Opinion No. 57-263

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BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. Charles B. Barker, Attorney, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

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Is the Apache Summit Service Station, operated by the Mescalero Apache Tribal Enterprises liable for the payment of New Mexico motor fuel tax?

CONCLUSION

Yes.

OPINION

ANALYSIS

As a factual basis for this opinion, it is assumed that the Apache Summit Service Station is operated in much the same fashion as any other commonly designated service station and for the same general purpose, that of realizing a gain or profit from the sale of motor fuels and the performance of associated services.

From the presentments of the letter of inquiry, the considered station is located within the exterior boundaries of the Mescalero Apache Reservation and it is assumed that the Mescalero Apache Tribal Enterprises represents a tribal operating association which functions primarily for the benefit of the Tribe.

There is no suggestion that the services rendered or fuels dispensed are for the exclusive use and benefit of the Tribe or any agency thereof. Accordingly, it is finally assumed that any highway traveler may avail himself of the offered fuels, services and conveniences in a manner similar to that tendered elsewhere in the State.

Limitations of the several state's authority to impose taxes upon the Tribes or Nations stem principally from an area pre-empted by the Federal Government in its exercise of sovereignty arising from the commerce clause of the Constitution. These limitations are generally considered by Felix Cohn, Handbook of Federal Indian Law, page 254, as follows:

"To the extent that Indians and Indian property within an Indian reservation are not subject to state laws, they are not subject to state tax laws. "We have seen, elsewhere, that state laws, are not applicable to tribal Indians on an Indian reservation **except where Congress has expressly provided that state laws shall apply.** It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the state by Act of Congress. Conversely Indian property outside of an Indian reservation is subject to state taxation unless congressional authority for a claim of tax exemption can be found." (Emphasis supplied.)

and further:

"Perhaps the most frequent reason stressed by the Courts for the exemption of Indian property from state taxation is the federal instrumentality doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a federal function, and that a state cannot impose a tax which will substantially impede or burden the functioning of the Federal government."

Returning to the instant question, we find that Section 64-26-2, N.M.S.A., 1953 Compilation, provides as follows:

"(a) There is hereby levied and imposed an excise tax of six cents per gallon upon the **sale, use, or sale and use** of all motor fuel sold or used in this state for any purpose; Provided, that this tax shall be collected only once upon any particular motor fuel and where the excise tax has been paid in this state upon the sale, a like tax shall not be collected for the use of the same motor fuel, and likewise where the excise tax has been paid in this state upon the use a like tax shall not be collected for the sale of the same motor fuel: Provided further that nothing in this article shall prohibit any incorporated municipality from assessing and collecting the tax provided for in chapter 159 of the 1931 Session Laws. "The excise tax hereby levied and imposed shall not apply to the sale of motor fuel for export from the state of New Mexico to any other state, territory, or foreign country; Provided that satisfactory proof of actual exportation of all such motor fuel is furnished by the distributor claiming exemption from such tax at the time and in the manner prescribed by the Bureau of Revenue.

"(b) There is also hereby levied and imposed a tax of six cents per gallon upon motor fuel not purchased in this state but used to propel motor vehicles upon the highways of this state. Said tax is levied as a toll for the use of the highways; Provided, however, that the operator of any motor vehicle propelled by motor fuel upon which a tax is levied by this section shall be entitled to have within the fuel tank on their motor vehicles 'connected to the carburetor' upon entering this state not to exceed twenty gallons of motor fuel upon which number of gallons the tax levied by this section shall not apply; Provided that said 20 gallon exemption shall not apply to distributors.

"(c) It is hereby made unlawful to use gasoline formed by natural processes and commonly known as drip gasoline to operate an internal combustion engine to propel a motor vehicle on the highways in the state."

In keeping with the theory of "implied immunity" of Federal instrumentalities the New Mexico law further provides at Section 64-26-13, N.M.S.A., 1953 Compilation, 1957 Pocket Supplement, that:

"In case any distributor, wholesale dealer or retail dealer has sold any motor fuel to the United States of America or any of its agencies or instrumentalities which under the Constitution and laws of the United States is not subject to the taxes imposed by this act, and which motor fuel was sold for a price less the amount of such motor fuel taxes, the distributor who would otherwise be required to pay to the bureau of revenue the motor fuel tax on such motor fuel so sold may deduct from his remittance the amount of such taxes on the number of gallons of motor fuel so sold to the United States or its agency or instrumentality, but only if his report is accompanied by a certificate on a form prescribed by and executed in the manner required by the bureau of revenue, provided that all claims for deductions shall be made within one year from the date of sale. . . ."

But with reference to the United States, any of its agencies or instrumentalities, the 1957 Legislature also required that:

"All taxes on the sale or use of motor fuel or special motor fuels levied by this state or by any duly constituted taxing authority herein, having jurisdiction to levy such a tax, shall apply to the use or sale of motor fuel by or to persons upon federal areas and by or to persons by federal instrumentalities or agencies to the extent permitted by Acts of Congress." (Section 64-26-2.1, N.M.S.A., 1953 Comp., 1957 P.S.)

To determine what is permitted by the Federal government in the area of taxation, and specifically with reference to motor fuel, Section 104 (a) Title 4 FCA, provides as follows:

"All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measure by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United State military **or other reservations, when such fuels are not for the exclusive use of the United States.** Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or District of Columbia, within whose borders the reservation affected may be located." (Emphasis supplied.)

Thus we find a specific allowance of local or state taxation on sales, purchases, storage or use of gasoline where such fuels are not for the exclusive use of the United States or its instrumentalities.

In Sanders vs. Okla. Tax Commission, 197 Okla. 285, 169 P. 2d 748, the Oklahoma Supreme Court when confronted with the state's authority to levy and collect a motor fuel tax in view of the Buck Act of 1940 on gasoline delivered to Federal areas, pointed out that:

"We think the purpose of the amendment of 1940 was to permit the various states to tax the use or sale of gasoline occurring within federal areas in exactly the same manner as though such areas did not exist, except in cases where the gasoline was to be used exclusively by the United States. It is true that in amending the statute Congress did not change the qualifying phrase 'when sold by or through' post exchanges, etc., and under a literal construction the act might be interpreted to mean that the state could tax the use of gasoline only if sold in the area. Such an interpretation however leads to an absurd result. In State of Minnesota v. Keeley, 126 F.2d 863, the Circuit Court of Appeals for the Eighth Circuit stated that the purpose of the Act, even before the amendment, was to permit the states to obtain more revenue for highway improvement and thus extend the program initiated by the Federal Aid Highway Act of 1916, 39 Stat. 355, which was financed by matching state and federal funds. If such be the case, why should Congress have intended to restrict the right of the state to tax gasoline withdrawn from storage and used in the area to that previously sold within the area? Such a result would be contrary to the purpose of the act, because it would decrease the revenue of the state for highway improvement. Federal statutes must be interpreted to effect the will of Congress. United States v. N. E. Rosenblum Truck Lines, 315 U.S. 50, 62 S. Ct. 445, 86 L. Ed. 671; State of Minnesota v. Keeley, above; 50 Am. Jur. 199, 200."

Accordingly, it is our opinion that in keeping with the facts herein-before assumed the purchase of gasoline by the Apache Summit Service Station and its subsequent sale to any and all purchasers in no manner of thinking exempts the Tribal Enterprises from payment of the New Mexico motor fuel tax as is levied.