

OPINION NO. 83-086**Syllabus:**

The American National Red Cross is an agency of the United States for purposes of R.C. 5735.05(D), so that sales of motor vehicle fuel to the Red Cross are exempt from the motor vehicle fuel tax. (1937 Op. Att'y Gen. No. 1283, vol. III, p. 2200, and 1951 Op. Att'y Gen. No. 1019, p. 862, overruled.)

To: Joanne Limbach, Tax Commissioner, Department of Taxation, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983

I have before me your request for my opinion on whether the American National Red Cross and its local chapters are agencies of the United States government for purposes of R.C. 5735.05(D).

R.C. 5735.05 imposes an excise tax upon "all dealers in motor vehicle fuel upon the use, distribution, or sale within the state by them of motor vehicle fuel." Various transactions are exempted from the tax. One type of transaction which is exempt is, as set forth in R.C. 5735.05(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.

You wish to know whether sales of motor vehicle fuel to the American National Red Cross (Red Cross) and its local chapters are sales to agencies of the United States government, and thus exempt from the motor vehicle fuel tax.¹

As you note, this question has been addressed twice in previous Attorney General Opinions. In 1937 Op. Att'y Gen. No. 1283, vol. III, p. 2200, it was noted that the Red Cross is incorporated, organized, and empowered to act pursuant to Congressional enactment, see 36 U.S.C. §§1-16. The opinion went on to note, however, that "the American National Red Cross functions entirely from funds provided by voluntary contributions from the general public. There is no expenditure of government funds, raised by taxation in the carrying on of any of its work." *Id.* at 2204. In conclusion, it was stated:

[I]n order for the American National Red Cross to be classified as an agency of the United States Government, for purposes of exemption from the taxes herein levied, it is necessary that it be controlled by the government, and that it be authorized to act for and in behalf of the government, and be able to carry out governmental functions specifically delegated to it by authority of the government itself. However, such does not seem to be the case here, as the government has no immediate control over the functions of the American National Red Cross except to see that the receipts and expenditures of the Society properly balance, as per its annual report required to be filed with the War Department [now the Department of Defense, 36 U.S.C. §6].

. . . I am therefore lead [sic] to the conclusion that the American National Red Cross is not such an agency of the United States Government as would entitle it to claim exemption from the application of the motor vehicle or liquid fuel taxes to purchases of these items made by the Society in this state.

Id. at 2205.

In 1951 Op. Att'y Gen. No. 1019, p. 862, the considerations deemed pertinent in 1937 Op. No. 1283—that the Red Cross operates with funds raised by voluntary contributions rather than with public tax money and that the government exercises no immediate control over the activities of the Red Cross, except for the audit of its accounts by the (then) War Department—were reiterated. In concluding that the sale of motor vehicle fuel tax to the Red Cross is not exempt from the motor vehicle fuel tax, the opinion emphasized the independent nature of the Red Cross and the limited extent of governmental control over the organization.

¹ In your request, you have asked whether sales of motor vehicle fuel to the local chapters of the Red Cross, as well as to the American National Red Cross, are exempt from taxation. 36 U.S.C. §4a states in part: "The chapters of the American National Red Cross shall be the local units of the corporation within the States and Territories of the United States." This statement is reiterated in §9.01 of the Bylaws of the American National Red Cross, which further provides that "[c]hapters shall not be constituted as separate legal entites." Section 9.08 of the Bylaws states: "All funds and property received by or coming into the custody of any chapter or any local unit are property of the corporation to be expended or applied only for the purposes authorized by the charter and only in accordance with the policies and regulations prescribed by the Board of Governors." Because the American National Red Cross and its local chapters constitute the same legal entity and motor vehicle fuel coming into the custody of a local chapter is property of the corporation as a whole, the following discussion will be couched in terms of sales of motor vehicle fuel to the Red Cross. My discussion and conclusion are, however, applicable to sales to the local chapters as well as to the American National Red Cross.

Both of these opinions were rendered prior to the issuance of Department of Employment v. United States, 385 U.S. 355 (1966), wherein it was held "that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment." 385 U.S. at 358. In so concluding, the Court noted the following:

Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. . . . Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U.S.C. §1 et seq. Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U.S.C. §5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government. In those respects in which the Red Cross differs from the usual government agency—e.g., in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute. (Footnotes omitted.)

385 U.S. at 358-360. But cf. Irwin Memorial Blood Bank v. American National Red Cross, 640 F.2d 1051 (9th Cir. 1981) (concluding that the Red Cross is not an agency of the federal government for purposes of the Freedom of Information Act).

In light of the Supreme Court's holding in Department of Employment, and its characterization of the Red Cross in that case, I feel compelled to overrule 1937 Op. No. 1283 and 1951 Op. No. 1019 and conclude that, for purposes of R.C. 5735.05(D), the Red Cross is an agency of the United States. Thus, sales of motor vehicle fuel to the Red Cross are exempt from the motor vehicle fuel tax.

I point out that my conclusion that sales to the Red Cross are exempt from the motor vehicle fuel tax is not based only on an interpretation of R.C. 5735.05 but may be compelled as a matter of constitutional law. U.S. Const. art. VI, cl. 2, known as the Supremacy Clause, states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause has been interpreted as prohibiting the states from taxing the United States and its instrumentalities, unless the United States has expressly waived its immunity from state taxation. See United States v. Anderson County, Tennessee, 705 F.2d 184 (6th Cir. 1983); Columbus Production Credit Association v. Bowers, 173 Ohio St. 97, 180 N.E.2d 1 (1962), cert. denied, 371 U.S. 826 (1962); Dunn v. Board of Tax Appeals, 154 Ohio St. 42, 93 N.E.2d 278 (1950).

Although the motor vehicle fuel tax is imposed on the dealers in motor vehicle fuel, see R.C. 5735.05; R.C. 5735.25; R.C. 5735.29; R.C. 5735.30, and the dealers are responsible for paying the tax to the state, see R.C. 5735.02; R.C. 5735.03; 5735.06; R.C. 5735.07; R.C. 5735.10; R.C. 5735.11; R.C. 5735.12, an argument may be made that the tax is in reality directed toward the consumers of the fuel, while the dealers merely act to collect the tax for the state. See R.C. 5735.05 (imposing the motor vehicle fuel tax, in part, "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"); Shafer v. Glander, 153 Ohio St. 483, 92 N.E.2d 601 (1950) (the purpose of the motor vehicle fuel tax is to tax users of the highways); State ex rel. Janes v. Brown, 112 Ohio St. 590, 148 N.E. 95 (1925) (the motor vehicle fuel tax is upon the privilege of using the motor vehicle fuel in traveling upon the highways and streets of the state); State ex rel. Bettman v. Canfield Oil Co., 34 Ohio App. 267, 171 N.E. 111 (Cuyahoga County 1929), aff'd, 122 Ohio St. 175, 171 N.E. 33 (1930). See also R.C. 5735.14; R.C. 5735.142; R.C. 5735.15. But see Hickok Oil Corp. v. Evatt, 141 Ohio St. 644, 49 N.E.2d 937 (1943); City of Cincinnati v. Cincinnati Oil Works Co., 123 Ohio St. 448, 175 N.E. 699 (1931). Under this analysis, the taxation of the sale of motor vehicle fuel to the Red Cross would, in effect, operate as a tax upon the Red Cross. Because the Supreme Court concluded in Department of Employment that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation, the taxation of motor vehicle fuel sold to the Red Cross could present a possible conflict with the Supremacy Clause. The conclusion that the Red Cross is an agency of the federal government for purposes of R.C. 5735.05(D) not only provides a reasonable interpretation of R.C. 5735.05(D), but also avoids such a constitutional conflict.

In conclusion, it is my opinion, and you are advised, that the American National Red Cross is an agency of the United States for purposes of R.C. 5735.05(D), so that the sales of motor vehicle fuel to the Red Cross are exempt from the motor vehicle fuel tax. (1937 Op. Att'y Gen. No. 1283, vol. III, p. 2200, and 1951 Op. Att'y Gen. No. 1019, p. 862, overruled.)