could be used as a solvent. The gasoline for which a permit to obtain refunds has been applied, however, is not within the broad scope of the Gasoline Excise Tax Act. It will never be used on the highways of New Mexico. Presumably, the taxpayer in his application for a permit to obtain refunds could have listed the oil well equipment in or on which the gasoline was used as a solvent. Nevertheless, his failure to do so should not prevent him from being entitled to a permit to obtain refunds.

Section 64-26-31 clearly gives the taxpayer a substantive right to a refund. The fact that he did not fulfill to the letter the requirements provision of 64-26-32 should not defeat his substantive right under present circumstances. Accordingly, the Bureau of Revenue should issue the taxpayer a permit to obtain refunds on excise taxes paid on gasoline used solely in the manner described above in the production of oil.