

July 21, 1948

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ARIZONA ATTORNEY GENERAL

Mr. T. B. Blaine
Accountant, Sales Tax Division
Arizona Tax Commission
Phoenix, Arizona

Dear Mr. Blaine:

We have your request for the opinion of this office stated as follows:

"It is hereby requested that you furnish the State Tax Commission, Sales Tax Division, with a ruling regarding the applicability of the sales tax to the sale of 'Use Fuel'".

The Excise Revenue Act of 1934, commonly called the sales tax law, has been declared constitutional. (Giragi v. Moore, 49 Ariz. 74).

This act has been declared to be a revenue measure for the purpose of increasing the state's general fund. (O'Neil v. Horsemen's Ass'n., 57 Ariz. 424). It has also been declared to be, not a property tax, but a tax on the privilege of doing business. (White v. Moore, 46 Ariz. 48). In this latter case the court said:

"It must be kept in mind that a privilege tax is not a tax on property but a tax on the right to engage in business, etc."
(Emphasis supplied)

Also, Harmonson v. Tax Commission, 63 Ariz. 452.

With the above principles in mind, an examination of the Use Fuel Tax law discloses:

"Sec. 66-1003. Imposition of tax. For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of five (5¢) cents per gallon upon fuel used by any user thereof, after the effective date of this act."
(Emphasis supplied)

Section 66-1005 reads in part:

"Every user of fuel, on or before the fifteenth day of each month, shall file with the superintendent, under oath a report showing the amount of fuel used by him during the next preceding calendar month...." (Emphasis supplied)

A comparison of the above two taxes discloses that the first, the sales tax, is a tax on the right of the retailer to engage in business, whereas the second is a direct tax on the "user" of fuel and that this tax is paid by such "user".

A further comparison shows that the sales tax is usually collected from the consumer by the retailer and paid by the retailer to the state, while the Use Fuel Tax is paid by the user direct to the state.

Because of these differences we do not believe double taxation results, as we do not believe the two taxes are for the same purpose.

In C. F. Smith Co. v. Fitzgerald, 259 N.W. 352, the Michigan court said:

"Gasoline filling stations are in Michigan subject to ad valorem taxes on their real estate. The owners or operators thereof pay a gasoline tax to the state and another gasoline tax to the government of the United States. They are also subject to the general sales tax imposed by the state. We need add nothing to the reasoning of the Supreme Court of the United States in Liggett Co. v. Lee, 228 U.S. 517, 53 S. Ct. 481, 486; 77 L. Ed. 929; 85 A.L.R. 699, where it is said: 'Section 8, which defines a store, contains a proviso to the effect that the term shall not include 'filling stations engaged exclusively in the sale of gasoline and other petroleum products'. The appellants assert the exemption deprives them of equal protection, since it is arbitrary and unreasonable. It appears, however, that all dealers in gasoline, including those conducting filling stations, are required by statute to pay a

license tax of \$5 per annum, and in addition a tax of seven cents per gallon for every gallon of gasoline or other like products of petroleum sold (Laws of Florida, Acts of 1931 (Ex. Sess.) chaps. 15659 and 15788). It has long been settled that the Fourteenth Amendment does not prevent a state from imposing differing taxes upon different trades and professions or varying the rates of excise upon various products!"

In Bardon v. Nudelman, 15 N.E. 2d 836, 117 A.L.R. 683, the Illinois Court said:

"Somewhat similar questions to those involved here were presented in People v. Deep Rock Oil Corp. 343 Ill. 388, 175 N.E. 572, Harder's Fire Proof Storage Co. v. City of Chicago, 235 Ill. 58, 85 N.E. 245, 14 Ann. Cas. 536, and New York Central Railroad Co. v. Stevenson, 277 Ill. 474, 115 N.E. 633. In the first of these three cases, we held the motor fuel tax, the property tax on motor vehicles, and the license required to be paid under the Motor Vehicle act, Smith-Hurd Stats. c. 120, ss 417 et seq., did not constitute double or triple taxation, and that, as to the two privilege taxes, the one was on the use of the highway measured by the amount of gasoline consumed, and the other was based on the character and horse-power of the vehicle. We also held that there is no constitutional inhibition against more than one privilege or excise tax where the total does not exceed reasonable taxation for the privilege enjoyed."

In People v. Werner, 5 N.E. 2d 238, the defendant was charged with failure to report and pay sales tax, to which charge the defendant answered that because he reported and paid a motor fuel tax on the gasoline he bought and sold, a sales tax amounted to double taxation and was for that reason unconstitutional. The court said:

"* * * Under these circumstances (the tax being collected from the customer) it will readily be seen that Werner has actually paid nothing under the Motor Fuel Tax Law

for the privilege of carrying on his retail business, but, on the other hand, he is actually paid a small fee for collecting this tax from the consumer and turning it over to the State. He is then allowed to deduct the amounts collected and paid over under the Motor Fuel Tax Law from his gross receipts which are liable for 3 per cent. tax under the Retailers' Occupational Tax Act. Under no sense of the word, therefore, could such a transaction be properly termed a tax upon a tax, or double taxation."

See: Terrell v. McDonald, 32 Ariz. 30,
255 P. 485;

Glendale v. Betty, 45 Ariz. 327,
43 P. 2d 206;

51 Am. Jur. p. 346.

Finally we believe that more than one excise tax, that is a tax levied for revenue purposes, may be levied, without violating the rule against double taxation. This was well stated in Klickitat County v. Jenner, 130 P. 2d 880, where the Washington court said:

"There is no constitutional inhibition either of this state or the United States against double taxation as applied to excise taxes." (Citing cases)

It is, therefore, our opinion that a sales tax may be legally collected on sales made to users of fuel under the Use Fuel Tax law.

Finally, does this statute permit deduction of the five (5%) cent tax from gross for sales tax payment.

This is answered by Section 66-1027 which provides that the Use Fuel Tax is in lieu of the Motor Vehicle Fuel Tax (66-300) - therefore, no change would be made in the method of accounting.

Trusting this answers your inquiry, we are,

Very truly yours,

EVO De CONCINI, Attorney General

PERRY M. LING,

Chief Assistant Attorney General