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DECISION

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

FILE: B-190293

DATE: NOV 3 1977

MATTER OF: Vermont Gasoline Tax

DIGEST:

Vermont statute imposing a sales tax on gasoline of nine cents a gallon, requiring the distributor to collect the tax from the dealer, and the dealer to collect it from the consumer, places the legal incidence of the tax on the vendee. The United States is immune from payment of this tax. 33 Comp. Gen. 453 (1954) is overruled.

We have received a request for a decision from the Director, Financial Management Division, Chicago Region, U.S. Customs Service, Department of the Treasury, asking whether the Federal Government is immune from a Vermont State tax on gasoline purchased at the retail level.

During the summer of 1977, Customs Service agents on temporary duty in Vermont used credit cards issued to Customs by the Mobil Oil Corporation. The total purchases amounted to 289.4 gallons, with the State tax totalling \$26.05. The Vermont Attorney General disagrees with the Customs Service contention that the Federal Government is immune from this tax. The Customs Service has paid the tax in question under protest, pending our decision in this matter.

The immunity of the Federal Government from payment of State taxes is based upon the constitutional principle of sovereign immunity. However, a tax does not necessarily violate the immunity of the Federal Government merely because the financial burden of the tax can be passed on to the United States. Alabama v. King and Berger, 314 U.S. 1 (1941) (which held that a tax on a Government contractor was not prohibited simply because its tax burden is passed on to the United States economically by the terms of a contract). Whether governmental immunity applies depends on where the legal incidence of the tax falls under the State statute.

Generally, if the legal incidence of the tax is on the vendor, the United States is not constitutionally immune from payment of the

B-190295

tax, even when it ultimately bears the economic burden. However, if the incidence of the tax falls on the vendor by operation of State law, the United States, as the vendor, would be constitutionally immune from its payment. See 15 Comp. Gen. 1358, 1359 (1976), and cases cited therein.

Thus, resolution of the Federal Government's immunity rests upon an analysis of the particular State statute involved. The Vermont statute in question reads, in pertinent part:

"* * * each distributor shall pay to the commissioner a tax of nine cents a gallon upon each gallon of such motor fuel sold by the distributor. The distributor shall collect such tax from the dealer and the dealer from the consumer."
Vt. Stat. Ann. tit. 22, § 6005 (Supp. 1977).

It is noted that the tax is first upon the distributor, who must pass the tax onto the retail vendor, who then is required to pass it in turn to the vendor. The Supreme Court has spoken to this situation, stating:

"It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See Federal Land Bank v. Richmond National Bank Co., 314 U.S. 95, 99, 96 L. Ed. 65, 69, 55 S. Ct. 1. * * *

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 347 (1968).

A similar result was reached in Richmond National Bank v. State Board of Equalization, 425 U.S. 268 (1976), dealing with whether the incidence of a California sales tax fell upon the retailer-vendor, or upon the vendor, a purchasing national bank. The statute involved provided that:

"[t]he tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done."

Cal. Rev. & Tax Code § 6052 (emphasis added).

B-198293

The United States Supreme Court, reversing the California Court of Appeal's decision that this statute merely permitted the retailer to pass the tax on and that the incidence of the tax was therefore on the vendor, held that the State and local sales taxes fall upon the national bank as purchaser and not upon the vendor. Therefore, the national bank was exempt from taxes.

Certainly, if the California statute is now held to place the incidence of the tax on the vendor, so, too, does the Vermont statute under consideration here, as its language requiring the collection by the vendor from the vendor is clearly stated. See 55 Comp. Gen. 1338, 1339-40. (1976).

In 33 Comp. Gen. 453 (1954), we discussed the same issue involving this very statute. We held that the incidence of the tax fell upon the gasoline distributor, rather than the consumer. This was based on the fact that the gasoline distributor was still liable for the tax regardless of whether it was collected by him from the retailer. In addition, we noted that the distributor could be held liable for the tax on an alternate basis of the amount purchased, imported, etc., from the manufacturer, even if he never sold the gasoline in question to the retailer. We have now reconsidered our position in the 1954 decision in light of more recent opinions of the Supreme Court and the decisions of the Comptroller General and the Treasury. We now hold that the fact that there is no suit against a vendor who fails to pass along the tax does not automatically mean that the tax is on the vendor. First Agricultural National Bank v. State Tax Commission, 392 U.S. 379, 388 (1968). When a tax statute states that the tax may be passed on to the purchaser, the legal incidence of the tax falls upon the purchaser. 33 Comp. Gen. 453 (1954) is therefore overruled. See Planned National Corp. v. State Board of Equalization, 425 U.S. 268 (1976); First Agricultural National Bank v. State Tax Commission, supra; 55 Comp. Gen. 1338 (1976).

Our attention has been brought by a Vermont Assistant Attorney General and the Customs Service to the case of Korn-Linrick v. New York, 347 U.S. 110 (1953), which involved an Arkansas sales tax similar to the Vermont statute under consideration here. The Arkansas taxing statute provided that the tax would be levied on the seller's gross receipts and that the seller "shall collect the tax levied hereby from the purchaser." 347 U.S. at 111-12. Additionally, the statute contained an express exemption for sales to the United States Government.