

Opinion No. 33-686

November 16, 1933

BY: E. K. NEUMANN, Attorney General

TO: Hon. E. B. Swope, Supt., New Mexico State Penitentiary, Santa Fe, New Mexico.

{*94} Your letter of November 7th inquires if the one cent gasoline tax imposed by municipalities may legally be assessed and collected from the Penitentiary, it being, in effect, a charge against a state agency.

This is an excise tax and is levied by virtue of authority contained in Chapter 159 of the Laws of 1931. No exemption is set forth in the Act itself and, from general rules of construction, we must determine if such tax may be imposed as against the state.

So far as property taxes are concerned, the property of the state and its sub-divisions is not taxable. However, a state may levy taxes upon its own property if it desires, but ordinarily such procedure is useless.

The power of a municipality to tax is derived from the legislature and must be exercised within the terms of such delegated power. Regardless of whether exempted in the Act or not, we know that Federal property and agencies cannot be taxed by the States. Also, we have an exemption of state and county property in Article 8, Section 3 of the State Constitution, but, in our opinion, this has no reference to excise taxes. And by decisions of our Supreme Court special assessments against county and state property may be imposed and are not unconstitutional.

Our state gasoline taxing laws make no provision for exemption of state owned vehicles and all pay the tax. No doubt it would be held that in the absence of an express provision to the contrary that the state has by implication consented to the imposition of such tax.

We believe the same rule would govern in the instant case.

The power has been delegated to the municipalities and while the exemption could have been set forth in the Act, it was not done.

Therefore, in the absence of such exemption, we hold that the tax is payable by the various state agencies. However, if you desire, you may continue to refuse to pay and it may be tested in the courts.

By: FRANK H. PATTON,

Asst. Attorney General