Opinion No. 73-51

June 26, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Johnny Taylor Motor Transportation Commissioner Motor Transportation Department P.O. Box 1028 Santa Fe, New Mexico 87501

QUESTIONS

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Does the special fuels tax levied on liquefied petroleum gas and other "special fuels" sold for highway use under the Special Fuels Act apply to such fuels which are lost from the dealer's bulk storage by evaporation, shrinkage, or unknown causes?

CONCLUSION

No, provided the dealer maintains adequate records.

OPINION

*{*102}* **ANALYSIS**

The Special Fuels Act, Laws of 1957, ch. 175, compiled as §§ 64-26-66 to 64-26-89, N.M.S.A., 1953 Comp. (2d Repl. Vol. 9, pt. 2), repealed and replaced the former law on this subject, which was compiled as §§ 64-26-39 to 64-26-56, N.M.S.A., 1953 Comp., being Laws of 1955, ch. 207. The original tax on special fuels was levied by Laws of 1937, ch. 83, formerly compiled as §§ 64-26-1 to 64-26-30, N.M.S.A., 1953 Comp. It is useful to refer to these former statutes on the subject as an aid to determination of legislative intent in enacting the present Special Fuels Act.

The 1937 act amended the statutes pertaining to taxes on the use of gasoline, levying the tax on "the sale, use, or sale and use of all motor fuel sold or used in this state for any purpose" (§ 2). The tax computation was based on "the total number of gallons of motor fuel received by the distributor, wholesaler dealer, or retail dealer," less an allowance of "not to exceed" 3% for "evaporation, shrinkage, leakage and losses resulting from unknown causes" (with authority given to the Commissioner of Revenue to allow a further deduction "upon a proper showing"), and less sales to certain exempt users (§ 5). In short, the tax was levied on all motor fuels received by the dealer, less the specified deductions, regardless of use. If losses from evaporation, etc., exceeded 3%, and the Commissioner did not make a further allowance for this purpose, the dealer might have to pay the tax on lost fuels. This is still true as far as the present Gasoline Tax Act, §§ 72-27-1 to 72-27-15, N.M.S.A., 1953 Comp. (Vol. 10, pt. 2, 1971 P.S.), is concerned.

The 1955 law (ch. 207, **supra)** departed from the method of taxing special fuels on the basis of the quantity received, less allowable deductions, and for the first time levied the tax on the **use** of such fuels on the highways, attaching at the time of its delivery into supply tanks of a motor vehicle (§ 2), with a deduction of a "flat allowance" of 2% of "net taxable gallonage" for losses from evaporation, shrinkage and unknown causes (§ 6). This same method was carried over into the present law, the provisions of immediate importance reading as follows:

"§ 64-26-68. * * *

A. The tax on all special fuel delivered by a special fuel dealer into a special fuel supply tank of a motor vehicle attaches at the time of the delivery and receipt except as otherwise provided in *{*103}* the Special Fuels Act [64-26-66 to 64-26-89] and shall be collected by the special fuel dealer from the purchaser or recipient of the special fuel and reported and paid to the bureau of revenue as provided in the Special Fuels Act."

"§ 64-26-75. * * *

B. A deduction of two per cent [2%] of the net taxable gallonage reported shall be allowed to special fuel dealers only to cover evaporation, shrinkage, and losses resulting from unknown causes, irrespective of the actual amount thereof."

The reason for the evaporation, etc., allowance from "net taxable gallonage," that is, fuel actually delivered into supply tanks of motor vehicles, is obscure, but it may be a legislative recognition of the volatility of these fuels and the inevitability of some losses before they can be delivered into the user's tanks. The problem of the Motor Transportation Department, which is charged with administering the act, is that dealers commonly use the same bulk storage facilities for both taxable and non-taxable uses, and their records frequently disclose unaccountable losses far in excess of 2%. In his Ruling No. 72-1, dated July 10, 1972, the Motor Transportation Commissioner ruled:

"When adequate records are maintained on all fuel measured or gauged out of the storage facility for both off-highway use and highway use purposes the tax will be applied to the shortage based on the ratio of on and off-highway use fuel which was measured or gauged out of the storage facility during the period in which the shortage occurred. For example, if adequate records show that 50 percent of all fuel measured or gauged out of storage was used to propel a motor vehicle the per gallon special fuel tax rate would then be applied to 50 percent of the gallonage which constitutes the total shortage. However, if the records of fuel measured or gauged out for off-highway and highway usage are not adequate or are otherwise insufficient the special fuel tax must be applied to the entire shortage.

We would point out that the use of separate storage facilities for dispensing highway use fuel would eliminate the necessity of having to apply the tax to a shortage on a percentage or ratio basis."

No statutory authority for this ruling is cited, and we have discovered none. It is true that § 64-34-12, N.M.S.A., 1953 Comp. (2d Repl. Vol. 9, pt. 2), provides,

"The commissioner may promulgate regulations necessary to enforce all laws the department enforces, either by statutory direction or by agreement with other state or federal departments, commissions or agencies."

However, it is the opinion of this office that, broad as this regulatory authority is, it does not encompass the power to levy the special fuel tax against shortages, where the dealer has maintained adequate records.

Incidentally, if enforced literally, Ruling No. 72-1 would levy the tax even against the 2% "flat allowance" for losses under § 64-26-75 (B), **supra.** This would be clearly contrary to the statue.

However, it is the opinion of this office that the portion of Ruling No. 72-1 making the tax applicable to all shortages where the dealer has not maintained adequate records is within the commissioner's regulatory powers. Rather detailed provisions concerning such records are contained in §§ 64-26-75 (E), 64-26-76 and 64-26-77, **supra,** and criminal penalties for failure to comply are provided by § 64-26-89, **supra.** Although there is no statutory provision imposing the tax on the shortage for failure to keep adequate records, we believe the commissioner's regulatory powers are sufficient to justify the imposition of the tax to the shortage under such circumstances, as provided by Ruling No. 72-1.

By: Dee C. Blythe

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