

Opinion No. [29-32]

September 24, 1929

BY: J. A. MILLER, Assistant Attorney General

TO: Mountain States Tel. & Tel. Co., Albuquerque, New Mexico. Attention: E. J. Steneck, Dist. Plant Chief

GASOLINE -- Excise tax held constitutional.

OPINION

I have before me yours of the 23rd inst. in re gasoline tax -- power equipment -- file 205, in which you say you have been informed that in some states gasoline purchased for power equipment such as trenching and tamping machines, paving breakers, etc., is exempt from taxes. You ask to be advised as to whether or not such a tax exemption applies in the State of New Mexico.

In answer, your attention is directed to section 1 of chapter 14 of the Laws of 1927 as amended by chapter 29 of the Session Laws of 1929 and which section, as amended, is as follows:

"Sec. 1. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state **for any purpose**; provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

By section 2 of the act, it is required that users of gasoline or motor fuel shall before the 20th day of each month render to the Gasoline Tax Department of the State Comptroller a return of all gasoline used during the preceding month and which was not purchased from a licensed distributor or dealer in this state and to accompany such return by remittance of a sum of money equal to the tax thereon.

The provisions of section 2 as to the reporting and remitting apply, as you see, only to gasoline used and which was not purchased from a licensed distributor or dealer in this state. On gasoline sold by such licensed dealers the tax will be collected from the purchaser at the time of the sale and reported by the dealer.

A few months ago suit was brought in the District Court of the First Judicial District by certain users of gasoline in an attempt to have section 1 as above quoted held unconstitutional. Their contention was sustained by the District Court, but the matter is now pending in the Supreme Court of this State on appeal and a final and authoritative answer to your question cannot be given until the opinion of the Supreme Court shall have been handed down.

It is the opinion of this office that the statute is not in conflict with any constitutional prohibition and that the enactment was within the legislative authority. However, the District Court did not take that view of it and it remains to be seen what the holding of the Supreme Court will be.