

Gasoline License Tax — Interference With Federal Agencies.

The license tax provided for by Chapter 156 of the Laws of 1921 is not a tax upon Federal agencies, and does not apply to them or interfere with the instrumentalities of the Federal Government as to gasoline purchased by them.

J. W. Walker, Esq.,
State Treasurer,
Helena, Montana.

My dear Mr. Walker:

I have your letter with enclosures from Mr. Willis J. Eggleston, district counsel of the United States Reclamation Service, in which you inquire whether the agencies of the United States Government purchasing gasoline or distillate from dealers are exempt from the operation of Chapter 156 of the Laws of 1921 to the extent of one cent per gallon of the cost to such agencies of gasoline or distillate purchased by them.

The tax imposed by Chapter 156 of the Laws of 1921 upon dealers in gasoline and distillate is without doubt a license tax. The Constitution of Montana authorizes the imposition of two forms of tax, namely, a property tax and a license tax, Section 1 of Article XII of the Constitution reading as follows:

“The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state.”

The tax imposed is under the last provision of this section.

It has been many times held by the Montana Supreme Court that taxes similar in nature to the one here in question are license taxes under the last part of the section quoted.

Equitable Life Assurance Co. v. Hart, 55 Mont. 76;
State v. Hammond Packing Co., 45 Mont. 343; affirmed
by United States Supreme Court, 288 U. S. 331;

Northwestern Mutual Life Ins. Co. v. Lewis and Clark County,
28 Mont. 484;

State v. Camp Sing, 18 Mont. 128, 44 Pac. 516;

San Toi v. French, 17 Mont. 54, 41 Pac. 1078;

Quong Wing v. Kirkendall, 39 Mont. 64 101 Pac. 250; af-
firmed by U. S. Supreme Court, 223 U. S. 59, 56 L. Ed. 350;

State v. McKinney, 29 Mont. 375, 74 Pac. 1095.

See, also:

Askren v. Continental Oil Co., 252 U. S. 444;

Bowman v. Continental Oil Co.,—U. S., 65 L. Ed. 1139.

Chapter 156 of the Laws of 1921 is in part as follows:

"An Act Requiring All Persons, Firms, Associations, Joint Stock Companies, Syndicates and Corporations engaging in or Carrying on the Business in this State of Selling Gasoline and Distillate to This State, to Pay to the State Treasurer Certain License Taxes for Engaging in and Carrying on Such Business in This State; Fixing the Amount of Such License Taxes; Providing a Method for the Assessment, Collection and Disposition Thereof; And Prescribing Penalties for the Violation of This Act.

"Section 1. As used in this Act: The term 'person' means and includes every individual, firm, association, joint stock company, syndicate and corporation.

"The term 'distributor' means and includes every person who engages in the business in the State of refining, manufacturing, producing or compounding gasoline or distillate, and selling the same in this State; and also every person who engages in the business in this State of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this State.

"The term 'dealer' means and includes every person, other than a distributor, who engages in the business in this State, of distributing or selling gasoline or distillate within this State.

"Section 2. Every distributor shall, for the year 1921, and each year thereafter, when engaged in such business in this State, pay to the State Treasurer a license tax for engaging in and carrying on such business in this State, in an amount equal to one cent for each gallon of gasoline, and one cent for each gallon of distillate refined, manufactured, produced or compounded by such distributor and sold by him in this State, or shipped, transported or imported by such distributor into, and distributed or sold by him within this State, during such year * * *

"Section 3. Every dealer shall for the year 1921, and each year thereafter, when engaged in such business in this State, pay to the State Treasurer, for the exclusive use and benefit

of the State of Montana, a license tax for engaging in such business in this state equal to one cent for each gallon of gasoline and one cent for each gallon of distillate sold or distributed by such dealer in this state during such year * * *

It is to be observed that by the foregoing the tax is imposed not upon the sales of gasoline but upon persons selling the same as a license or privilege tax. In this the Montana Act is distinguishable from that of the Commonwealth of Pennsylvania of May 20, 1921, from the operation of which Federal agencies have been held to be exempt, which required to be collected from the purchaser a tax of one cent per gallon on all gasoline purchased by him, the provision of that Act being as follows:

"Section 1. * * * A State tax of one cent a gallon, or fraction thereof, is hereby imposed on all gasoline sold in this Commonwealth for any purpose whatsoever, except for the purpose of resale. The tax hereby provided for shall be collected by the person, firm, association or corporation, selling gasoline to purchasers who purchase for purposes other than resale, and shall be paid by the said firm, association, or corporation into the general fund of the State Treasury, in the manner and within the time hereinafter specified."

"Section 4. The tax imposed by this act shall be paid by the person, firm, association or corporation purchasing gasoline for his or its own use and not for the purpose of resale; and every person, firm, association or corporation, required by section one of this act to collect the tax herein specified, shall state the amount of said tax separately from the price of the said gasoline, and any one failing so to state separately the tax and the price of the said gasoline shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars (\$250) for each offence."

Likewise, the Arizona Act (Chap. 116 of the Arizona Laws of 1921), held unenforceable as to sales to agencies of the Federal Government, contains the provision "which tax shall be added to the sales price of the dealer as herein defined." Thus in both the above Acts the tax was imposed as a sales tax directly upon the purchaser.

Chapter 156 of the Laws of 1921, both in its title and by the provisions of the Act, specifically creates a license or privilege tax upon persons for engaging in the business of selling gasoline. The reference to the number of gallons sold is merely for the purpose of measuring the extent of the business transacted, and consequently the value of the privilege.

In *Continental Oil Company v. Walker*, State Treasurer, decided February 24, 1922, in the United States Court for the District of Montana, in which the Act here in question was under consideration,

Judge Bourquin, after quoting the last sentence of Section 1 of Article XII of the Constitution of Montana, said in part:

"The tax is not upon business done before the act was approved, but is upon the privilege of doing business after the approval. * * * It (the company) is subject to the Act and tax, the latter in part measured by the business done in 1921 before the Act's approval.

"The Act approved, found plaintiff exercising the privilege of 'doing business.' This satisfies the constitution aforesaid, and to in part measure the tax upon the privilege of doing business, by business done, does no violence to the constitution. It is not uncommon to wholly measure license, privilege or excise taxes for any year by the business receipts of the preceding year. Although in some respects the act is not clear, it is believed this construction accords with what is permissible, and ascertains and sustains the legislative intent."

Since the Act is within the above constitutional provision it is necessarily imposed *upon persons or corporations doing business in the State*, that is, upon sellers of gasoline.

Furthermore, the above case holds that the tax is not a sales tax upon sales of gasoline, but that the number of gallons sold is a mere measure of the amount of the license to be paid by the dealer.

Since the tax is upon the seller it follows that it necessarily could not be a tax upon the purchaser in any legal sense. The same tax could not be upon two different persons. The State by this Act imposes it upon the dealer, and the State goes no further than this. If one cent per gallon is collected by the dealer from the purchaser, that is not the act of the State but of the dealer, and there is no requirement or authority in the Act for such collection.

It is, therefore, my opinion that the license tax provided by Chapter 156 of the Laws of 1921 to be paid by dealers and distributors of gasoline and distillates, is not a tax upon Federal agencies and does not apply to them or interfere with the instrumentalities of the Federal Government, and does not exact any tax from the Federal Government or its agencies, as to gasoline purchased by them.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.