

2611.

APPROVAL — BONDS CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$7,000.00, PART OF ISSUE DATED AUGUST 1, 1929.

COLUMBUS, OHIO, June 17, 1938.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of City of Cleveland, Cuyahoga County,
Ohio, \$7,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated August 1, 1929. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of December 16, 1937, being Opinion No. 1642.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2612.

TAX COMMISSION OF OHIO—BUREAU OF MOTOR VEHICLES—MOTOR VEHICLE FUEL—WHERE USED IN STATIONARY POWER UNIT—MECHANICAL CONTRIVANCE—OPERATION OF MOTOR VEHICLE UPON HIGHWAYS—REQUIREMENTS AS TO DETAILS IN APPLICATION FOR CLAIMS FOR FUEL TAX REFUND.

SYLLABUS:

1. *The owner or operator of a motor vehicle or portable contrivance having one engine and one storage tank, but dual power by virtue of a gear shift arrangement (sometimes known as a power take-off) is entitled to a refund of taxes paid on motor vehicle fuel used in the operation of such contrivance while used as a stationary power unit, under the authority contained in Section 5534, General Code, as amended August 23, 1937.*

2. *The Tax Commission of Ohio has no authority to require the owner or operator of a motor vehicle on which a mechanical contrivance has been constructed for the purpose of grinding feed, mixing concrete, or sawing wood, to install an additional or separate fuel storage tank to be used only while the motor of such vehicle is being used to drive and operate such separate and added machinery, in order to entitle such owner or operator to file claim for refund of taxes paid on motor vehicle fuel used in such separate and distinct operation.*

3. *The Tax Commission of Ohio has no authority to consider the question as to whether or not such mechanical contrivances have been licensed by the Bureau of Motor Vehicles, as the sole question to be decided is whether or not such motor vehicle fuel was used for any other purpose than the propulsion of motor vehicles or mechanical contrivances upon the highways of this state.*

4. *In establishing the validity of claims for refund of motor vehicle fuel taxes paid, the Tax Commission of Ohio has authority under Section 5534 of the General Code, to require persons who file such applications, to include therein full and complete details as to the exact quantity of fuel used for any other purpose than the propulsion of motor vehicles upon the highways of this state, together with supporting original invoices covering the same, and also require that such application be supported by the personal affidavit of the claimant. This is the only procedure provided by law for the establishment of the validity of such refund claims.*

COLUMBUS, OHIO, June 18, 1938.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your letter of recent date, in which you ask my opinion on the following:

“Amended House Bill No. 458, Volume 117 Ohio Laws, Section 5534, G. C., after enumerating certain specific exemptions, reads in part as follows:

‘ * * * or any other purpose than the propulsion of motor vehicles upon the highways of this state, shall be reimbursed to the extent of the amount of the tax so paid.’

A prior specific exemption of the same statute granted a refund of tax paid on motor vehicle fuel used for the purpose of operating or propelling stationary gas engines.

The Tax Commission of Ohio receives innumerable requests for the refund of tax paid on motor vehicle fuel used in portable mechanical contrivances, such as feed grinders, concrete mixers, saw rigs, etc., having a gear shift (sometimes known as a

power take-off) which enables the operator to use said mechanical contrivance as a stationary power unit or as a propelling power unit by the mere shifting of a gear.

It has been our policy to refuse to grant tax refunds on motor vehicle fuel used by such contrivances, for the reason that it is practically impossible to determine how much of the motor vehicle fuel is used for propulsion on the highways of the State and how much is used for stationary power.

Some portable contrivances have a separate engine and a separate storage tank, which can be used only for stationary power. On motor vehicle fuel so used, we have granted tax refunds.

The policy subjects us to the accusation of discriminating in favor of the portable contrivance having a separate engine and a separate storage tank, and against the portable contrivances that do the same work and accomplish the same purpose by the shifting of a gear, thus having dual power. The practical impossibility of accurately determining the exact amount of motor vehicle fuel used in such contrivances for propulsion on the highways of this state and for stationary power, with the resultant likelihood of fraud, has in part determined our policy.

We would like your formal opinion on the following questions:

1. Is the owner or operator of a portable contrivance having one engine and one storage tank but dual power by virtue of a gear shift, entitled to a refund of tax paid on motor vehicle fuel used by such contrivance while it is operating as a stationary unit?

2. If not entitled to a refund, in the above case, would the installation of an additional and separate motor vehicle fuel storage tank to be used only while furnishing stationary power, entitle the operator to a refund of the tax paid on the motor vehicle fuel used from said tank while operating solely in a stationary capacity?

3. Would the fact that some portable contrivances are licensed by the Bureau of Motor Vehicles and some are not licensed by said bureau make any difference?

4. If, in your opinion, applications for refund of motor vehicle fuel tax should be granted in any or all of the above cases, what proof of use should be required by the Tax Commission of Ohio in order to eliminate fraud?"

Section 5534, of the General Code of Ohio, as amended in Amended

House Bill No. 458, 117 O. L., page 673, effective August 23, 1937, reads as follows:

“Any person who shall use any motor vehicle fuel on which the tax herein imposed has been paid, for the purpose of operating or propelling stationary gas engines, road rollers, power shovels, tractors not used on public highways, unlicensed motor vehicles used exclusively in intraplant operations, motor boats or aircraft, or who shall use any such fuel upon which the tax herein provided for has been paid, for cleaning or dyeing, or any other purpose than the propulsion of motor vehicles upon the highways of this state shall be reimbursed to the extent of the amount of the tax so paid on such motor vehicle fuel in the following manner; provided, however, that such applications for refunds must be filed with the Tax Commission of Ohio within ninety days from the date of purchase, or invoice.

Such person shall file with the Tax Commission of Ohio an application for refund, stating the quantity of fuel used for purposes other than propulsion of motor vehicles as set out in this section. Such application shall be accompanied by the original invoice, or certified copy thereof, showing such purchase together with evidence of payment thereof, except that the tax commission may in its discretion waive evidence of such payment in those cases where the claim for refund shall have been assigned in the manner hereinafter in this section permitted, and also the duplicate statement described in Section 5532 of the General Code. On filing of such application, invoice and duplicate statement in the form herein prescribed, the Tax Commission of Ohio shall determine the amount of the refund due and, within thirty (30) days from the time of filing the same, shall certify such amount to the auditor of state. The auditor of state shall thereupon draw a warrant for such certified amount on the treasurer of state in favor of the person claiming such refund. Such refund shall be paid by the treasurer of state from the rotary fund hereinafter provided for. The tax commission may require the application provided for herein to be supported by the affidavit of the claimant.

The right to receive any refund under the provisions of this section shall not be assignable, except to the duly licensed dealer who shall have sold to the user the motor vehicle fuel upon which the claim for refund is based. Nor shall any payment thereof be made by the treasurer of state to any person other than such duly licensed dealer or the person originally entitled

thereto, using the motor vehicle fuel upon which the claim for refund is based, except that such refunds when duly allowed and certified as in this section provided be paid to the executor or administrator, or to the receiver, trustee in bankruptcy, or assignee in insolvency proceedings of such person entitled thereto."

In reviewing the above section it should be noted that, when any person uses motor vehicle fuel on which the tax has been paid, for the purpose of operating or propelling stationary gas engines, road rollers, power shovels, tractors not used on public highways or for operating any unlicensed motor vehicles used exclusively in intra-plant operations, or for *any other purpose than the propulsion of motor vehicles upon the highways of this state*, such person is entitled to be reimbursed to the extent of the amount of the tax paid on such motor vehicle fuel. It should also be noted that the Tax Commission has the authority to require the application for refund of motor vehicle fuel taxes so paid to be supported by the affidavit of the claimant. It should further be noted that any person who files an application for refund of such taxes with the Tax Commission, must set out in their application the quantity of fuel so used for purposes other than propulsion of motor vehicles upon the highways of this state, as provided in Section 5534, *supra*.

The questions which you present for my consideration relate mostly to an interpretation of the provisions contained in Section 5534, *supra*. They seem to revolve around the use of motor vehicle chassis for the conveyance of feed grinders, concrete mixers, saw rigs and other similar portable mechanical contrivances upon the highways of this state, and then using the same motive power, that propels the motor vehicle, as the driving power in the operation of such feed grinder, concrete mixer or saw rig, attached thereto, when the motor vehicle reaches its destination where the work is to be performed. The question then arises as to whether or not the owner of the propelled motor vehicle is entitled to a refund of taxes paid on motor vehicle fuel used in the operation of the power plant of the vehicle while it is used as the driving power for the food grinder, concrete mixer or buzz saw, attached thereto or operated thereby, in the performance of the specific work for which it was intended.

You say it has been the policy of the Tax Commission to refuse to grant tax refunds on motor vehicle fuel used in the operation of mechanical contrivances installed on such motor vehicle chassis for the reason that it seems practically impossible to determine how much of the motor vehicle fuel is used for the propulsion of the motor vehicle upon the highways, as distinguished from the motor vehicle fuel used in the opera-

tion of the same motor while used as a stationary power plant. You further state that when these portable contrivances have a separate fuel storage tank from which fuel is used only for stationary power that in such instances it has been your practice to grant tax refunds on the motor vehicle fuel so used. I realize it is a problem for the Tax Commission to secure information that will enable them to determine the exact amount of motor vehicle fuel used for the propulsion of such mechanical contrivance upon the highways of this state, as distinguished from the motor vehicle fuel used by the same motor when used as a power plant in the operation of a feed grinder, concrete mixer, buzz saw or some other form or type of similar machinery. However, in view of the specific provision contained in Section 5334, supra, to the effect that:

*“Any person who shall use any motor vehicle fuel on which the tax herein imposed has been paid * * * for any purpose other than the propulsion of motor vehicles upon the highways of this state, shall be reimbursed to the extent of the amount of the tax so paid on such motor vehicle fuel. * * *”* (Italics the writer’s.)

I am inclined to the belief that the answer to your first question should be in the affirmative.

In regard to your second question, there seems to be nothing in the statutes which requires the owner of a motor vehicle which uses the same power unit for the dual purpose of propelling such vehicle upon the public highways, and also for furnishing driving power in the operation of mechanical contrivances constructed thereon or operated thereby, to install an additional or separate fuel storage tank to be used only while furnishing power for the operation of such mechanical contrivance. This would probably be a commendable move on the part of the owner, but there is no law to enforce it.

Relative to your third question in which you ask as to whether or not there would be any difference if the particular portable mechanical contrivance is licensed for operation upon the highways of this state by the Bureau of Motor Vehicles, I am inclined to believe that this can also be answered in the negative. I reach this conclusion because the term “motor vehicles” has been defined in Section 5526, General Code, which is the first section of the Motor Vehicle Fuel Tax Act, to include the following:

“‘Motor vehicles’ shall mean and include all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors.”

The same section also defines the term "public highways" as :

"Lands and lots over which the public, either as user or owner generally has a right to pass * * *."

Thus, when motor vehicle fuel is purchased for any other purpose than the propulsion of motor vehicles on the highways of this state, the purchaser is entitled to a refund of the motor vehicle fuel taxes so paid. This is true whether the motor vehicle has been licensed by the Bureau of Motor Vehicles or not.

In regard to your fourth question, in which you ask as to what proof the Tax Commission should require of applicants who are seeking refunds of taxes paid on motor vehicle fuel used in the operation of portable power plants mentioned herein, when in a stationary position, in order to eliminate fraud, I am inclined to believe that Section 5534, *supra*, already answers this problem for you. This section reads in part :

"Such person shall file with the Tax Commission of Ohio, an application for refund, stating the quantity of fuel used for purposes *other than propulsion of motor vehicles as set out in this section.* * * *" (Italics, the writers.)

In addition to the above, it says :

"The Tax Commission may require the application provided for herein to be supported by the affidavit of the applicant."

When this procedure has been followed and the Tax Commission of Ohio has determined the exact amount of the refund due, everything has been done that is necessary to be done under the law, for the establishment of legal claims for refund of such motor vehicle fuel taxes paid and for the elimination of possible fraud in the making and filing of such applications.

Accordingly, in specific answer to your questions it is my opinion that :

1. The owner or operator of a motor vehicle or portable contrivance having one engine and one storage tank, but dual power, by virtue of a gear shift arrangement (sometimes known as a power take-off) is entitled to a refund of taxes paid on motor vehicle fuel used in the operation of such contrivance, while used as a stationary power unit, under the authority contained in Section 5534, General Code, as amended August 23, 1937.

2. The Tax Commission of Ohio has no authority to require the owner or operator of a motor vehicle, on which a mechanical contrivance has been constructed for the purpose of grinding feed, mixing concrete

or sawing wood, to install an additional or separate fuel storage tank to be used only while the motor of such vehicle is being used to drive and operate such separate and added machinery in order to entitle such owner or operator to file claim for refund of taxes paid on motor vehicle fuel used in such separate and distinct operation.

3. The Tax Commission of Ohio, has no authority to consider the question as to whether or not the portable mechanical contrivances in question have been licensed by the Bureau of Motor Vehicles, as the sole question to be decided is whether or not such motor vehicle fuel was used for any other purpose than the propulsion of such motor vehicle or mechanical contrivance upon the highways of this state.

4. In establishing the validity of claims for refund of motor vehicle fuel taxes paid, the Tax Commission of Ohio, has authority under Section 5534, of the General Code, to require persons who file such applications to include therein full and complete details as to the exact quantity of fuel used for any other purpose than the propulsion of motor vehicles upon the highways of this state together with supporting original invoices covering the same and also require that such applications be supported by the personal affidavit of the claimants. This is the only procedure provided by law for the establishment of the validity of such refund claims.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2613.

APPROVAL—LEASE, STATE OF OHIO, THROUGH DIRECTOR, DEPARTMENT OF PUBLIC WORKS, WITH THE WALPARK REALTY COMPANY, MANSFIELD, OHIO, CERTAIN ROOMS, FIFTH FLOOR, THE WALPARK REALTY COMPANY BUILDING, PARK AVENUE AND WALNUT STREET, MANSFIELD, OHIO, USE, SALES TAX DIVISION, TAX COMMISSION OF OHIO.

COLUMBUS, OHIO, June 18, 1938.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain lease executed by The Walpark Realty Company of Mansfield,