

Opinion No. 146.**Taxation—Gasoline Tax Refund.**

Held: Gasoline sold at a military post exchange, for use by army personnel, is not exempt from payment of gasoline license tax.

October 15, 1943.

Mr. Sam D. Goza, Chairman
State Board of Equalization
Helena, Montana

Dear Mr. Goza:

You have requested my opinion whether a filling station operated in connection with the post exchange at Gore Field, Great Falls, is subject to the provisions of the laws of Montana requiring the payment of a gasoline tax of 5c per gallon.

It is represented to your board the filling station in question is located within the boundaries of Gore Field, and that gasoline will only be sold to army personnel, army regulations prohibiting sale to civilians through a post exchange.

Section 2381.11, Revised Codes of Montana, 1935, defines a "dealer" as meaning and including any person who engages in the business in the State of Montana of producing, refining, manufacturing or compounding gasoline and using it or selling it in less than railway tank car lots, or of importing gasoline into the State of Montana or purchasing gasoline within the State of Montana for sale or for one's own use. Such gasoline, for the purpose of this act, shall be deemed to be "handled" by such dealer.

A further definition of dealer appears in Section 2396.9, Revised Codes of Montana, 1935, as meaning and including every person, firm, association, joint stock company, syndicate and corporation engaged in the business in the State of Montana of producing, refining, compounding or importing into this state gasoline for sale, or purchasing gasoline within this state in quantities of not less than railway tank car lots.

It is thus seen the definitions are all inclusive and apply to:

(1) Producing, refining, manufacturing or compounding of gasoline

and using it or selling it in less than railway tank lots;

(2) Importing gasoline into the state for sale or for one's own use;

(3) Purchasing gasoline within the state for sale or for one's own use.

Further, while the definition appearing in Section 2381.11 may be construed to limit it to quantities in less than railway tank lots, the definition appearing in Section 2396.9 extends the limit to not less than railway tank lots, so the word "dealer" is sufficiently comprehensive to include all those within the definition, irrespective of the quantities of gasoline handled.

The nature of a post exchange operated in connection with an army post, and its relation to the United States government is considered in *Keane vs. United States* (C. C. A. Va.) 272 Fed. 577, 578, wherein it is pointed out that such an exchange is a voluntary association of companies, detachments or other army units at military posts, permitted but not required by special regulations of the war department, for the purpose of conducting, for the benefit of the members of such units, what is in effect a cooperative store and place of entertainment with their own funds, and for whose contracts and obligations the United States is not responsible, and in whose funds it has no interest. It was held not to be a department of the government, and that proof of a conspiracy to defraud a post exchange would not sustain an indictment for conspiracy to defraud the United States.

Thus, it is apparent that there is no question of federal government immunity from taxation present in the matter.

It is to be noted under our gasoline tax law, the tax is not imposed on the sale of the gasoline to the consumer (although the tax is passed on to the consumer), but is imposed on the importing of gasoline into the state for sale, or the purchasing of gasoline within the state for sale, insofar as the post exchange in question is concerned. In other words, the tax is not imposed by reason of any transaction of sale at the post exchange, but by reason of either the importing into the state or the purchase in the state, and before the gasoline reaches the pumps

of the post exchange. It is therefore unnecessary to consider the applicability of Section 25, Revised Codes of Montana, 1935, as amended by Chapter 155, Laws of 1939, ceding jurisdiction to the United States, with certain reservations, one reservation being the right to tax persons and corporations, their franchises and property within the ceded territory. And for the same reason, it is not necessary to consider the decision of the Supreme Court of the United States in *Sandard Oil Co. v. California*, 291, U. S. 242, 54 Sup. Ct. 381, 78 L. Ed. 775, relative to the right of taxation in such ceded territory, or *State v. Bruce*, 106 Mont. 322, 338, 77 Pac. (2nd) 403, and *Valley County v. Thomas*, 109 Mont. 345, 97 Pac. (2nd) 345.

It is my understanding the actual collection of the tax is made from the refiner or the wholesaler, who in turn passes it on to the retailer, and who in turn passes it on to the consumer. Thus, the tax is not a sales tax, but an occupational license tax.

Neither is there any authority in your board to make refund of this gasoline tax under the provisions of Chapter 67, Laws of 1943, as the refund may only be made to those specifically mentioned in the chapter, and a post exchange at an army post is not included therein.

It is therefore my opinion there is no authority in law for your board to make an exemption from this tax covering gasoline sold at the post exchange of an army post.

Sincerely yours,
R. V. BOTTOMLY
Attorney General