

my approval thereon, and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2899.

APPROVAL, ARTICLES OF INCORPORATION OF THE GIBRALTAR
MUTUAL BENEFIT ASSOCIATION, CINCINNATI, OHIO.

COLUMBUS, OHIO, July 9, 1934.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have examined the proposed articles of incorporation of The Gibraltar Mutual Benefit Association, located at Cincinnati, Ohio, which is proposed to be organized by virtue of Sections 9445, et seq. of the General Code.

Finding these articles not to be inconsistent with the constitution and laws of the United States or of the State of Ohio, I am herewith returning them, with my approval endorsed thereon.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2900.

MOTOR VEHICLE FUEL TAX—MANUFACTURER OF CLEANING
FLUID USING NAPHTHA UPON WHICH TAX PAID ENTITLED TO
REFUND WHEN.

SYLLABUS:

The use of naphtha by a manufacturer of cleaning fluid on which the motor vehicle fuel tax has been paid in the manufacture of such fluid, when the naphtha is so mixed with other ingredients to such extent that it loses its identity as such and becomes one of the component parts of the manufactured product, and is no longer practicable for use as a motor vehicle fuel, constitutes the manufacturer the "user" of the motor vehicle fuel for "any other purpose than the propulsion of motor vehicles" as provided in Section 5534, General Code, and entitles the manufacturer to a refund of such fuel taxes on the naphtha so used.

COLUMBUS, OHIO, July 9, 1934.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your request for my opinion reads as follows:

"Will you kindly favor us with an opinion relative to the following:—
There are quite a number of concerns in Ohio purchasing motor

vehicle fuel with the Ohio 3c per gallon motor vehicle fuel tax included in the purchase price. The motor vehicle fuel is then blended with the other ingredients to be used, distributed or sold as cleaning fluids.

The question now arises as to whether or not the concern purchasing and blending the motor vehicle fuel with the other ingredients to produce the cleaning fluid may secure a refund, under the Ohio motor vehicle fuel excise tax law, of the motor vehicle fuel tax paid on the motor vehicle fuel so blended.

We are sending you, herewith, a brief prepared for the National Solvent Corporation of Cleveland, relative to the cleaning fluid produced by them, a pamphlet showing listings of the Underwriter's Laboratories, a booklet of labels, reports of The James H. Herron Company and the Industrial Testing Laboratories and letter of the Underwriters' Laboratories, all submitted by the National Solvent Corporation.

It is our understanding that the ingredients blended by this corporation in the manufacture of its cleaning fluid are the ingredients used with more or less variation in the manufacture of practically all cleaning fluids and the enclosures are sent to you with the thought that they might be of aid to you in rendering your opinion."

By virtue of the motor vehicle fuel tax laws, Sections 5526 to and including 5541-8, General Code, an excise tax of three cents per gallon is imposed upon the dealer, based upon the total number of gallons received by said dealer. The Supreme Court held this to be an excise tax upon the dealer and not a tax upon the consumer. *City of Cincinnati vs. Cincinnati Oil Works Company*, 123 O. S. 448. The legislature has determined that the most convenient and efficient way to collect the tax is from the dealer. The dealer is required to pay the tax on the total number of gallons received but provision is made for a refund when the motor vehicle fuel for which the tax has been paid is not used for the purpose of "generating power for the propulsion of motor vehicles upon the public highways".

Motor vehicle fuel is defined in Section 5526, General Code, as follows:

"'Motor vehicle fuel' shall mean and include any volatile or inflammable liquid by whatever name such liquid may be known or sold which is used or usable, either alone or when mixed or compounded, for the purpose of generating power for the propulsion of motor vehicles upon the public highways. The term 'motor vehicle fuel', however, shall not include the product commonly known as kerosene oil, except when such kerosene oil is mixed or compounded with motor vehicle fuel or except when such kerosene oil is used in operating motor vehicles on the public highways."

Under this definition it makes no difference what use is ultimately made of the motor vehicle fuel, the dealer is subject to the tax on the total number of gallons received.

You state in your inquiry that the taxes as provided by Sections 5527 and 5541 have been paid on the naphtha used by the manufacturer of the cleaning

fluid and this opinion will be confined to the question of whether or not the manufacturer is entitled to a refund of the taxes so paid.

Sections 5532 and 5534, General Code, outline the procedure and provide for a refund of motor vehicle fuel taxes paid on motor vehicle fuel which is used for a non-highway purpose. Said sections read:

Sec. 5532. "When motor vehicle fuel is sold to a person who shall claim to be entitled to a refund under section 5534 of the General Code, the seller of such motor vehicle fuel shall make out in triplicate on forms prescribed and supplied by the tax commission, which forms shall have printed thereon that the liability to the state for the excise tax imposed under the motor vehicle fuel laws of Ohio with respect to such motor vehicle fuel has been assumed by the seller and that said excise tax has already been paid or will be paid by the seller when the same shall become payable, a statement setting forth the name and address of the purchaser, the number of gallons of motor vehicle fuel so sold, the proposed use for which such motor vehicle fuel is purchased, and such other information as the tax commission shall require. One of such statements shall be mailed by the seller to the tax commission not later than the tenth (10th) day of the calendar month next succeeding the sale. The duplicate of such statement shall be given to the purchaser at the time of the sale."

Sec. 5534. "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, motor boats or aircraft, or who shall use any such fuel upon which the tax therein provided for has been paid, for cleaning or dyeing, or any other purpose than the propulsion of motor vehicles, 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 the 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, 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 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 shall 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 may be paid to the executor or administrator, or to the receiver, trustee in bankruptcy, or assignee in insolvency proceedings of such person entitled thereto."

It is assumed for the purpose of this opinion that the manufacturer who has filed an application for the refund of the tax paid on the naphtha used in the manufacture of cleaning fluid has complied with the procedure outlined in the above two sections.

A refund of taxes amounts to an exemption of the tax and statutes providing for the refund should be strictly construed. It is stated by Horthcott, J. in the case of *South Carolina Produce Assn. vs. Comm. Int. Rev.*, 59 Fed. 2nd, 742, at page 744:

"Exemptions from taxation are not favored, and, if any rule of interpretation were to be invoked, it would be that the statute in question would be strictly construed against the taxpayer."

Hoge vs. R. R. C., 99 U. S. 345.

Bank of Commerce vs. Tennessee, 161 U. S. 134.

This rule of statutory construction applied to statutes of exemption or providing for refunds is the reverse of the rule of construction as to strictness as is applied when interpreting a statute imposing a tax. The rule of interpretation of tax statutes is clearly stated by Marshall, C. J., in the case of *Caldwell vs. State*, 115 O. S. 458 at page 460:

"Where there is ambiguity or doubt as to the legislative intent, the doubt should be resolved in favor of the person upon whom the burden of taxation is sought to be imposed, and that language employed in a taxation statute should not be extended by implication beyond the clear import, or to enlarge its operation so as to embrace subjects of taxation not specifically named. This rule is as well settled as not to be longer debatable. It is supported both by authority and reason."

I find no adjudicated cases in this state nor opinions of former Attorneys General interpreting the above section of the General Code. It will be necessary to apply the general principles of statutory construction in the interpretations of Sections 5532 and 5534 to determine whether or not the manufacturer who uses the motor vehicle fuel in manufacturing cleaning fluid is entitled to a refund.

Section 5532, General Code, supra, requires the seller of the motor vehicle fuel to be used for non-highway purposes to forward to the Tax Commission a certificate that the tax on the fuel has been paid or will be paid when the same becomes payable, the name of the purchaser, the proposed use of the fuel, and the number of gallons of fuel sold. The seller is also required to deliver to the purchaser the duplicate of the certificate, in order that the purchaser can

prove that the tax has been paid on the fuel he has used for a non-highway purpose, in securing a refund of the tax.

Section 5534, General Code, *supra*, provides for a refund of the tax on the motor vehicle fuel, to any person which term includes natural persons, partnerships, firms, associations or corporations, who shall use or have used motor vehicle fuel for a non-highway purpose. In Section 5534 is enumerated certain specific purposes for which the motor vehicle fuel is used on which the tax shall be refunded. This specific enumeration of purposes is followed by a general clause "or any other purpose than the propulsion of motor vehicles".

Assuming that all the other procedural steps to secure refund have been followed, your inquiry resolves itself into the question of whether or not use of motor vehicles fuel for the purpose of manufacturing cleaning fluid constitutes a use within the meaning of the above clause as will constitute the manufacturer the "user" thereby entitling him to a refund of the tax. The word "use" is defined in Webster's New International Dictionary as follows: "to make use of; to convert to one's service; to avail one's self of; to employ". It is a recognizable principle of statutory construction that common words used in the statute should be given their common meaning and scientific words their scientific meaning. This principle of statutory construction is stated in Sutherland Statutory Construction, Vol. 2, Sec. 389, as follows:

"Primarily—that is, in the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense; common law words according to their sense in the common law; and technical words, pertaining to any science, art or trade, in a technical sense. It is a familiar rule of construction, alike dictated by authority and common sense, that common words are to be extended to all the objects which, in their usual acceptance, they describe or denote; and that technical terms are to be allowed their technical meaning and effect, unless in either case the context indicates that such construction would frustrate the real intention of the maker. They should be construed according to the intent of the legislature which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense."

In a letter directed to Mr. Dargusch, Vice-Chairman of your Commission, under date of February 19, 1934, I informally advised that:

"When naphtha is used in the manufacture of soap, the naphtha is 'used' as that term is used in section 5542-2. The naphtha is no longer a liquid fuel but becomes a component part or ingredient of the manufactured product, soap. Its identity is lost when it becomes mixed or compounded with the other materials and ingredients which are used in the manufacture of the soap. When the soap is exported out of the state it is the soap that is being exported and not its component elements, of which naphtha is one.

* * *

All of the liquid fuel which includes naphtha which is received by said dealer to be used in the manufacture of soap in the state of Ohio

is taxable, and shipment of soap to outside points does not constitute an exportation of liquid fuel within the meaning of sub-paragraph b of section 5542-2, General Code. The liquid fuel through the soap manufacturing process has lost its identity as a liquid fuel."

In the above letter there was under discussion the question as to whether or not the use of naphtha in the manufacture of soap constituted a use within the meaning of the liquid fuel tax statutes and an analogous question is raised by your present inquiry.

In an opinion reported in Opinions of the Attorney General in 1929, Vol. I, page 172, the then Attorney General held that the placing of motor vehicle fuel in small containers did not constitute a use of motor vehicle fuel for non-highway purposes as would entitle the person to a refund of the tax. The syllabus of said opinion reads:

"A person who purchases, in large quantities, motor vehicle fuel tax paid, from a dealer in this state, and sells the same in its original form, in small quantities, is not entitled, under the provisions of section 5534, G. C., to a refunder of said tax, as said sale does not come within the provisions of said section wherein a refunder is granted to those who shall use any such motor vehicle fuel for 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."

The facts under discussion in that opinion are not similar to the facts presented by your present inquiry because no change was made in the form of the motor vehicle fuel. The fuel was merely placed in small containers and sold as a lighting fluid. Specific reference was made in that opinion to a situation where the form of the fuel was changed and no opinion was expressed in that regard. It was stated in the course of the opinion at page 174:

"While this statement might be qualified in instances wherein there is such a blending of motor vehicle fuel with other ingredients as to render it incapable of further use in motor vehicles, such qualification would obviously not cover the present case where no change is made at all in the motor vehicle fuel except that it is placed in small containers."

In the documents forwarded to this office with your request is the report of two chemical analyses of the cleaning fluid produced by the N. S. Corp. In the report of the analysis made by The James H. Herron Company by C. R. Holmberg, the following remarks appear in the report:

"The amount of deposit (gum like nature) in this fluid is far above any permissible amount for motor fuel. Attempts to use this fluid in an internal combustion engine would quickly result in operating difficulties."

In the report of the chemical analysis made by the Industrial Testing Laboratories of a sample of the cleaning fluid designated "National Super

Home Cleaning Fluid" manufactured by the N. S. Corp., the following remarks appear in that report:

"The above cleaning fluid is not usable as fuel for a combustion engine, and in its present form is in solution and would require complete redistillation to remove the solids, and even if this would be done would be most impractical, due to the distillation range."

In a letter from the N. S. Corp., under date of May 11, 1934, is shown the ingredients used by this particular company in the manufacture of its cleaning fluid. This letter reads in part as follows:

"We herewith submit a list of the various ingredients that are used in the blending of our cleaning fluids:

TRICHLORETHYLENE, which has the following specifications: Boiling point, 188 degrees F. It is not inflammable or explosive, nor does its vapor form combustible or explosive mixtures with air. Specific gravity at 15/4 C-1.472-1.476. Water—not over .01% by weight. No cloud at—10 degrees C. Acidity—less than .003% as H C 1. Residue—not over .00067% by weight.

NAPTHA consists of a special blend made for our use with an approximate initial of 220 degrees, and an end point of 340 degrees.

VIO FLORE consists of an imported chemical that has a tendency to revive colors.

SOAP a special type of dry cleaners' soap which is soluble in cleaning fluid. This also acts as a vehicle in the fluid which eliminates friction hazards.

⊙ CARBON TETRACHLORIDE, an ideal solvent which is non-inflammable and non-explosive, even with mixtures of air, and its vapors will not support combustion. Boiling point, 170 degrees F. Molecular weight, 153.8. Weight per gallon, 13.28 lbs. Vapor Density, —.00536 g/cc at 76.8 degrees C., .00502 g/cc at 100 degrees C. Heat of Vaporization 46.5 cal/g or 83.7 BTU/lb. at B. pt.

STODDARD SOLVENT consists of a special blend made for our use with an approximate initial of 310 degrees, and an end point of 420 degrees in a Cleveland open cup tester.

CHLORIDE OF SODIUM (Salt), a large amount of this is used in our various types of fluid. It has a tendency to eliminate the forming of rings when removing spots and general soil.

We also use Yarmor Steam Distilled Pine Oil, Solvenol, Naptha, Dipentine, Turpentine, Mineral Spirits, and Stoddard Solvent in a product that we manufacture, which is known as Pur-Pine-Spirits, for the paint trade."

It will be noted from the statements contained in the above letter that the naphtha is only one of the ingredients used in the manufacture of the cleaning fluid by this company.

A letter from the Underwriters' Laboratories, signed by A. E. Maitre, Assistant Chemical Engineer, shows that a sample of the cleaning fluid manufactured by the N. S. Corp. marked "Quick Dry Home Cleaning Fluid" has

been analyzed by that laboratory and that the cleaning fluid will be listed by the National Board of Fire Underwriters under its listing of "Inspected Gas, Oil and Miscellaneous Appliances" as "Non-Combustible and Non-Flammable." A rating such as this by the National Board of Fire Underwriters must be given considerable weight.

This particular cleaning fluid manufactured by the N. S. Corp., as shown by the samples of the labels used by the various retailers, is sold as a "Non-Explosive" cleaner. It will also be noted from the data submitted that the retail selling price of the cleaning fluid is from fifty to sixty-nine cents per gallon. This is a fact to be considered from a practical viewpoint whether or not the cleaning fluid should still be considered as a motor vehicle fuel.

Considering all the facts and circumstances, and the purpose of the motor vehicle fuel tax, and applying the general principles of statutory construction in the interpretation of section 5534, General Code, it is my opinion that where a manufacturer of cleaning fluid uses naphtha on which the motor vehicle fuel tax has been paid, in the manufacturing of cleaning fluid and the naphtha is so mixed with other ingredients to such an extent that the naphtha loses its identity as such and becomes one of the component parts of the manufactured product, constitutes the manufacturer the "user" within the provisions of section 5534, General Code. The blending and compounding of the naphtha with the other ingredients from a practical viewpoint renders the naphtha incapable of further use as a motor vehicle fuel.

It is not necessary that the fuel be consumed to constitute a use of the same within the meaning of this section. All procedural steps required to secure a refund outlined by the statute must be strictly followed by the manufacturer in order to entitle him to a refund of the tax. The burden of proof is upon the manufacturer to show that the tax has been paid on the naphtha on which a refund of the tax is being sought and that the naphtha is actually being used in the manufacture of the cleaning fluid. It must be kept in mind that it is not intended that this opinion cover the situation where there is no substantial change in the character of the naphtha in the manufacturing process. In order to amount to a use, the finished product must be a new and different substance than the naphtha. Although possible, it is not practicable to ever use the naphtha after it has once been blended with the other ingredients, as is shown by the data furnished by the N. S. Corp. It is impracticable not only on the grounds that the price would be prohibitive, but it would be necessary that the cleaning fluid be distilled in order to recover the naphtha, and as pointed out in the chemical analyses, to use the cleaning fluid alone as a motor vehicle fuel would result in a gumming up of the mechanism of the engine in the motor vehicle.

In specific answer to your inquiry, it is my opinion that a manufacturer of cleaning fluid who uses naphtha on which the motor vehicle fuel tax has been paid, in the manufacturing of cleaning fluid, and the application for the refund has been properly made to your Commission and all the other necessary information is furnished and the chemical content of the finished product is so changed that it is no longer practicable to use the cleaning fluid as a motor vehicle fuel, such use of the naphtha in the manufacturing process constitutes a use of the motor vehicle fuel for "any other purpose than the propulsion of motor vehicles" within the meaning of section 5534, General Code,

and your Commission is required by virtue of this section to determine the amount of the taxes to be refunded and certify the same to the Auditor of State.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2901.

INSURANCE—DOMESTIC MUTUAL CASUALTY COMPANY MAY
 WRITE FIDELITY AND SURETY BUSINESS—DEPOSIT RE-
 QUIRED BY SECTION 9568, GENERAL CODE.

SYLLABUS:

1. *A domestic mutual casualty company organized under Section 9607-2, General Code, may write fidelity and surety business under the provisions of Section 9607-2, General Code, sub-paragraph 7.*

2. *A domestic mutual casualty company which writes fidelity and surety business under the provisions of Section 9607-2, sub-paragraph 7, is required to make a deposit in accordance with the provisions of Section 9568, General Code.*

3. *Where a domestic mutual casualty company, engaged solely in the business of writing casualty insurance, has voluntarily deposited two hundred thousand dollars (\$200,000.00) with the Superintendent of Insurance in trust for the benefit of its casualty insurance policy-holders, which amount is required under Section 9568, General Code, to be deposited by a company engaged in the fidelity and surety business, such company may not thereafter, in applying for the right to engage in the fidelity and surety business under Section 9607-2, sub-paragraph 7, General Code, utilize such two hundred thousand dollars (\$200,000.00) deposit to meet the requirements of Section 9568, General Code, but must make an additional deposit therefor.*

COLUMBUS, OHIO, July 9, 1934.

HON. CHARLES T. WARNER, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“We have before us the proposal by a domestic mutual casualty company organized under the provisions of Section 9607-2 et seq., of the General Code, to engage in the business of writing fidelity and surety bonds in addition to the casualty business they are writing at the present time. This company has a surplus in excess of \$100,000.00, and, consequently, may take the advantage of the provisions of Section 9607-2, of the General Code, providing for the writing of a non-assessable policy. The company making this proposal has on deposit with this Division securities in the sum of \$200,000.00 made originally as a voluntary deposit, and, of course, maintained at the present time. In addition to being licensed to operate in Ohio, this com-