Opinion No. 26

State Board of Equalization—Gasoline Drawbacks—Refund of Gasoline Taxes—Invoices—Taxation—Evidence.

Held: Gasoline tax refund claims are to be determined by the board of equalization in the manner set out in Section 10516 of the Revised Codes of Montana, 1935, when the "original" or top impression of the invoice or invoices on which such claims are founded has been lost or destroyed.

April 11, 1947

State Board of Equalization
State House
Helena, Montana

Gentlemen:

You have presented the following problem:

"The State Board of Equalization requests your opinion as to the application of the 'Lost Instrument Act' (Section 10516, Revised Codes of Montana, 1935) to the action of this Board while sitting as a quasi-judicial body, for the refund on application of gasoline taxes paid wherein the invoices have been lost or destroyed."

Section 2396.4 of the Revised Codes of Montana, 1935, as amended by Chapter 67, Laws of 1939, and as last amended by Chapter 130, Laws of 1947, provides in part:

"When gasoline is sold to a person who shall claim to be entitled to a refund of the tax imposed, the seller of such gasoline shall make and deliver at the time of such sale separate invoices for each purchase on invoice forms approved by the State Board of Equalization showing the name and address of the seller and the name and address of the purchaser, the number of gallons of gasoline so sold in words and figures and the date of such purchase which invoice, attached to the claim presented shall be the only proof upon which a legal claim can be made for a refund based upon such purchase. The seller shall retain the duplicate original invoices for the period of one year from and after the date of issuance, during which period they shall be open to inspection by the State Board of Equilization and its agents. Such invoices shall be legibly written and shall be void if any corrections or erasures appear on the face thereof."

Section 10516 of the Revised Codes of Montana, 1935—to which you refer in your request—provides:

"There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

"1. **When the original has been lost or destroyed;** in which case the proof of loss or destruction must first be made.

"2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after responsible notice.

"3. When the original is a record or other document in the custody of a public officer.

"4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.

"5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

"In the cases mentioned in subdivisions 3 and 4, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents."
(Emphasis mine)

I understand the invoice forms which your board has approved for claiming refund are printed in triplicate and are numbered serially, the top copy or impression to be delivered to the purchaser and the remaining carbons to be held by the seller. It seems to me there is, then, abundant evidence available to your board to determine the validity of any claim presented.

Although lay usage of the words "original" and "carbon copy" may often appear to indicate the two items are things of different character, legal usage does not support that impression:

"The rule which excludes evidenc of copies of documents where the documents themselves are available as proof does not apply to documents and writings which are executed in duplicate or multiplicate form. It is well settled that where a writing is executed in duplicate or multiplicate, each of the parts in the writing which is to be proved, because, by the act of the parties, each is made as much the legal act as the other. Each part of a document so executed is regarded as the primary evidence of its contents, and the original need not be produced. **Thus, the different impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are, according to the prevailing view, duplicate originals, and may be introduced in evidence without accounting for the non-production of the original, unless it appears that the parties did not intend such papers to operate as the original evidence of the matters therein contained.** But there is authority for the view that carbon copies of letters are inadmissible where no proper foundation was laid explaining the absence of the original, although there are decisions to the effect that a carbon copy is admissible without first making a demand that the ad-addressee produce the original. **In any jurisdiction, of course, where some foundation has been laid to account for the absence of the original, it is proper to admit carbon copies thereof . . . "** (Emphasis mine)

20 A. Jur., Evidence, No. 427

The opinion of many courts support the above-quoted statements from American Jurisprudence. It has been held a carbon impression of a letter written on a typewriter, made by the same stroke of the keys as the companion impression, is an original. (United States Fire Insurance Company of City of New York v. L. C. Adam Mercantile Company, (Okla.) 245 Pac. 885, 887; Anglo-Texas Oil Company v. Manatt, (Okl.) 256 Pac. 740.) Louisiana, Kentucky, and Illinois have all expressed a similar view. (State v. Lee, (La.) 138 So. 662; Gus Dattilo Fruit Company v. Louisville & N. R. Company, (Ky.) 37 S.W. (2d)856, 858; and People v. Hauke (Ill.) 167 N.E. 1, 7.)

The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the legislature. The legislative intent in enacting Section 2396.4, as last amended by Chapter 130, Laws of 1947, is obvious from the provisions of the section itself; to return the tax of five cents per gallon of gasoline paid by those purchasers of gasoline who use such gasoline for purposes other than on the public highways or streets of this state. Such users are legion—farmers, stockmen, sportsmen, aviators, and business men such as cleaners and dyers, to name only a few. The legislative assembly has, in effect, said to these purchasers who used gasoline for purposes other than on the public highways or streets of

this state: "This gasoline tax is a method to secure revenue for highways and streets, and it reaches to the pocketbooks of those who use those highways and streets; but those persons who must use gasoline for other purposes shall in fairness be refunded taxes paid on gasoline not used on the highways and streets."

The legislative assembly placed the administration of such refund machinery in the hands of a board which had been held to be a quasi-judiciary board in certain of its functions when it chose the Board of Equalization. (State v. State Board of Equalization, (1919) 56 Mont. 413, 448, 185 Pac. 708; Belknap Realty Company v. Simineo, (1923) 67 Mont. 359, 363, 364, 215 Pac. 659; State ex rel. Schoonover v. Stewart, (1931) 89 Mont. 257, 267, 297 Pac. 476; and International Business Machine Corporation v. Lewis and Clark County, et al., (1941) 111 Mont. 384, 387, 112 Pac. (2d) 447.)

I emphasize the fact the board of equalization has been held by our court to be a quasi-judicial body in certain of its functions for the purpose of overcoming the language used in opinion number fifteen of Volume 19, Report and Official Opinions of the Attorney General. In that opinion the then attorney general stated Section 10516, supra, could not apply to your present problem for the reason it applied to judicial proceedings and your board was not bound by the statutory rules of evidence. I cannot agree with the inescapable inference of that opinion: that the board of equalization, in determining the validity of gasoline refund claims, is bound to require a higher degree of evidence than are the courts of this state. If there is to be any deviation from the standards set by Section 10516, supra, it would seem to be a quasi-judicial body would not be held to such rigid limits as a court.

Under opinion number fifteen of Volume 19, Report and Official Opinions of the Attorney General, the rigid and inflexible rule there expressed would deny refund of tax paid to a purchaser whose invoice or invoices might be destroyed or lost while in the possession of the board of equalization or one of its employees, but before the claim based thereon had been investigated and acted upon.

It is therefore my opinion gasoline tax refund claims are to be determined by the board of equalization in the manner set out in Section 10516 of the Revised Codes of Montana, 1935, when the "original" or top impression of the invoice or invoices on which such claims are founded has been lost or destroyed. I hereby specifically overrule the holding of opinion number fifteen of Volume 19, Report and Official Opinions of the Attorney General.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General