

No. 15

BOARD OF EQUALIZATION—GASOLINE TAX REFUND—INVOICES—TAXATION—EVIDENCE

- Held: 1. Invoice issued to claimant at time of purchase of gasoline constitutes only proof upon which legal claim for tax refund can be made.
2. Secondary evidence, such as carbon copies of original invoice or affidavits of loss or destruction, is not admissible before the Board of Equalization to support claim to tax refund.

February 5, 1941.

State Board of Equalization
State Capitol
Helena, Montana
Attention: Mr. Sam D. Goza

Gentlemen:

You have requested my opinion as to whether or not the Gasoline Tax and Refund Laws of Montana permit the Board to authorize refunds to claimants upon anything except the original sales invoices, or whether

the Board may, in its discretion, accept in support of such claims secondary evidence, such as carbon copies of the original invoices or affidavits establishing the loss or destruction of the original invoice.

The Act which governs this matter is Section 2396.4, Revised Codes of Montana, 1935, as last amended by Section 1, Chapter 67, Session Laws of 1939. After providing that purchasers of gasoline to be used for certain designated purposes shall be entitled to a refund of five cents (5c) a gallon, the Act provides that such refund shall be allowed upon the claimant's presenting to the Board a sworn statement "accompanied by the invoice or invoices issued to the claimant at the time of purchasing such gasoline," etc. The Act further provides that when gasoline is sold to a person who shall thereafter claim a refund, the seller shall make and deliver to the purchaser, at the time of the sale, separate invoices for each purchase, which invoices, attached to the claim presented, "shall be the only proof upon which legal claim can be made for refund based upon such purchase."

In my opinion, the Legislature could hardly have used clearer or plainer language to indicate its intent that the only way in which a legal claim for a gasoline refund can be made is by presenting the invoice or invoices which the statute says shall be issued to the claimant at the time of making the purchase. I can think of no language by which the intent of the present statute can be made clearer; and I do not think that any amendment of the existing statute is necessary to clarify its meaning or to emphasize its effect.

It cannot be said of any instrument that a copy is the equivalent of the original; and it is only by virtue of statutes establishing rules of evidence that a copy of the original instrument is sometimes made admissible to prove the contents of the instrument, after preliminary proof that the original cannot be produced has been offered. It is therefore, my opinion that your Board is without authority to allow a gasoline refund claim except upon the production of the original invoice (referred to in your rules as the "top" copy) and that you may not legally receive affidavits or other secondary evidence to prove the loss of such original invoice, in support of a claim for refund.

In reaching this conclusion I am aware that a contrary opinion has been rendered by a former Attorney General. I have examined that opinion and I find it to be based upon two main grounds. First, that the requirement that the original invoice shall be the only proof of the claim is not the essence of the statute but rather "a mere matter of form" and, therefore, not mandatory but only directory to the Board. I am unable to concur with this conclusion. If there is anything about the enactment above quoted that seems to be more than a "mere matter of form," it is the unequivocal requirement that the invoices attached to the claim shall be the only proof upon which a legal claim can be based. It seems to me, beyond question, that when the Legislature enacted this statute it was doing its best, by the language used, to guard against fraud in the presentation of refund claims and, in particular, to forestall the presentation of "repeaters" which might easily be done if copies of the original invoices were to be received in support of such claims. To that end, the Legislature made it mandatory on the Board to accept no other proof than the original invoices in support of refund claims.

The former opinion further directs attention to the fact that our statute provides a method for proving lost instruments and that documents of the greatest dignity and solemnity may be so proved. In my opinion this argument admits of two sufficient answers. In the first place, the Sections of our Code, notably Sections 10516 and 10585, referred to in the former opinion, making provision for the proof of lost instruments and authorizing secondary proof of their contents in certain cases, are rules of evidence applicable to **judicial proceedings** (Section 10488, Revised Codes of 1935). An application for a refund of gasoline tax is not in my opinion a judicial proceeding and the Board is not therefore (in the absence of a statute making them so) bound by the statutory rules of evidence in allowing or disallowing such claims.

In the second place, we have here a special rule of evidence expressly made applicable by the Legislature to the allowance of gasoline refund claims, namely, the requirement that the invoice shall constitute the only proof upon which a legal claim for a refund can be made. So long as rules of evidence are uniform in their application it is perfectly competent for the Legislative Assembly to establish such rules as it deems proper. As you know, the determination as to what entitles one to a refund is a matter for the Legislature to decide. The present law may, in many instances, operate harshly, but until such time as the Legislature sees fit to make some change, that law will govern.

Sincerely yours,

JOHN W. BONNER
Attorney General