

2945.

GASOLINE TAX—DEALER EXEMPT WHEN SELLING TO FEDERAL AGENCIES—PRESENTMENT OF CLAIM FOR ERRONEOUS PAYMENT TO SUNDRY CLAIMS BOARD—ROTARY FUND MONEYS EXPENDED ONLY UNDER TERMS OF SECTION 5534, GENERAL CODE.

SYLLABUS:

1. *By the terms of Sections 5527 and 5541-1 of the General Code of Ohio, motor vehicle fuels sold to the United States Government or any of its agencies by a dealer as defined in the acts imposing the two cent gasoline tax and the one cent gasoline tax are not subject to said taxes.*

2. *Section 5527, General Code, providing that the sale of motor vehicle fuels to the United States Government or any of its agencies by a dealer as defined in the act imposing the two cent gasoline tax in Ohio, became effective April 17, 1925; and the provisions thereof exempting such sales from the imposition of the gasoline tax were incorporated by reference in the act of March 3, 1927 (112 O. L. 508), effective May 25, 1927, imposing an additional one cent gasoline tax. See Section 5541-1, General Code.*

3. *Moneys in the rotary fund created by Sections 5537 and 5541-7 of the General Code, which sections were respectively enacted in the act imposing the two cent gasoline tax (111 O. L. 294) and the act imposing the one cent gasoline tax (112 O. L. 508) may only be paid in accordance with the provisions of Section 5534 of the General Code.*

4. *A claim for the refunding of taxes erroneously paid on motor vehicle fuels sold to the United States Government or any of its agencies may be presented to the sundry claims board, together with such evidence as will satisfy such board, for recommendation as to the allowance or disallowance of such claim to the General Assembly of Ohio. Such claim cannot be paid unless money therefor is specifically appropriated by the General Assembly of Ohio.*

COLUMBUS, OHIO, November 30, 1928.

HON. JOHN G. SARGENT, *Attorney General of The United States, Washington, D. C.*

MY DEAR MR. ATTORNEY GENERAL:—This will acknowledge receipt of your communication which reads:

“Inquiries have been received from the various Federal departments and independent agencies on the question of whether the State of Ohio exempts from tax purchases made by branches of the Federal government of gasoline used for governmental purposes.

On May 14, 1928, the Supreme Court of the United States decided in *Panhandle Oil Company vs. State of Mississippi* that dealers in gasoline are not liable for the Mississippi state tax of three cents per gallon on motor vehicle fuels sold by them to the United States or its Federal agencies for use in governmental operations. On October 9, 1928, the United States District Court for the District of Nebraska in the case of *United States vs. H. J. McLaughlin, Secretary of the Department of Agriculture, State of Nebraska*, granted an injunction restraining that officer from collecting a State tax from dealers on gasoline imported or manufactured and subsequently sold by them to the United States.

These decisions lead me to inquire whether any administrative procedure has been established by the State authorities exempting from tax motor vehicle fuels sold to the United States by dealers who are accountable to the State for the tax, the date when the procedure became effective, whether claims for the refundment of taxes heretofore erroneously collected will be allowed if properly supported by evidence of payment, and what showing should be made in such claims."

The original Ohio Gasoline Tax Act was passed in 1925, 111 Ohio Laws, 294, and contained a provision exempting from the tax, motor vehicle fuels sold to the United States Government or any of its agencies. Section 5527, Ohio General Code, reads in part as follows:

"For the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties and municipal corporations of the state to properly maintain and repair their roads and streets, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, there is hereby levied and imposed on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the state of Ohio, an excise tax of two cents; subject, however, to the following specific exemptions.

The sale of motor vehicle fuel shall not be subject to said tax

\* \* \*

(c) if such motor vehicle fuel be sold by a dealer, as herein defined, to the United States Government or any of its agencies;

\* \* \*"

In 1927, an additional excise tax of one cent on each gallon was imposed, but said tax was imposed as provided in Section 5541-1, General Code, "subject, however, to the specific exemptions set forth in said Section 5527 of the General Code." Specific exemption from the payment of the gasoline tax on sales of motor vehicle fuel made to the United States Government or any of its agencies, is therefore expressly provided for.

On May 8, 1925, this department in answer to the question as to whether or not the Federal Reserve Banks were exempt from the payment of the excise tax of two cents per gallon imposed upon the sale and use of motor vehicle fuel sold by a dealer, advised the Tax Commission of Ohio That:

"If a dealer, as defined in the act, sells motor vehicle fuel, as defined in the act, to the government or its agencies, including the Federal Reserve Bank, the dealer is exempted from paying the tax on motor vehicle fuel so sold. But, if the government or its agencies purchase gasoline not from a dealer, on which the tax has already been paid, the government or

its agency does not pay a tax, although the fact that a tax has been paid upon the fuel by a dealer may have enhanced its price. However, in such event, there is no provision for reimbursement of the government for the tax so paid (except as provided in Section 9 of the act). In order, therefore, for the government, or its agencies, to enjoy the exemption provided in the act, it will be necessary for it to purchase its fuel from the 'dealer,' defined in the act."

The Tax Commission of Ohio was also advised by this department in an opinion dated February 14, 1928, that:

"Motor vehicle fuel purchased by the United States property and disbursing officer for Ohio with Federal funds for the use of The Ohio National Guard is exempt from the payment of the motor vehicle fuel tax."

Under date of November 20, 1928, I was advised by the Tax Commission of Ohio, that:

"\* \* \* The Tax Commission of Ohio under the provisions of 5527 of the General Code, does permit dealers in motor vehicle fuel, as the term is defined in the Ohio Gasoline Tax Law, to sell motor vehicle fuel to the United States Government or any of its agencies without the Ohio three cent tax. Such dealers are permitted to take credit for the number of gallons of motor vehicle fuel they sell to the United States Government or any of its agencies on their monthly motor vehicle fuel reports made to the Tax Commission."

You also inquire in regard to refundment of taxes erroneously collected. Section 5534 of the General Code reads as follows:

"Any person, firm, association, partnership or corporation who shall use any motor vehicle fuel, as defined in this act, on which the tax herein imposed has been paid, for the purpose of operating or propelling stationary gas engines, tractors not used on highways, 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 operated or intended to be operated in whole or in part 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 secretary of state within ninety days from the date of purchase or invoice.

Such person, firm, association, partnership or corporation shall file with the tax commission of Ohio a statement of the quantity of fuel used for purposes other than propulsion of motor vehicles, as set out in this section. Such statement shall be accompanied by the original invoice showing such purchase. On filing of such statement and invoice in form herein prescribed, the tax commission of Ohio shall determine the amount of refund due and within thirty 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 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 shall require the statement provided for herein to be supported by the affidavit of the claimant."

Section 5541-6 of the General Code, which was enacted as Section 7 of the act imposing an additional one cent gasoline tax (112 O. L. 510) reads as follows:

"Where applications for refunds are made and allowed under the provisions of G. C., Section 5534, a refund of the tax paid under the provisions of this act shall also be allowed and paid, and the procedure in the manner of claiming, allowing and paying such refunds shall be in all respects the same as is provided in G. C., Section 5534."

The rotary fund referred to in Section 5534, supra, is provided for in Section 5537, General Code, which reads in part as follows:

"Upon receipt of taxes herein provided for the treasurer of state shall place the first \$50,000.00 collected in a special fund to be known as the gasoline tax rotary fund. Thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to \$50,000.00. \* \* \*"

The act imposing the additional one cent gasoline tax also creates a rotary fund, and provides, *inter alia*, that:

Section 5541-7. "Upon receipts of taxes herein provided for, the treasurer of state shall place the first twenty-five thousand dollars collected in a special fund, which shall constitute a rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to twenty-five thousand dollars. The refunds provided for by this act shall be paid from such rotary fund. \* \* \*"

The above provision was enacted as a part of Section 8 of the act in question, and, as above indicated, was codified as Section 5541-7 of the General Code.

Obviously, moneys in these two rotary funds can only be refunded in accordance with the provisions of Section 5534 above quoted, and the administrative or executive officers of this state would be without authority to pay out any of the moneys in these two funds except in strict accordance with the terms of the section authorizing such payments.

In this connection, your attention is directed to Section 22 of Article II of the Constitution of Ohio, which reads as follows:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

While Section 270-6 of the General Code creates a "sundry claims board" and defines its powers and duties, this board acts only in an advisory capacity, submitting its reports and findings to the chairman of the finance committee of the house of representatives. The Legislature is, of course, not bound by the findings of the sundry claims board, and refunders found to be due by such board could only be paid when an appropriation act duly appropriating money to pay refunders, had been passed by the General Assembly.

Section 270-6, reads as follows:

"There is hereby created a board to be known as the 'sundry claims board' to consist of the major appointee authorized by Section 270-5 of the General Code, commonly known as the 'budget commissioner' who shall be president, the auditor of state who shall be secretary, the attorney general, the chairman of the senate finance committee, and the chairman of the finance committee of the house of representatives. In addition to any other duties that may by law devolve upon such board, it is hereby authorized and empowered to receive original papers representing claims against the state of Ohio for the payment of which no moneys have been appropriated. Such claims shall be filed and properly designated either by number or short title or both. All such claims shall be carefully investigated by such board. The president of the sundry claims board shall, for the purposes contemplated by this section, have power to administer oaths, compel the attendance of witnesses, and the production of books and papers, and to punish for disobedience of subpoena, refusal to be sworn, or to answer as a witness, or to produce books and papers, as is conferred upon officers authorized to take depositions. After such investigation the board shall either approve, approve with conditions and limitations or disapprove of each such claim, and append to the original papers heretofore mentioned representing each claim, a concise statement of facts brought out in such investigation upon which its approval or disapproval is based. Such original papers and appended statements shall be filed in the office of the president of such board, and delivered to the chairman of the finance committee of the house of representatives of the next general assembly promptly upon the appointment of such chairman. A copy of the above-mentioned appended statement shall be kept on file in the office of the president of such board and, together with the original papers representing such claim and any other matters pertaining thereto, shall constitute a permanent claims' record.

A per diem of ten dollars for each day actually spent by the chairman of the finance committee of the senate and house respectively, while in the performance of the duties herein enumerated, and upon the summons of the president of the board, together with their necessary expenses, shall be paid from the funds appropriated for the expense of legislative committees upon vouchers approved by the president and secretary of the board herein created; provided, however, that the provisions of this act shall not be construed to conflict with Section 15 of the General Code."

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

1. By the terms of Sections 5527 and 5541-1 of the General Code of Ohio, motor vehicle fuels sold to the United States Government or any of its agencies by a dealer as defined in the acts imposing the two cent gasoline tax and the one cent gasoline tax are not subject to said taxes.

2. Section 5527, General Code, providing that the sale of motor vehicle fuels to the United States Government or any of its agencies by a dealer as defined in the act imposing the two cent gasoline tax in Ohio, became effective April 17, 1925; and the provisions thereof exempting such sales from the imposition of the gasoline tax were incorporated by reference in the act of March 3, 1927 (112 O. L. 508), effective May 25, 1927, imposing an additional one cent gasoline tax. See Section 5541-1, General Code.

3. Moneys in the rotary fund created by Sections 5537 and 5541-7 of the General Code, which sections were respectively enacted in the act imposing the two cent gasoline tax (111 O. L. 294) and the act imposing the one cent gasoline tax (112 O. L. 508) may only be paid in accordance with the provisions of Section 5534 of the General Code.

4. A claim for the refunding of taxes erroneously paid on motor vehicle fuels sold to the United States Government or any of its agencies may be presented to the sundry claims board, together with such evidence as will satisfy such board, for recommendation as to the allowance or disallowance of such claim to the General Assembly of Ohio. Such claim cannot be paid unless money therefor is specifically appropriated by the General Assembly of Ohio.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

2946.

JUSTICE OF THE PEACE—EMBEZZLEMENT OF STATE AND TOWNSHIP FUNDS—BOND INSUFFICIENT—PROCEEDS PRORATED—BOND RELEASED BY PROSECUTING ATTORNEY.

*SYLLABUS:*

1. *Where a justice of the peace embezzles funds belonging to both the state treasury and a township, and his bond is not sufficient to cover said defalcation, the amount recovered upon the official bond should be distributed in proportion to the respective claims of the state and township.*

2. *Under such circumstances, the prosecuting attorney of the county may lawfully collect said moneys and execute a receipt therefor in the name of the State of Ohio, and distribute said moneys to the state and township in the proportion that their respective claims bear to the amount collected.*

COLUMBUS, OHIO, November 30, 1928.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads as follows:

"I desire your opinion on the following set of facts:

The State Examiner examining the justices of the peace of Mahoning County, Ohio, for the period between 1925 to December, 1927, made a finding against F. B. R., Justice of the Peace in and for ----- Township, in the amount of \$6,207.80; \$3,553.90 to the State Treasury, \$2,653.90 to ----- Township.