

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-184823 - B-184818

DATE: August 17, 1976

MATTER OF: State sales taxes - gasoline purchases

DIGEST:

1. Except for company owned stations, Government's liability for State taxes on gasoline is generally dependent upon whether incidence thereof, by State law, is on service station or on Government as purchaser of gasoline from service station. Although through use of its credit cards Government pays national oil companies for gasoline purchased from independent service stations, oil companies are not vendors but merely participants in credit arrangements.
2. California service stations are charged with collecting State sales tax from consumers "insofar as it can be done." Incidence of this tax is on the vendee (purchaser), Diamond National Corp. v. State Board of Equalization, 44 U.S.L.W. 3591 (U.S. April 20, 1976), and United States is constitutionally immune from payment thereof. To claim its constitutional immunity from California sales taxes on purchase of gasoline, Government must comply with reasonable State requirements.
3. Pennsylvania's fuel use tax is imposed on dealer-users of fuel; dealer-user is defined to include retailer who delivers fuel into fuel tanks of motor vehicles. Since incidence of tax is on vendor of the fuel, not the vendee, United States is not constitutionally immune from economic burden of this tax on gasoline sales from service stations. However, Pennsylvania statute exempts from payment of tax any fuel used by or sold and delivered to the United States when such sales and deliveries are supported by documentary evidence satisfactory to State that vendee is the United States.

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4. New Mexico special fuel use tax, applicable to sale of diesel-engine fuel used to propel motor vehicle on highways, attaches at time of delivery of fuel and "shall be collected" by dealer from purchaser of the fuel. Hence, incidence of this tax is on purchaser of the fuel and United States in purchasing diesel-engine fuel is constitutionally immune from payment thereof.
5. Hawaii's fuel tax is imposed as a license tax on distributors of motor fuel based on total gallons sold. Incidence of tax is on distributor, not ultimate purchaser of the fuel. Hence, United States is not constitutionally immune from economic burden of this tax. Further, Hawaii's exemption from tax on sales to United States applies only to purchases from distributor and does not affect purchases from independent service stations.

We have received several requests for decision concerning the legality of the Federal Government's payment to the national oil companies for the amount of State taxes imposed by certain States on purchases of gasoline. The purchases were made at service stations by employees of the United States on official business, using United States Government National Credit Cards issued by the oil companies. The taxes involved included the California sales tax, the Hawaii motor fuel tax, the New Mexico tax on diesel-engine fuel and the Pennsylvania fuel use tax. We have consolidated these requests into one decision.

The general rule is that if the incidence of a tax, by State law, is placed on the vendee (ultimate purchaser), then the United States as the vendee is constitutionally immune from payment of the tax. On the other hand, if the incidence of the tax is on the vendor, the United States would not be constitutionally immune from payment thereof; it would be required to bear the economic burden of the tax unless the State statutorily exempted sales to the United States from the tax. See Alabama v. King and Boozer, 314 U.S. 1 (1941); 24 Comp. Gen. 150 (1944); 32 id. 577 (1953); 33 id. 453 (1954); and 41 id. 719 (1962).

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In this regard it should be noted that when the incidence of a tax is on the vendee, the vendee is liable for and actually pays the tax; the seller acts as the State's agent for collection thereof. When the incidence of the tax falls on the seller (vendor), the seller actually pays the tax. However, as with other costs of doing business, the seller may then pass on the amount of the tax to the purchaser; the purchaser is not paying the tax, but merely reimbursing the seller for that cost. That the seller is permitted (or, in many cases, required) by State law to separately state the amount of the tax it must pay on the sale does not change the basic character of the transaction.

Unlike most States, California imposes both a motor vehicle fuel tax based on a charge per gallon sold and a sales tax on the gross amount of the retail sale; it is the latter tax which is of concern here.

The California sales tax is imposed pursuant to Division 2 of the Revenue and Taxation Code, Deering's California Code Annotated (1975). Section 6051 thereof imposes with certain exceptions, a sales tax calculated as a percentage of the gross receipts from the sale of all tangible personal property sold at retail within the State. Tangible personal property is defined broadly enough to include gasoline. The retailer is charged by section 6052 with collecting the tax from the consumer "insofar as it can be done." Section 6381 specifically exempts from the computation of the amount of the sales tax the sale of any tangible personal property to the United States.

California courts have consistently held in the past that this tax is imposed on the vendor. However, in Diamond National Corp. v. State Board of Equalization, 44 U.S.L.W. 3591 (U.S. April 20, 1976), the Supreme Court determined that the incidence of a sales tax on bank supplies and equipment fell on the petitioning national bank as purchaser and not upon the vendor. The test the court said, is whether the vendor is required by State law to collect the tax from the consumer. Applying this test, since the vendor of gasoline must collect the tax from the consumer at the time of purchase, the previous California decisions on the incidence of sales taxes on tangible personal property may be considered to be overruled. Further, in United States v. State Board of Equalization, Civil No. 74-3360, (May 7, 1976), the Ninth Circuit Court of Appeals affirmed a district court decision holding that the application of the California sales tax with respect to leases of tangible personal property to the United States in California is unconstitutional. Accordingly, it is

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clear that the incidence of this tax with respect to the sale of gasoline and other tangible personal property to the United States is on the vendee and that the United States is constitutionally exempt from payment thereof.

To claim its constitutional immunity, the Government must comply with reasonable State requirements that it identify itself as the purchaser. In California, the State Board of Equalization required that except for purchases from company owned stations, the exemption be claimed at the time the fuel is purchased. The operator of the Government vehicle is required to request the service station attendant to fill out a special form prescribed by the Board; the Board refuses to accept the official United States tax exemption certificates in these circumstances. When the employee using the credit card failed to request the exemption or the service station attendant refused to fill out the form, the Government lost its exemption as neither it nor the national oil companies which issued the credit cards have standing under California law to obtain a refund of the tax. (The tax exemption on sales by company owned service stations can effectively be claimed at the time the company pays its otherwise duly owed sales taxes.)

It appears from the information with which we have been provided that in practice the Board's requirements result in the Government's having to pay this tax in a very substantial portion of its gasoline purchases. For example, we have been advised that attendants at service stations are frequently reluctant, and often refuse, to fill out the necessary California form. Thus, the operation of the Board's requirements have effectively prevented the United States from asserting its constitutional immunity from the tax.

Service stations selling gasoline to the United States are paying the taxes on those transactions for which the forms have not been completed. The national oil companies, through their financial arrangements with the independent service stations which market their products, have reimbursed the service stations therefor. Unless the Government pays the amounts of the taxes so paid, the oil companies receive the economic burden of the taxes. This violates the credit card agreements the United States has with these companies.

To avoid this result, we will not object at this time to the payment to the national oil companies of amounts designated (or calculated

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to be) the amount of California sales taxes imposed on the transaction and paid or owed by the oil companies to the independent service stations, since the Defense Supply Agency has advised us that it is exploring potential avenues that would lead to assuring that the Government's purchases of gasoline will be appropriately exempted from the California sales tax. However, if California persists in denying the Government a reasonable means to assert its constitutional immunity from this tax, the matter should be raised by the Defense Supply Agency and other affected agencies with the Department of Justice.

Of course, in some instances the national oil company owns the service stations which sell the gas placed in Government vehicles. In those instances the company is vendor of the gasoline and not merely the issuer of the credit card and a party to a financial arrangement. Since the company in those cases has the clear right under California law to obtain a tax refund from the State, the amount of sales tax incurred in these transactions may not be paid to the national oil companies.

In addition to the California tax, we have been asked about three other States--Pennsylvania, Hawaii and New Mexico. Our views on these States follow.

Pennsylvania's "Fuel Use Tax," 72 P.S. §§ 2614 et seq., imposes a permanent excise tax of \$0.08 per gallon "on all dealer-users upon the use of fuel" within Pennsylvania. 72 P.S. § 2614.4 (Supp. 1975-1976). The tax is applicable to all combustible gases or liquids used, among other purposes, to propel vehicles of any kind or character on the public highways. "Dealer-user" is partially defined in terms of one who delivers fuel into the fuel tanks of motor vehicles. The tax is therefore on the vendor, and the United States would not be constitutionally exempt from liability for its payment. However, 72 P.S. § 2614.4 (Supp. 1975-1976) also provides that "No tax is hereby imposed upon * * * any fuel that is used by or sold and delivered to the United States Government, when such sales and deliveries are supported by documentary evidence satisfactory to the department." Thus, although the United States is not constitutionally immune from this tax since it is merely reimbursing the dealer-user for his cost of doing business, steps should be taken by purchasing agencies to assert its State exemption from the tax.

New Mexico Stat. Ann. ch. 64-26-67 (Supp. 1973) includes "diesel-engine fuel" in the definition of "special fuel," and ch. 64-26-68

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imposes a "special fuel use tax" of \$0.07 per gallon "on the use of special fuel in any motor vehicle as a toll for the use of the highways." The tax attaches at the time of delivery and "shall be collected" by the dealer from the purchaser or recipient of the special fuel. The tax is paid by the "user" (ch. 64-26-72), defined in ch. 64-26-67 (Supp. 1973) as "any person who used special fuel to propel a motor vehicle on the highways." It is clear that the incidence of the New Mexico diesel engine fuel tax is on the user/vendee who is obligated to pay the tax to the dealer. Therefore, the United States, as vendee, is constitutionally immune from the payment of such tax.

Hawaii imposes a fuel tax in the form of a license tax on distributors of motor fuel based on the total number of gallons of fuel sold. Hawaii Rev. Stat. § 243-4 (Supp. 1974). Since the tax is levied against the distributor rather than the vendee, the United States is not constitutionally immune from the tax. However an exemption located at Hawaii Rev. Stat. § 243-7, provides:

"This chapter requiring the payment of license fees shall not be held or construed to apply to fuel * * * sold to the government of the United States or any department thereof for official use of the government * * *."

However, the concern here is not with purchases from distributors (such as the national oil companies), but rather from independent service stations, termed "retail dealers" and defined and treated separately from distributors under Hawaii tax law. See Hawaii Rev. Stat. § 243-1. Because Hawaii tax law considers distributors and dealers as different entities and because the license tax and its exemption deal only with sales by distributors, the exemption only applies to sales directly to the United States by licensed distributors. That credit arrangements are handled through the national oil companies does not change the fact that the purchases--except when the service stations are owned by the distributors--are actually from the independent retail service stations. Hence, purchases from independent retail dealers, even though at prices inclusive of the tax on distributors, must be considered as being distinct from purchases directly from distributors. Accordingly, the statutory exemption afforded by Hawaii does not apply where the purchase is from other than a distributor. Therefore, purchases of gasoline will be inclusive of the amount of the tax.


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of the United States