

Opinion No. 354.**Counties—Gasoline License Tax,
Exemptions.**

HELD: Counties cannot claim exemption from the five-cent gasoline license tax.

September 23, 1936.

Mr. Wm. R. Taylor
County Attorney
Anaconda, Montana

Your letter of August 26 is as follows:

"The county commissioners of Deer Lodge County have requested me to write and ask your opinion as to whether or not counties of the State of Montana can be compelled to pay the tax upon gasoline that is provided for in Chapter 216 of the Revised Codes of Montana of 1935. The commissioners of this county take the position that because of Article XII, Section 2, of the Constitution of the State of Montana, that the counties cannot be compelled to pay the five cent tax provided for in the above cited chapter. The county commissioners also believe they are correct in their opinion on this matter because the federal government does not require the counties to pay the one cent federal tax.

"The county commissioners will appreciate it if you will inform me

at your earliest convenience of your opinion in this matter."

Section 2, Article XII, of the Constitution exempts the property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries from taxation.

Section 2381.10 of Chapter 216, Revised Codes 1935, requires every gasoline distributor to pay to the state board of equalization a license tax for engaging in and carrying on such business in this state equal to five cents for each gallon of gasoline refined, manufactured, produced or impounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into and distributed and sold by him within the state, after it has arrived in and been brought to rest within this state, and also requires every gasoline dealer to pay to the state board of equalization a license tax for engaging in such business in this state equal to five cents for each gallon of gasoline sold by him in this state, provided, however, that no gasoline sold by such dealer, which was purchased by him from a distributor who has paid his license tax covering the same, shall be included or considered in determining the amount of such license tax to be paid by such dealer.

Section 2381.10 does not impose a property tax upon the gasoline, but it imposes an excise tax upon the business of a gasoline distributor and upon the business of a gasoline dealer. (Section 2381.5, Revised Codes 1935; *Arps v. State Highway Commission*, 90 Mont. 152; *People v. City of Denver*, 272 Pac. 629; *Crockett v. Salt Lake County*, 270 Pac. 142, 60 A. L. R. 867; *Independent School District v. Pfost*, 4 Pac. (2d) 893, 84 A. L. R. 820; *American Airways v. Wallace*, 57 Fed. (2d) 877, aff. 287 U. S. 565; *O'Berry v. Mecklenburg County*, 151 S. E. 880, 67 A. L. R. 1304.) Being an excise tax and not a property tax it is not violative of the provisions of Section 2, Article XII, of the Constitution in any event. But, as has already been indicated, the tax is not levied on the property of the county which is the purchaser but is imposed on the dealer who is the

seller, though it may enhance to that extent the cost of the gasoline to the purchaser. (*City of Portland v. Kozzer*, 217 Pac. 833; *People v. City of Denver*, supra.)

It is highly significant, too, that while the Gasoline License Tax Law (Chapter 216) grants no exemptions whatever, Section 2396.4 thereof provides for a refund of the tax only when the gasoline is used for other purposes than the operation of motor vehicles on the public highways, whether the tax was paid directly to the state by the consumer or indirectly as a part of the purchase price. This provision is in the nature of an exception, and had it been the will of the legislature to make an exception in favor of counties, it is reasonable to assume that the same would have been expressed in the act. The maxim "expressio unius est exclusio alterius"—the expression of one thing is the exclusion of another—applies. (*City of Portland v. Kozzer*, supra.)

The situation with regard to the tax is admirably summed up in the case just cited as follows: "After a tax has been levied and assessed on all property in the state, the state, counties, and municipalities might be required to purchase, and no doubt do purchase, large quantities of merchandise and personal property which have been subjected to taxation in the hands of the seller, and the price thereof raised on account of such taxes. Yet it would hardly be thought that under such circumstances a municipality would be entitled to a refund for any tax paid indirectly by the purchase of such property. To grant the prayer of the plaintiff city, and relieve the several municipalities of the state as desired by plaintiff, would leave the statutes in question like mere skeletons for all practical purposes; a condition that the lawmakers never intended. A statute should not be so construed to render it absurd, if it is susceptible of another construction which would avoid the absurdity."

Again, in *Independent School District v. Pfost*, supra, the Supreme Court of Idaho, in an able opinion, said: "The fundamental justice and policy of the gasoline tax in this state is the requirement that without ex-

emption the burden of maintenance of the highways is placed directly upon those benefitted by that maintenance. If exemptions were granted, then this equitable placement of the burden would to that extent be destroyed. To that extent the individuals using the highways as a class would alone pay for a benefit enjoyed by the general public through its agencies."

Doubtless, one reason why counties are able to purchase gasoline free of the one-cent federal tax is found in the federal statute which expressly provides that no tax shall be imposed with respect to the sale of gasoline to a state or any political subdivision thereof for its own exclusive use.

Our conclusion is, therefore, that counties cannot claim exemption from the five-cent gasoline license tax.