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TAX IMPOSED ON SALE OF MOTOR VEHICLE FUEL—DOES NOT COME WITHIN ANY OF EXCEPTIONS CONTAINED IN SECTION 5735.05 RC—TAX SO IMPOSED AND PAID MAY BE SUBJECT TO REFUND UNDER SECTION 5735.14 RC—TAX IMPOSED ON SALE, USE OR DISTRIBUTION OF MOTOR VEHICLE FUEL—SAID SALE EXEMPT FROM APPLICATION OF SALES TAX UNDER SECTION 5739.02 (B) (6) RC.

SYLLABUS:

Under the provisions of Section 5735.05, Revised Code, a tax is imposed on the sale of motor vehicle fuel which does not come within any of the exceptions contained in said section even though the tax so imposed and paid may be subject to refund under Section 5735.14, Revised Code. A tax being imposed on the sale, use or distribution of the motor vehicle fuel, then said sale is exempt from the application of the sales tax under the provisions of Section 5739.02 (B) (6), Revised Code.

Columbus, Ohio, November 18, 1955

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

Dear Sir:

Your request for my opinion reads as follows:

“The Tax Commissioner of Ohio hereby refers to you for your opinion a question relative to the administration of the Ohio Sales and Use Tax Law. The facts giving rise to the question are as follows:

“Section 5739.02 of the Revised Code, a part of the sales tax act, exempts from the application of such tax sales of motor vehicle fuel on the receipt, use, distribution or sale of which in this state a tax is imposed.

“Section 5735.14 of the Revised Code, a part of the motor vehicle fuel tax act, provides a refund of motor fuel tax when the fuel is used for nonhighway purposes.

“The Ohio Supreme Court, in *Haefner v. Youngstown*, 147 O. S. at page 64, said that the exemption from the sales tax of motor vehicle fuel is in keeping with a legislative policy of excepting from the sales tax proper sales already taxed in the same

or a similar way. The legislative course shows an intent to avoid double taxation.

“The question, therefore, submitted for your opinion is:

“Is the sales or use tax applicable to retail sales of motor vehicle fuel used for nonhighway purposes?”

“Your interpretation in this matter will be appreciated.”

Section 5735.05, Revised Code, levies a tax on the sale of motor vehicle fuel and excepts from the imposition of the tax certain transactions. The pertinent provisions of this section read as follows:

“* * * 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. * * *”

In Section 5735.14, Revised Code, a provision is made for refunds of motor vehicle fuel taxes paid when the motor vehicle fuel is used other than for the propulsion of motor vehicles upon the highways of this state, and the applicable provisions are 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. * * *” (Emphasis added.)

As can be seen from an examination of Section 5735.05, Revised Code, the exceptions from the imposition of the motor vehicle fuel tax do not encompass every sale of motor vehicle fuel when the fuel is used for nonhighway purposes. However, Section 5735.14, Revised Code, provides for refunds when the fuel purchased is used for “any purpose other than the propulsion of motor vehicles upon the highways of this state.”

In Opinion No. 4628, Opinions of the Attorney General for 1954, the following comment was made at page 646 :

“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.” (Emphasis added.)

Section 5739.02, Revised Code, levies a sales tax on retail sales and provides for certain exemptions. The portions of this section pertinent to the question raised are as follows :

“* * * an excise tax is hereby levied on each retail sale made in this state of tangible personal property. * * *

“(B) The tax does not apply to the following: * * *

“(6) Sales of motor vehicle fuel and of liquid fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state; * * *

This section exempts sales of motor vehicle fuel from the application of the sales tax if a tax is imposed by this state upon the receipt, use, distribution, or sale of the motor vehicle fuel.

In this connection then it becomes important to determine the meaning of the words “is imposed” inasmuch as if a tax is imposed upon the receipt, use, distribution or sale of motor vehicle fuel, the sale of such at retail is exempt from the application of the Ohio sales tax.

The word “impose” has been construed in several cases outside this state.

The Supreme Court of Pennsylvania in the case of *Rigby v. Great Atlantic & Pacific Tea Co.*, 25 A.2d, 401, had under consideration a lease with an option to cancel upon enactment of any law imposing a new tax on the corporation by the reason of conducting a chain store operation. Such a tax law was enacted and after cancellation of the lease the tax was held to be unconstitutional. The court had this to say concerning the meaning of “impose” at page 405 of that opinion:

“The word ‘impose’ means to lay, as a charge, tax, penalty, etc.; to levy (Webster). The tax or license fee is imposed, when it is laid, or levied, not when it is collected or paid. *Westhus v. Union Trust Co.*, 8 Cir., 164 F. 795, 799, 90 C.C.A. 441, approved in *Hertz v. Woodman*, 218 U.S. 205, 212, 30 S.Ct. 621, 54 L.Ed. 1001. Whether it can be justified or enforced, is a wholly different matter.”

In the case of *In re Robbins’ Estate*, 47 N.W. 2d, 889, the Wisconsin court had under consideration the question of reciprocity in inheritance tax statutes, and had the following to say concerning the word “impose” at page 890:

“* * * It was there made clear to us that ‘impose’ is not the equivalent of ‘collect’ and that a tax is ‘imposed’ as that word is used in tax legislation and administration, if the bequest or inheritance is subject to taxation although in a given case it may be absolved from ‘payment’ because it qualifies under some exemption. * * *”

In the case of *Westhus v. Union Trust Co.*, 164 F., 795, the court commented on the meaning of "impose" at pages 798 and 799:

"* * * The imposition of a tax and its maturity are distinct and separate things, and are commonly recognized to be so in schemes of taxation. To impose a tax means to levy it, and we all know that it is not the general custom to make a tax due and enforceable the very day it is imposed or levied. * * *"

In the problem at hand under the above interpretation of the word "imposed" the motor vehicle fuel tax is not only imposed at the time of the sale but is paid and no question of the sales tax arises until a claim is made for a refund of the motor vehicle fuel tax.

The question of whether a sale is subject to the Ohio sales tax must be answered at the time of the sale, except in cases of sales to holders of direct payment permits authorized by Section 5739.01, Revised Code. In the instant case the motor vehicle fuel tax has been imposed, as that term is used in tax legislation, even though it may be subject to refund, and since it has been imposed then the sale comes within the language of the exemption in Section 5739.02 (B) (6), Revised Code, and such sale would not be subject to the Ohio sales tax.

In specific answer to your question, it is my opinion and you are advised that under the provisions of Section 5735.05, Revised Code, a tax is imposed on the sale of motor vehicle fuel which does not come within any of the exceptions contained in said section even though the tax so imposed and paid may be subject to refund under Section 5735.14, Revised Code. A tax being imposed on the sale, use or distribution of the motor vehicle fuel, then said sale is exempt from the application of the sales tax under the provisions of Section 5739.02 (B) (6), Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General