

DECISION

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

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FILE: B-211399

DATE: November 18, 1983

MATTER OF: Vermont Gasoline Tax

DIGEST: Subsequent to decision in 57 Comp. Gen. 59 (1977), which held that Federal Government was constitutionally immune from Vermont gasoline tax, Vermont amended applicable statute, removing language which placed legal incidence of tax on purchaser. Legal incidence of tax now falls on seller, and Federal Government is no longer immune from tax.

This decision is in response to a request from Mr. Walter G. Lobisser, Chief, Accounting Branch, U.S. Customs Service, Boston, Massachusetts, regarding the propriety of payment by the Federal Government of the Vermont sales tax on gasoline. We previously ruled on this identical question in 57 Comp. Gen. 59 (1977), holding that the Federal Government was constitutionally immune from the tax. However, since our 1977 decision, the applicable Vermont statute has been revised. We now hold that, as a consequence of the amendment of the statute, the Federal Government is no longer immune from payment of taxes for gasoline purchased at retail in Vermont.

In determining whether the Federal Government may pay a sales tax imposed on its purchase of goods and services, this Office applies the "legal incidence" test, first employed by the Supreme Court in Alabama v. King and Boozer, 314 U.S. 1 (1941). The Supreme Court distinguished between the economic burden imposed on the United States when it must pay more for goods and services because of sales taxes levied against the seller of goods to the Government, and the constitutionally impermissible burden which occurs when the Government, as a purchaser of goods, is directly liable to the state for taxes imposed on a transaction. In essence, if the tax is a tax on the seller and one which he alone is obligated to pay, the Government may reimburse the seller for his total cost, including tax. However, if the buyer is in any way legally responsible for the payment of the tax, the Federal Government as a buyer cannot be held responsible for such payment. This principle was summarized in 55 Comp. Gen. 1358 (1976), a recent decision of this Office regarding the Federal Government's liability for payment of taxes on gasoline imposed by five States:

"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

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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).

"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." 55 Comp. Gen. at 1359.

In 57 Comp. Gen. 59 (1977), we considered the legality of payment by the Federal Government of the Vermont tax on gasoline purchased at the retail level. We held that, because the applicable statutory language clearly indicated that the legal incidence of the tax fell on the purchaser, the Federal Government was immune from payment of the tax. At the time of our decision, the Vermont statute in question read, in pertinent part:

"[E]ach distributor shall pay to the commissioner a tax of 9 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. 32, § 8806 (Supp. 1977).

Our decision in 57 Comp. Gen. 59 focused on the sentence, "The distributor shall collect such tax from the dealer and the dealer from the consumer." We held that this statutory language required the retail vendor to collect the tax from the vendee, thereby placing the incidence of the tax directly on the Federal Government as purchaser, a constitutionally impermissible result. 57 Comp. Gen. at 60-61.

However, in 1979, Vermont amended section 8806 and eliminated the sentence, "The distributor shall collect such tax from the dealer and the dealer from the consumer." Vt. Stat. Ann.

tit. 32, § 8806 (1981). The Customs Service has supplied us with a copy of an opinion letter by the Department of the Treasury, Office of General Counsel, concluding that, because of the amendment of the statute, it "is clear that the legal incidence of the tax falls squarely, and only, upon the distributor, * * * and thus the Federal Government will no longer be exempt from the payment of the Vermont state gasoline tax." We concur in that determination. With the elimination of the requirement that the tax be collected from the dealer and then from the consumer, the legal incidence of the tax now falls solely on the vendor. We have held in previous similar cases that it is permissible for the Federal Government, as a retail purchaser, to shoulder the economic burden of such state taxes, even when those taxes result in increased pump prices. See, e.g., 28 Comp. Gen. 706 (1949) (Washington); 55 Comp. Gen. 1358 (1976) (Pennsylvania, Hawaii).

Accordingly, in view of the amendment of the relevant Vermont statute, our decision in 57 Comp. Gen. 59 is no longer applicable, and payment for purchases of gasoline by the Federal Government in Vermont may be inclusive of the amount of tax.

for *Harry R. Van Cline*
Comptroller General
of the United States