

Opinion No. 43-4300

May 25, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Al S. Roughton, Director, Gasoline Tax Division, Santa Fe, New Mexico

We are in receipt of your letter of May 21, 1943, and the inclosed file relating to the question of whether or not the directors of the American Red Cross would be considered as federal officers or agents and, therefore, not subject to the state gasoline tax. You ask our formal opinion of the correct answer to this question.

Section 68-1208 of the 1941 Compilation provides, in part, as follows:

"In case any distributor, wholesale dealer or retail dealer has sold any motor fuel to the United States of America or any of its agencies or instrumentalities which under the Constitution and laws of the United States, is not subject to the taxes imposed by this act (Sections 68-1201 -- 68-1225), and which motor fuel was sold for a price less the amount of such motor fuel taxes, the distributor who would otherwise be required to pay to the bureau of revenue the motor fuel tax on such motor fuel so sold may deduct from his remittance the amount of such taxes on the number of gallons of motor fuel so sold to the United States or its agency or instrumentality, * * *"

It will be noted that this section does not grant an exemption but merely recognizes that federal agencies or instrumentalities may not be subject to the tax.

The American National Red Cross (hereinafter referred to as "Red Cross") was re-incorporated by the Act of Congress dated June 5th, 1905, being 36 Statutes 599, 36 U.S.C.A. 1, to carry out the Geneva Treaty of August 22, 1864. While a corporation chartered by the federal government is, in a sense, an agency of the United States (26 R. C. L. 105) yet this fact, in and of itself, would not entitle the Red Cross to an exemption, since

"A corporation cannot escape state taxation merely because it was created by the federal government, nor because it was subsidized by it, nor because it is employed by the federal government, wholly or in part, unless it is really an agency or instrumentality for the exercise of the constitutional powers of the United States." Vol. 2 Cooley on Taxation, 4th Ed., Sec. 613."

It is only when the effect of the tax will defeat or hinder the operation of the national government that such corporation is exempt. Cooley, in Sec. 607 of his work on taxation, says:

"The test is whether the tax deprives the persons or corporations taxed, in truth, of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power."

The writer has been unable to find any reported case dealing with the question of whether or not the Red Cross is subject to state taxation or even defining its scope as a United States instrumentality, so that it is necessary to examine the above cited act of Congress of June 5, 1905, to determine the extent to which it is intended to serve the federal government and then look to the tax in question to ascertain the extent to which it hinders the efficient exercise of this power.

Section 3 sets forth the purposes of the corporation to be, in part, as follows:

"To furnish volunteer aid to the sick and wounded of armies in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, 1863, and also of the treaty of the Red Cross, or the treaty of Geneva, of August 22, 1864, to which the United States of America gave its adhesion on March 1, 1882.

"To act in matters of voluntary relief and in accord with the military and naval authorities as a medium of communication between the people of the United States of America and their Army and Navy, and to act in such matters between similar national societies of other governments through the 'Comite International de Secours', and the Government and the people and the Army and Navy of the United States of America."

Sections 10 and 11, respectively, provide as follows:

"Whenever in time of war, or when war is imminent, the President may deem the cooperation and use of the American National Red Cross with the sanitary services of the land and naval forces to be necessary, he is authorized to accept the assistance tendered by the said Red Cross and to employ the same under the sanitary services of the Army and Navy in conformity with such rules and regulations as he may prescribe.

"When the Red Cross cooperation and assistance with the land and naval forces in time of war or threatened hostilities shall have been accepted by the President, the personnel entering upon the duty specified in section 10 of this title shall, while proceeding to their place of duty, while serving thereat, and while returning therefrom, be transported and subsisted at the cost and charge of the United States as civilian employees employed with the said forces, and the Red Cross supplies that may be tendered as a gift and accepted for use in the sanitary service shall be transported at the cost and charge of the United States."

In addition to these sections it is interesting to note that by section 5 the governing body of the Red Cross is to be appointed, namely, "six by the incorporators herein named and twelve by the President of the United States." Later, when state societies were formed, the President had power to appoint six members, including the chairman, and

one member from each of the following departments: State, War, Navy, Treasury and Justice.

By section 6 the Red Cross is required to make a report of its proceedings each year to the Secretary of War, who, in turn, must make a report to Congress.

In the light of these provisions it seems apparent to the writer that the Red Cross carries on an essential governmental function, not only in carrying out the terms of the treaty of Geneva, to which the United States is a party, but also in carrying out the war powers set up in the federal constitution, so that any state tax which becomes a burden on the exercise of such functions is prohibited.

Turning now to the tax itself it is found that there are many cases, both pro and con, on the question of whether or not a state gasoline tax, when applied to a federal instrumentality, is a burden on such instrumentality. However, the latter cases and the cases decided by the Supreme Court of the United States have uniformly held that such a tax did constitute a burden on a federal instrumentality.

In *Panhandle Oil Co. v. Miss.*, 275 U.S. , 48 Sup. Ct. Rep. 451, 56 A. L. R., 583, the Supreme Court, in holding the Mississippi gasoline tax a burden on a government instrumentality, went further than is necessary here, as in that state the tax was imposed as a privilege tax on the gasoline dealer. There the court said:

"The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. * * *

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untremmeled. *Osborn v. Bank of United States*, 9 Wheat. 738, 867, 6 L. Ed. 204, 234; *Western U. Teleg. Co. v. Texas*, supra. Cf. *Terrace v. Thompson*, 263 U.S. 197, 216, 6 L. Ed. 255, 274, 44 Supt. Ct. Rep. 15. Petitioner is not liable for the taxes claimed."

In view of the foregoing, it is my opinion that a director of the American National Red Cross is entitled to an exemption from the state gasoline tax when such gasoline is used exclusively for the American National Red Cross. As a word of caution the writer wishes to call attention to the fact that this opinion is limited strictly to the American National Red Cross and what has been said herein would not necessarily apply to state or local chapters of the Red Cross.

Trusting the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General