

**Opinion No. 21-3189**

November 17, 1921

**BY:** HARRY S. BOWMAN, Attorney General

**TO:** Hon. Edward L. Safford, State Auditor, Santa Fe, New Mexico.

**Liability for Gasoline Excise Tax for Gasoline Sold to Government Agencies.**

**OPINION**

{\*98} I have before me letter from the SINCLAIR REFINING COMPANY {\*99} from Denver, addressed to you, requesting a refund to the company for the 2-cent per gallon gasoline tax paid by the company to you for gasoline sold to the City of Albuquerque for the period from July 1, 1919, to March 1, 1921, and you request that I advise you whether the Sinclair Refining Company is entitled to such refund.

There is involved in your request for our opinion the question as to whether a municipality is exempt from the provisions of the act of 1919, imposing the 2-cent per gallon tax on all gasoline sold by distributors.

Under date of May 11, 1920, the writer as Assistant Attorney General, advised Mr. W. A. Keleher, City Attorney of Albuquerque, that municipalities were not subject to the payment of the tax on gasoline because of the exemption from taxation by section 3 of Article VIII of the Constitution of property of municipal corporations, and we suggested that while the tax was not one upon the property of the municipality and did not fall within the prohibition of the above mentioned section of the constitution that the payment of the tax by a municipality would be an indirect imposition of a tax which directly could not be collected.

Since the rendition of the foregoing opinion the Supreme Court of the United States has held in the case of Bowman vs. Continental Oil Company, 41 Supreme Court Reporter, 606, that the law imposing the tax was valid insofar as it applied to gasoline sold in intrastate commerce and in so holding specifically designated the tax an "excise tax."

There is a very marked distinction between direct tax and duties and excise taxes and it has been held that an exemption from taxation applies generally and primarily to the annual general property tax and does not ordinarily apply to excises, especially to such as are not in lieu of property taxes but are imposed upon the enjoyment of a privilege. (26 R.C.L. 315, section 276.)

In view of the fact that the tax in question is such an excise tax as that above mentioned, we are compelled to recede from our former position that municipalities are exempt from the payment of the gasoline tax, and to hold that under the provisions of Chapter 93, Laws 1919, municipalities are required to pay the tax.

Under the provisions of Chapter 175, Laws 1921, the gasoline excise tax law which superseded the 1919 act, the tax is not collectible from the state, counties, municipalities or any of their agencies. The final decree entered by the United States District Court in the case above mentioned, prohibits the collection of the tax from the above mentioned agencies under the 1921 act.

I am returning to you herewith the letter from the Sinclair Refining Company above mentioned.