

Opinion No. [29-30]

September 23, 1929

TO: State Comptroller, Gasoline Tax Department.

GASOLINE -- Federal government not to be taxed directly or indirectly.

OPINION

Reference is made to yours of the 20th inst. in which you request an opinion from this office regarding the situation arising because of conflicting opinions as to the construction to be given Section 2 of Chapter 96 of the New Mexico Session Laws of 1929, which section is as follows:

"Sec. 2. In case any such distributor or retail dealer has during such preceding month sold any gasoline or motor fuel to any officer or duly authorized agent of the United States for the use of said Federal Government and not for the private use of said officer or agent and sold at the usual price less the amount of such excise taxes, such distributor or retail dealer may deduct from his remittance the amount of such taxes on the number of gallons so sold to such officer or agent, but only if his report is accompanied by a certificate on a form prescribed by said Comptroller and signed by such officer or agent for each such sale setting forth the name and address of such officer or agent, the branch of the service in which he is such officer or agent, the number of gallons purchased and that the same is for the use of the Federal Government and not for private use."

You state that since the enactment of the section above quoted your "department has been annoyed more or less by requests from Federal Government employees who operate privately owned automobiles for the gasoline consumed in the operation of such automobiles, at a price less the state tax."

While the Ninth Legislature was yet in session this office, in answer to a request from His Excellency the Governor, rendered an opinion as to the enforceability of the Gasoline Excise Tax Law as it then stood and I believe that the changes and amendments made in this respect were based upon that opinion. We, at that time, held that the state may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions. Our views are, I believe, specifically set forth in Section 2 above quoted and as I read your letter your interpretation of that section harmonizes with our own. The section is so worded as to exempt completely and specifically from the excise tax imposed gasoline or motor fuel sold to any officer or any duly authorized agent of the United States "for the use of said Federal Government and not for the private use of said officer or agent."

The distributor or retail dealer making such sale is not required to remit the amount of such taxes on the number of gallons so sold. However, the duty is laid upon him if he would escape this liability of submitting in lieu of such remittance with his monthly report a certificate on a form prescribed by your office, signed by the purchaser of the gasoline or motor fuel for each such sale, the certificate to set forth the name and address of the purchasing officer or agent, the branch of the service in which he is an officer or agent, the number of gallons purchased and that the same is for the use of the Federal Government and not for private use.

Let it be noted here that the State, through your department, is dealing with the distributor and not with the Federal Government. You do not require the distributor to collect from the Federal Government, through its purchasing agent, an excise tax, nor do you require the distributor to remit an excise tax for gasoline and motor fuels so sold, but you do require the distributor and properly in cases in which he claims sales to have been made for the use of the Federal Government and not for private use to accompany his claim with the certificates above mentioned.

It is probable that the differences of opinion primarily grow out of the question as to what constitutes the use of gasoline **for the Federal Government**. I am inclined to think that a comparatively safe rule would be that gasoline and motor fuels, payment for which as such primarily or ultimately comes from the Treasury of the United States, may be said to be purchased by or for the government for its use. The fact that a purchaser is a government employee in some department is not sufficient. He, of course, may be such employee and use gasoline for his private purposes. Purchases by him for government use will be recognized by and paid for by such government.

In an attempt to prevent misrepresentations and frauds, penalties have been provided both for distributors and purchasers guilty of such misstatements in Section 3 of Chapter 96, Laws of 1929, as follows:

"Sec. 3. Any person making any false statement in such certificate as to his being such officer or agent, or as to the branch of the service to which he belongs, or as to the purpose for which such gasoline or motor fuel is to be used or as to any other matter, information or fact required to be set forth in such certificate, or who uses the motor fuel so purchased for any purpose other than the use of the Federal Government, and any distributor or retail dealer accepting, using or forwarding any certificate knowing it to contain any false statement, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine not less than one hundred dollars nor more than one thousand dollars for each offense."

You, of course, will continue as heretofore to require of distributors and retail dealers a full report of all gasoline and motor fuel sold and grant exemption of tax under Section 2 only upon properly executed certificates filed with reports. Should it come to your attention that any distributor, retail dealer, or purchaser is guilty of offense as provided in Section 3 of the Act, such offense should be brought to the attention of the District Attorney in whose district it is committed.