

## Opinion No. 23-3662

January 19, 1923

**BY:** MILTON J. HELMICK, Attorney General

**TO:** Requested by: L. A. Gillett, State Highway Engineer, Santa Fe, New Mexico.

### **Salary of Collector of Gasoline Excise Tax Cannot Be Paid by State Highway Commission from Road Funds.**

#### **OPINION**

{\*6} It appears from the request for an opinion that some months ago the then Auditor and the then Secretary of State entered {\*7} into an arrangement with the State Highway Commission whereby the Auditor and Secretary of State authorized a certain person to act as an agent of their offices, for the collection of gasoline excise tax and automobile license fees, and whereby the salary and expenses of such collector were paid by the State Highway Commission. It is stated that this arrangement was made because all parties concerned felt that gasoline taxes as well as automobile license fees were not being strictly collected and a considerable evasion of said taxes was being had in the state. It appeared that neither the State Auditor nor the Secretary of State had, at their disposal, any funds for the payment of a Collector or Inspector in the field as the agent of the Auditor and Secretary of State, but agreed to pay him through the State Highway Commission because the proceeds of the gasoline excise tax and automobile license tax were covered into the state road fund under the provisions of Chapter 175 of the laws of 1921.

It is stated that in pursuance of such arrangement that the Inspector, after being in the field some eight months at a cost for salary and expenses at slightly less than \$ 3,000.00, collected unpaid gasoline taxes in the amount of \$ 30,000.00 and obtained evidence of additional unpaid gasoline taxes in the amount of approximately \$ 31,000.00.

This Inspector is now ready to proceed again to the field and carry on this work, and inquiry is made whether or not such arrangement is legal, and whether or not the State Auditor and the Secretary of State can properly constitute such Inspector their agent to be paid by the State Highway Commission.

It appears that the Inspector has confined his activities almost exclusively to the collection of the gasoline excise tax rather than the collection of automobile license fees. The gasoline excise tax is authorized and the mode of its collection is specified in Chapter 175 of the laws of 1921. Section 5 of this Chapter provides that on or before the 10th day of each month every distributor of gasoline and every retail dealer in gasoline shall render to the State Auditor, on forms prescribed by him, a true and correct statement of all gasoline sold by said distributor or dealer during the preceding

month, except gasoline the sale of which is excepted from taxation, and shall accompany said statement with an amount of money equal to the taxes by law laid upon such gasoline. Section 2 of the same Chapter provides that every distributor of gasoline shall pay an annual license tax of \$ 25.00 for each distributing station, and that every retail dealer shall pay a license tax of \$ 5.00. License certificates shall be procured from the Secretary of State on payment of such license fees. Section 6 of the same Chapter provides a severe penalty for any distributor or retail dealer who shall fail to make return and remittances required by the act. Section 7 of the same Chapter authorizes the enjoining of any distributor or retail dealer for violating the provisions of the act from further distributing or selling gasoline, the sale of which is taxable, until such distributor or retail dealer shall have complied with the provisions of the act. Section 8 of the same Chapter provides for penalties to be added to the amount of tax when same becomes delinquent.

From the foregoing it is clear that the act itself provides the machinery for the collection of the gasoline excise tax. It is the duty of the dealer to make his monthly return and remittance {\*8} on forms prescribed by the Auditor and in the event of his failure so to do he is liable to:

- a -- criminal prosecution.
- b -- injunction from carrying on business.
- c -- penalty and interest on the amount due.

The law contemplates no field inspector or traveling collector, nor any active or extraneous agency for the collection of the taxes. The law casts the burden upon the distributor and retail dealer of making his return and remittance, and does not provide that the Auditor or Secretary of State should authorize any agent for collection or incur any expenditures in going into the field after the taxes. Indeed I think it would be a violation of the act for the Auditor in anywise to relieve the tax payer of his duty to make his return and remittance, as required by the terms of the act.

The success of the so-called Inspector in procuring large sums of money for the state, and the apparent practical wisdom of the arrangement are very persuasive features, but no matter how convenient or profitable the arrangement may be it must not be continued if it is contrary to the law of the state. The act fully provides the method of collection of the gasoline excise tax and, obviously, it is not lawful to substitute some other method. The method prescribed by the statute is doubtless unsatisfactory but nevertheless it is the lawful method. As long as this law remains in its present form the distributors and retail dealers must themselves make their returns and remittances and any delinquencies must be handled by the several district attorneys and other law officers of the state.

All money collected in the form of gasoline excise tax is to be covered into the State Road Fund, there to be expended for proper road purposes. The Road Fund is entitled

to receive 100% of the tax collected (except a lump sum granted to the State Fish Hatchery). It is not lawful for the Road Fund to receive only a net amount after the deduction of collection expenses; neither is it lawful for the State Highway Commission to expend anything for collection expenses from the funds which is designed for road purposes only.

From all of the foregoing I conclude that the collection arrangement is not sanctioned by the law and should be discontinued.