

## Opinion No. [29-33]

February 5, 1929

**TO:** Office of the Attorney General of New Mexico

GASOLINE TAX -- Not to be collected from United States or United States Agencies.

### OPINION

With further regard to the matter which I spoke to you about the other day with reference to the proposition as to whether or not our five cent gasoline tax law applies to gasoline sold to the United States, or whether it would be advisable to amend the law so as to specifically exclude from the operation of the tax all gasoline sold to the United States, will say that in view of the fact that the legislative session is nearing completion I thought it best to write you fully on the subject.

A review of the Acts of the Legislature of New Mexico pertinent to this question reveals that the first legislation in this state bearing on this subject appears to be contained in Chapter 93 of the Laws of 1919. There was further legislation, which is contained in Chapter 175 of the Laws of 1921, which Act repealed Chapter 93, above referred to. Sections 3 and 5 of the Act of 1921 were amended by Chapter 61, Laws of 1925, and again amended by Chapter 20 of the Laws of 1927. In addition to which Chapter 14 of the Laws of 1927 was enacted.

Referring to the titles of these various Acts and for the purpose of determining what was the intent and purpose of the Legislature when passing them, we find the first Act, that of 1919, in its title, "To provide for an excise tax upon the sale or use of gasoline." By Chapter 175 of the Laws of 1921 an excise tax was levied and imposed upon the sale of all gasoline sold in the State with certain exceptions. This is true also of the amendments made in 1925 and 1927 to sections 3 and 5 of that Act. The title to Chapter 14 of the Laws of 1927 is as follows: "An act providing for an excise tax upon the use of gasoline and motor fuel."

A study of these several Acts of the Legislature leads to the conclusion that the intent and the effect of such legislation has been and is the imposing of an excise tax on the use of gasoline and motor fuels in the State, the rate being fixed at so much per gallon, the present rate being five cents, the tax to be collected and paid to the Stat by distributors or retail dealers upon all gasoline sold, distributed or used by them, and, as to gasoline or motor fuel used in this State, and not purchased from a licensed distributor or dealer in this State, the person, firm, corporation or association using the same is required to make report and to pay the tax. This tax is not imposed upon the gasoline purchased by the distributor or retail dealer or held in possession by him. It attaches only when such gasoline or motor fuel passes to a purchaser from such distributor or retail dealer or in the case of gasoline or motor fuel not so purchased at the time of its use in the State.

Assuming that gasoline or other motor fuel purchased in this State or brought into the State by the several agencies of the United States is for use by such agencies in the performance of government functions, authorized by the Constitution of the United States, the question arises as to whether or not the State may make such use of gasoline, by the United States, a source of revenue to the State, or, in other words, tax the means used for the performance of governmental purposes.

This question appears to have been answered specifically by the Supreme Court of the United States in a decision handed down May 14, 1928, in the case of Panhandle Oil Company v. State of Mississippi, U.S. Supreme Court 72 L. Ed. Advance Opinions, page 517.

This case reached the Supreme Court of the United States on a Writ of Error to the Supreme Court of the State of Mississippi. The laws of Mississippi provide that any person engaged in the business of distributing gasoline or retail dealers in gasoline shall pay for the privilege of engaging in such business an excise tax per gallon upon the sale of gasoline, with some exceptions. Petitioner, Panhandle Oil Company, for some time had been engaged in that business. The State sued to recover taxes claimed on account of sales made by the Panhandle Oil Company to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico, and its Veterans Hospital at Gulport. Petitioner defended on the ground that these statutes, if construed to impose a tax on such sales, are repugnant to the Federal Constitution.

The Supreme Court of Mississippi held the exaction a valid privilege tax, measured by the number of gallons sold; that it was not a tax upon instrumentalities of the Federal Government, and that the United States was not entitled to buy such gasoline without the payment of the taxes charged dealers. This decision was reversed by the Supreme Court of the United States. Mr. Justice Butler, delivering the opinion of the Supreme Court of the United States, said, in part:

"The United States is empowered by the Constitution to maintain and operate the Fleet and Hospital. (Art. 1, Paragraph 8). That authorization and laws enacted pursuant thereto are supreme. (Article 6), and in case of conflict they control State enactments. The states 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 -- \* \* \* \*"

Here follows references to nine decisions of the Supreme Court of the United States in support of the matter quoted. The Court then proceeds:

"The strictness of that rule was emphasized in Gillispie v. Oklahoma, 257 U.S. 501, 505, 66 L. Ed. 338, 340. The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the State and does not depend on State laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. **While Mississippi may impose charges upon petitioner for the privilege of**

**carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.**

"The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. \* \* \* A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. 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. \* \* \* \* To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. \* \* \* And that is to tax the United States -- to exact tribute on its transactions and apply the same to the support of the state.

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammelled. \* \* \* Petitioner is not liable for the taxes claimed."

Following the case just quoted the United States District Court for the District of Nebraska, on October 9th, 1928, granted the United States a permanent injunction, restraining the collection of a tax in Nebraska on gasoline sold to the United States for use in the performance of its governmental functions in that State, and enjoining the imposition of penalties on licensed dealers for failure to pay the tax on gasoline sold to the United States.

Another case, Grayburg Oil Company, plaintiff in error v. The State of Texas, was filed in the Supreme Court of the United States at the October term, 1928. I can not learn that a decision has yet been handed down in this case, which apparently involves these same questions, and which went up from the State of Texas as the result of an effort on the part of the State of Texas to recover from the Grayburg Oil Company certain taxes on gasoline sold by that Company to the Quartermaster at Fort Sam Houston, the Grayburg Oil Company having sold and delivered under contract a large quantity of gasoline to the Quartermaster, tax free. We shall await with interest the opinion of the United States Supreme Court in this case.

As stated above, it is the opinion of this office that the purpose and effect of New Mexico legislation on this subject is to impose a tax on the **use** of gasoline rather than upon the substance or the dealer. However, it has been contended by some that this is in effect a property tax, even though called a sales tax, and that its effect is to impose a tax on the gasoline itself. **If** such contention be correct, then, as has been quoted, the tax is not imposed and does not attach to the gasoline until a sale is consummated, that is, not until the gasoline becomes the property of the purchaser. It follows that when the

United States is a purchaser a tax imposed upon the gasoline so purchased would be a tax on property belonging to the United States. Article 8, Section 3 of the Constitution of New Mexico provides, "That the property of the United States shall be exempt from taxation," and Article 21, Section 2, "That no taxes shall be imposed by this State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use."

I am aware that the opinion herein expressed is at variance with opinions rendered by our predecessors in office, and especially by my immediate predecessor. It is thought however, that in view of the decision of the United States Supreme Court in the Panhandle case, and the decision of the United States District Court in the Nebraska Court, above referred to, such opinions are no longer tenable.

Considering the provisions of the Constitution of the State of New Mexico and more especially Article 6 of the Constitution of the United States, which makes supreme that constitution and the governmental functions thereunder, and which binds the Judges of every State, anything in the Constitution or laws of such State to the contrary notwithstanding, we must conclude:

- (a) That the provisions of the New Mexico statutes, imposing an excise tax on the sale or use of gasoline, do **not** apply to sales to, or gasoline used by, the United States.
- (b) States 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.
- (c) A State may not impose a tax measured by the quantity sold upon the privilege of one of its citizens of selling gasoline to the Federal government for its use in the performance of Federal functions.

From the conclusions arrived at in the foregoing opinion I do not believe that it will be necessary to have a special law passed by the Legislature exempting gasoline sold to the United States from the operation of our gasoline tax law. However, in view of the importance of the subject, I thought it just as well to go into detail and thus lay the entire matter before you so you could decide whether or not you wish to recommend to the Legislature an amendment of the said law.