J. Baker 6 6 77

DECISION

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

7811

FILE: B-190293 DATE: September 22, 1978

MATTER OF: Vermont Gasoline Tax

DIGEST: Request by certifying officer for authority to certify for payment vouchers covering the Vermont State tax on gasoline notwithstanding our decision in 57 Comp. Gen. 59 (1977) that that tax is unconstitutional as applied to the Federal Government must be denied. We have no authority to authorize payment of an unconstitutional exaction. If loss of service beneficial to agency may or does result from our decision, the agency should refer matter to Department of Justice. 16 Comp. Gen. 297 (1936) and 42 id. 179 (1962) are distinguished.

We have received a request by letter for an advance decision from Mr. H. Larry Jordan, Chief, Certification Section, Department of Agriculture, as to whether he may certify for payment three vouchers in favor of the Shell Oil Company in the total amount of $18.07. The vouchers cover the nine cents per gallon Vermont State Motor Fuel Tax imposed on sales of gasoline. Vermont law requires the distributor to collect the tax from the dealer who in turn is required to collect it from the consumer. The vouchers are invoices submitted by the Shell Oil Company requesting payment from the Department of Agriculture of the amount of the tax which had been deducted from the original amount invoiced.

In our decision of November 3, 1977, 57 Comp. Gen. 59, we held that the United States is immune from the payment of taxes for gasoline purchase at the retail level in Vermont. Thereupon, Mr. Jordan states, "in December 1977, the National Finance Center began deducting State Motor Fuel Tax from oil company's invoices presented for payment for gasoline purchased in Vermont."

The Attorney General of the State of Vermont has taken the position that our holding, that the Federal Government is immune from payment of the tax is wrong and that, "The State of Vermont therefore considers all sales to the U.S. Government to be taxable

unless they are bulk lots of 500 gallons or more." In July, after this request was made, we attempted informally to resolve our differences on this question with the State of Vermont by conferring with its Attorney General, but were unsuccessful.

Due to this conflict between the United States and Vermont on the question of the applicability of the State's Motor Fuel Tax, Shell Oil Company which submitted the vouchers has not collected the tax from its customer, the United States, but it is still being asked to pay it by the State. Mr. Jordan asserts that in our decisions 42 Comp. Gen. 179 (1962), and 16 Comp. Gen. 297 (1936), we held that agencies could pay the amount of gasoline taxes to oil companies when States refuse to refund taxes to such vendors and he states that,

> "* * * questions arise as to the responsibility of the Certifying Officer and the relief which may be granted to oil companies as follows: (1) Should the Government withhold State Motor Fuel Tax from payments to oil companies when there is a dispute between the Government and the State over the validity of the tax being imposed? (2) What relief do the oil companies have if the State insists on collecting the tax? (3) Can a payment of this nature be certified under protest in order to relieve the oil companies of tax liability to the State?"

For the reasons stated in our recent decision on this question, the United States is constitutionally immune from paying the Vermont State Retail Sales Tax on gasoline. Vouchers representing State taxes which the United States is exempt from paying because of its sovereign immunity may not properly be certified for payment. 27 Comp. Gen. 20, 22 (1947), 55 Comp. Gen. 1358, 1361 (1976), paragraph 26.1, title VII, GAO Policy and Procedures Manual for the Guidance of Federal Agencies. Here, Shell has submitted its bills, in effect, in the capacity of a tax collecting agent on behalf of the State of Vermont for the sole purpose of transferring the funds from the taxpayer to the State. Payment of the oil company's bills is tantamount to paying the tax to Vermont. GAO has no authority to permit payment of unconstitutional exactions. Therefore, the vouchers covering the Vermont State Motor Fuel Tax, presented by the Shell Oil Company, may not properly be certified for payment.

We recognize that even though the oil company is not a party to the dispute in any real sense, in all likelihood it will suffer detriment as a result of our holding in this case. This is because under the Vermont statutory scheme, the oil company has the duty to collect and pay over the motor fuel tax, and if it is not paid, then presumably the State may look first to the vendor to recover the tax. Nevertheless, that fact does not provide sufficient justification for certifying a voucher which is not properly payable because the United States is immune from the tax it represents.

Furthermore, the Vermont case is distinguishable from the situations presented in the two Comptroller General decisions referred to in Mr. Jordan's letter. In 16 Comp. Gen. 297 (September 22, 1936), the Coast Guard purchased gasoline from the Sinclair Refining Company which was delivered in several States, including Massachusetts. There, the State did not dispute that the Government was not liable for the tax. Accordingly, the Coast Guard had been deducting the amount of the tax from Sinclair's invoices. It was then contemplated that, as was apparently the practice in other States, the oil company would in turn be allowed a refund of the tax by Massachusetts. However, that State's law required that refunds be paid only to the user of the gasoline and not to the oil company. The case presented what could be characterized as a procedural question of whether, in light of the State's limitations on the recipients of refunds, the portion of the vouchers which represented the tax could properly be paid. Payments were allowable under circumstances where the taxing State fully recognized that it had no right to collect the tax, and a refund to the United States was assured. Unlike the present case, neither the legal nor financial position of the Government suffered.

In 42 Comp. Gen. 179 (1962), the decision was on a claim by Texaco, Inc. for an amount withheld from its billings for New Mexico State gasoline taxes which the Government had erroneously paid earlier. The State acknowledged that the tax had been improperly collected and it admitted the validity of the Government's claims for refund. However, it denied administrative requests for refund because of the State statute of limitations. In order to clear exceptions stated by our Office against the officer who certified the vouchers on which the taxes were paid, amounts were withheld from payments to the oil companies. The case presented the question of the determination of the proper party for the Government to look to for the refund of the erroneously paid State tax. Our decision, in which we held that the Government practice was incorrect was based on the specific collection procedures

established in title VII of the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies which contemplate collection from the State taxing authority. Further, in that circumstance, we felt that it would be improper to try to collect the refund from the oil company when it had already passed amounts collected to the State. The case is distinguishable from the one now under consideration because the tax had already been received by the State and that receipt was due to the Government's error. To have allowed the Government to make the deduction from payment owed to Texaco in order to clear the exceptions, would have meant that the oil company would have had to bear the burden of the tax because of the Government's mistake.

Here, however, the refusal to pay vouchers will not result in the oil company having to bear the burden of the tax. Since the United States is not liable to pay the Vermont Gasoline Tax, it follows that the oil company-vendor, who merely serves as an intermediary agent between the State and the vendee has no duty to collect it. Therefore, the oil company has no tax liability to the State.

Should the State of Vermont fail to recede from its position that the United States is liable for its tax on the sale of motor vehicle fuel in nonbulk amounts, and should an agency determine that, as a result, it may be faced with the loss of a beneficial service, e.g., loss of ability to charge retail gasoline purchases which hinders the effective carrying out of the agency's business then the matter should be referred to the Department of Justice for potential litigation of the issue. We have been informally advised by Department officials that under these particular circumstances, the Department is inclined to institute litigation.

T. F. Keller

Acting Comptroller General
of the United States

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

J Burton
GGA

OFFICE OF GENERAL COUNSEL

B-190293

September 22, 1978

Mr. W. O. Hufnagel, Manager
State Excise and Wage Taxes
Tax Administration Department
Mobile Corporation
P. O. Box 900
Dallas, Texas 75221

Dear Mr. Hufnagel:

On March 28, 1978, you wrote to request a resolution of the dispute with the State of Vermont over the United States' liability for that State's Motor Fuel Tax. In July, we attempted to resolve our differences through informal discussions with members of the States Attorney General's office, but were unable to do so. Today, we rendered our decision in which we held that the tax cannot be paid. Enclosed please find a copy for your information.

Sincerely yours,

Mrs. Rollee Efros
Assistant General Counsel

Enclosure