

Opinion No. 55-6280

September 9, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Louis C. Lujan, Attorney for Bureau of Revenue, Santa Fe, New Mexico

You have requested the opinion of this office upon the following question:

"A distributor as defined in the New Mexico Gasoline Tax Law makes a sale of gasoline to the Federal Government or one of its agencies or instrumentalities. The New Mexico Bureau of Revenue, Gasoline Tax Division, attempts to tax such sale. Section 64-26-2(a) of the New Mexico Statutes Annotated, as amended, provides that 'there is hereby levied and imposed an excise tax of six cents (6c) per gallon upon the sale, use, or sale and use of all motor fuel sold or used in this state for any purpose' Under this language can a tax be levied and assessed against the above mentioned sale or is that a tax on the United States Government and, therefore, prohibited by the Federal Constitution?"

Irrespective of whether the New Mexico Gasoline Tax is a tax upon the use of gasoline or is a tax upon the sale of gasoline, it is clear that under any of the several theories of taxation enunciated by the Supreme Court of the United States that the sale you describe in your question is not taxable. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218; *Esso Standard Oil v. Evans*, 345 U.S. 495; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110; *Mayo v. United States*, 319 U.S. 441. We cannot characterize the New Mexico Gasoline Tax as a privilege tax upon the sale of gasoline, which would be the only type of a tax which could be legally assessed upon the sale in question. *Alabama v. Keen and Boozer*, 314 U.S. 1.

We wish it clearly understood that this opinion is directed only to the answer of the specific question asked and does not in any sense determine that other sales of gasoline within the State of New Mexico to the Federal government are not taxable.

By Walter R. Kegel

Assistant Attorney General