

4628

MOTOR VEHICLE FUEL TAX—PAID ON MOTOR VEHICLE FUEL PURCHASED IN OHIO—USED TO PROPEL VEHICLES UPON HIGHWAYS OF ANOTHER STATE—APPLICANT ENTITLED TO REFUND—SECTION 5735.14 RC.

SYLLABUS:

Under the provisions of Section 5735.14, Revised Code, an applicant is entitled to a refund of the motor vehicle fuel tax paid on motor vehicle fuel which is purchased in Ohio but used to propel vehicles upon the highways of another state.

Columbus, Ohio, December 14, 1954

Hon. Stanley J. Bowers, Tax Commissioner, Department of Taxation
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“You are respectfully requested to give this Department your official opinion relative to the following question which has arisen under the administration of the Motor Vehicle Fuel Tax Law Sections 5728.16 and 5735.01 et seq., Revised Code.

“A trucking company has filed a claim with this Department under Section 5735.14 (5534), R. C., requesting a refund of the tax on that portion of motor vehicle fuel which was purchased in Ohio and subsequently used to propel trucks on the highways of Kentucky. It is the contention of the trucking company that even though the motor vehicle fuel is purchased in Ohio the tax thereon should be refunded to the extent that such fuel is used to propel

trucks on highways in states other than Ohio. In support of its refund claim the company refers to Sections 5735.14 and 5735.18, R. C.

“The question presented is whether the tax on motor vehicle fuel purchased in this state should be refunded to the applicant in accordance with the provisions of Section 5735.14, R. C., in the proportion that such fuel was consumed in propelling trucks on highways outside the state of Ohio.”

The Motor Vehicle Fuel Tax Law is set forth in Chapter 5735 Revised Code. Section 5735.05, Revised Code, levies upon all dealers of motor vehicle fuel an excise tax of two cents per gallon upon the use, distribution or sale by them of motor vehicle fuel. Additional taxes upon the use, distribution or sale of motor vehicle fuel are levied by Sections 5735.25 and 5728.16, Revised Code. The tax levied by both of these sections is to be reported, computed, paid, collected, administered, enforced and refunded in the manner provided by Sections 5735.02 to 5735.21, inclusive, of the Revised Code.

Section 5735.05, Revised Code, reads as follows:

“To provide revenue for maintaining the state highway system, to widen existing surfaces on such highways, to resurface such highways, to enable the counties of the state properly to maintain and repair their roads, to enable the municipal corporations of the state properly to maintain, repair, construct, clean, and clear the public streets and roads and purchase and maintain traffic lights and repave their streets, to supplement revenue already available for such purposes, and to distribute equitably among those persons using the privilege of driving motor vehicles upon such highways and streets the cost of maintaining and repairing the same, an excise tax is hereby imposed on all dealers in motor vehicle fuel upon the use, distribution, or sale within the state by them of motor vehicle fuel at the rate of two cents per gallon so used, distributed, or sold to be computed in the manner set forth in sections 5735.01 to 5735.27, inclusive, of the Revised Code; provided that no tax is hereby imposed upon the following transactions:

(A) The sale of motor vehicle fuel in tank car or cargo lots for delivery by tank car or boat for use wholly for purposes other than propelling motor vehicles on the public highways, or the use thereof wholly for such other purposes when so purchased.

(B) The sale of motor vehicle fuel by a licensed dealer in tank car or cargo lots to another licensed dealer for delivery by tank car or boat;

(C) The exportation or sale for exportation of motor vehicle fuel from the state to any other state or foreign country ;

(D) The sale of motor vehicle fuel to the United States government or any of its agencies, except such tax as is permitted by it, where such sale is evidenced by an exemption certificate, in form approved by the tax commissioner, executed by the United States government or an agency thereof certifying that the motor vehicle fuel therein identified has been purchased for the exclusive use of the United States government or its agency ;

(E) The sale of motor vehicle fuel which is in the process of transportation in foreign or interstate commerce, except in so far as the same may be taxable under the constitution and statutes of the United States, and except such as may be agreed upon in writing by the dealer and the commissioner ;

(F) The sale of motor vehicle fuel when sold exclusively for use in the propulsion of aircraft, where such sale is evidenced by an exemption certificate prescribed by the commissioner and executed by the purchaser certifying that the motor vehicle fuel purchased has been purchased for exclusive use in the propulsion of aircraft.

After the tax provided for by this section on the sale, distribution, or use of any motor vehicle fuel has been paid by the dealer, such motor vehicle fuel may thereafter be used, sold, or resold by any person having lawful title to the same, without incurring liability for such tax.

If a licensed dealer sells motor vehicle fuel received by him in other than tank car, cargo, or pipe-line lots to another licensed dealer, the seller may deduct on the report required by section 5735.07 of the Revised Code the number of gallons so sold for the month within which such motor vehicle fuel was sold or delivered. In such event such number of gallons is deemed to have been received by the purchaser, who shall report and pay the tax imposed thereon."

It will be noted that Section 5735.05, Revised Code, levies a tax upon all dealers in motor vehicle fuel upon the use, distribution, or sale within the state of motor vehicle fuel. Certain exceptions are set forth but none of the exceptions is applicable to the factual situation outlined in your request.

Section 5735.14, Revised Code, to which reference is made in your letter, reads as follows :

"Any person who uses any motor vehicle fuel, on which the tax imposed by section 5735.05 of the Revised Code has been paid, for the purpose of operating or propelling stationary gas engines,

tractors not used on public highways, unlicensed motor vehicles used exclusively in intraplant operations, motor boats, or aircraft, or who uses any such fuel upon which such tax has been paid, for cleaning or dyeing, or any purpose other than the propulsion of motor vehicles upon the highways of this state shall be reimbursed in the amount of the tax so paid on such motor vehicle fuel as provided in this section.

Such person shall file with the tax commissioner an application for refund within one hundred twenty days from the date of purchase, stating the quantity of fuel used for purposes other than the propulsion of motor vehicles. Such application shall be accompanied by the statement described in section 5735.15 of the Revised Code showing such purchase together with evidence of payment thereof. After consideration of such application and statement, the commissioner shall determine the amount of refund due, and, within thirty days from the time of filing same, shall certify such amount to the auditor of state. The auditor of state shall 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 provided for in section 5735.23 of the Revised Code. The Commissioner may require that the application be supported by the affidavit of the claimant.

The right to receive any refund under this section is not assignable. The payment of this refund by the treasurer of state shall not be made to any person other than the person originally entitled thereto who used the motor vehicle fuel upon which the claim for refund is based, except that such refunds when allowed and certified as provided in this section may be paid to the executor or administrator, or to the receiver, trustee in bankruptcy, or assignee in insolvency proceedings of such person."

When Sections 5735.05 and 5735.14, Revised Code, are considered together, a result, somewhat unusual, is reached. Refunds are provided in certain instances in which the levying section imposes a tax upon the sale of the motor vehicle fuel. The ultimate effect of Section 5735.14, Revised Code, is to create additional exceptions to the levy of the tax. However, the dealer must pay the tax on the fuel even though the subsequent use of the fuel by the purchaser creates a right to a refund of the tax.

In an analogous situation, the Supreme Court held that gasoline brought into Ohio by a dealer for use, distribution or sale, and delivery within Ohio, is subject to the motor vehicle fuel tax even though the gasoline is subsequently destroyed by fire. *The Texas Co., v. Glander*, 149 Ohio State 8. Section 5531, General Code, Section 5735.13, Revised

Code, provided for a refund of the tax paid on motor vehicle fuel which is lost or destroyed by fire. The opinion in the Texas Co. case recognized that the taxpayer might be able to secure a refund of the tax paid, but the assessment of the tax on the destroyed gasoline was upheld.

The language used in Section 5735.14, Revised Code, *supra*, seems clear. There is no need to resort to rules of statutory construction to ascertain the meaning of this section. The language used need only be applied to the facts disclosed in your request. If the motor vehicle fuel is used for any purpose other than the propulsion of motor vehicles upon the highways of this state the user of the motor vehicle fuel is entitled to a refund of the amount of the tax that has been paid on such fuel.

The allowance of a refund of the motor vehicle fuel tax paid on fuel that is subsequently used to propel vehicles on the highways of another state is consistent with the over-all purpose of the Ohio statutory scheme of taxation of motor vehicle fuel. A clear expression of this purpose is set forth in the first paragraph of Section 5735.05, Revised Code, *supra*. In the case of *Shafer v. Glander*, 153 Ohio State, 483, it was said in the majority opinion by Judge Turner, at page 487:

“When the General Assembly enacted the several statutes levying a tax upon the use of motor fuel the clear intention was to distribute the cost of road construction and repair equitably among those persons *using the privilege of driving motor vehicles upon such highways.*”

Of course the applicant for the refund must clearly show that the motor vehicle fuel for which the tax refund is sought was in fact used to propel vehicles upon the highways of another state. Since the applicant mentioned in your request purchased the motor vehicle fuel in Ohio I assume that at least some of the fuel would have been used to propel a vehicle upon the highways of Ohio.

The determination of the amount of fuel purchased in Ohio but used in other states presents a factual question which is not easily answered. To aid in answering this question the legislature has provided that the applicant must submit certain information with his refund application. See Sections 5735.14 and 5735.15, Revised Code. Section 5735.16, Revised Code, provides that a person must have a vendee's refund permit in order to secure a tax refund under the provisions of Section 5735.14, Revised Code.

In specific answer to your question it is my opinion, and you are ad-

vised, that under the provisions of Section 5735.14, Revised Code, a person is entitled to a refund of the motor vehicle fuel tax paid on motor vehicle fuel which is purchased in Ohio but used to propel vehicles upon the highways of another state.

Respectfully,

C. WILLIAM O'NEILL

Attorney General