



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-6964
Re: Refund Claim by Veterans
Administration for Gasoline
Taxes Paid by Beneficiary -
Claimants Traveling on Ac-
tual Expense Basis.

Your letter of September 19th submits the following
question for opinion:

"The Veterans Administration have filed several claims from their branch offices in Texas for refund of the tax paid upon motor fuel purchased and used upon the public highways of Texas by beneficiaries of the Veterans Administration who are required to travel to Veterans' Hospitals once a year for examination as a prerequisite to drawing disability compensation. The Federal Government either by regulation or statute reimburses the beneficiaries for the travelling expense incurred on such trips.

"The Veterans Administration have cited a decision of the Comptroller General of the United States, Volume 15, to support their claim for refund of State tax which reads in part as follows:

"Purchases of gasoline and oil by employees or beneficiaries of Veterans' Administration traveling under official orders on an actual expense basis for which the traveler is reimbursed by the Government must be considered purchases for the exclusive use of the United States within the meaning of section 401 of the Revenue Act of 1935, 49 Stat. 1025, and tax exempt effective October 1, 1935.
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"No distinction should be made, as to payment of State Taxes, between purchases by employees and by beneficiaries, since purchases by both classes are equally for the use of the United States." (Page 732)

"Section 13(d) of the Motor Fuel Tax Law, Art. 7065b, Vernon's Annotated Civil Statutes, recognizes the United States Government's right to purchase motor fuel free of the Texas tax when such purchase is made for exclusive use by the Government and indirectly this statute authorizes the sale of tax free motor fuel to the Federal Government only when such motor fuel is for the exclusive use of said Government.

"Will you please advise us whether or not the Comptroller can legally pay a refund of tax collected upon motor fuel used by beneficiaries of the Veterans Administration traveling under official orders to Government Veterans' Hospitals as described hereinabove?"

From the inquiry, it is obvious that the claim for refund is based upon the contention that imposition of the tax under the attendant circumstances constitutes the tax a burden on the Federal Government, which, because of our federalism, is beyond the constitutional power of the State of Texas. It is undoubted that the Federal Government has power to grant and allow such pensions and compensations for present and past services with the armed forces of the United States, or for injuries or disabilities suffered while in the public service, as Congress may deem proper; and corollary to this power, it is competent for Congress to adopt all legislation necessary and proper to the execution thereof. United States v. Hall, 98 U.S. 343, 25 L. Ed. 180; United States v. Van Leuven, 63 Fed. 52. We have found no federal enactment, and none has been cited to us, whereby immunity is granted to beneficiaries or pensioners of Veterans Administration, from payment of gasoline taxes incurred in execution of travel orders to and from a Veterans' Hospital for physical examination required by Veterans' Administration annually as prerequisite to drawing disability compensation. Such immunity as attaches, therefore must derive directly from the Constitutional immunity of the Federal Government to State taxes. McCulloch v. Maryland, 4 Wheat. 421, 4 L. Ed. 605; Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 83 L. Ed. 927, 59 S. Ct. 595, 127 A.L.R. 1466;

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Alabama v. King & Beecher, 314 U.S. 1, 86 L. Ed. 1, 62 S. Ct. 43; Curry v. United States, 314 U.S. 14, 86 L. Ed. 9, 62 S. Ct. 48; James v. Dravo Contr. Co., 302 U.S. 134, 82 L. Ed. 155, 58 S. Ct. 206, 114 A.L.R. 318.

Thus viewed, the problem here to be considered is that stated by the Supreme Court of the United States in the case of Graves v. New York ex rel. O'Keefe, supra, (120 A.L.R. 1470):

"It follows that when exemption is claimed on the ground that the Federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

The tax here involved is a non-discriminatory levy on the first sale or use of gasoline within the State of Texas, with the incidence of the tax laid upon the person ultimately using the fuel for propulsion of a motor vehicle upon the public highways of this state. Attorney General's Opinion No. 0-6341. Express provisions are contained in the Act, excepting from the tax sales made to the United States Government for its sole use. (Subsec. (d), Sec. 2, and Subsec. (d), Sec. 13, Texas Motor Fuel Tax Act; Vernon's Stat., Art. 7055b.)

As we understand the transaction here involved, the pensioner-beneficiary is merely ordered to report to a Government Hospital for physical examination upon which his right to disability compensation is made to depend. So far as we are advised, the mode of transportation is not specified, but the claimant is allowed to travel by private automobile if he desires. For completion of the required travel, the Federal Government assumes to reimburse the disability claimant for "actual expenses." The conception that this arrangement between the Federal Government and the disability-claimant results in the actual payment by the Federal Government of the amount of the gasoline tax laid by the State of Texas upon the gasoline purchased and used by the claimant in making the trip probably gives rise to the claim for refund which Veterans' Administration has presented. That the result of imposing the tax is a consequential increase in the amount which the Federal Government lays out in the form of reimbursement of the disability

claimant for travel will be assumed for purposes of this opinion. (In point of fact, the so-called "actual expense" basis of reimbursement is but an approximation of travel cost. Indirect costs are not calculated, and any direct expenditure deemed excessive or inappropriate is as a matter of practice reduced as to excess or disallowed. It cannot accurately be described as actual cost of travel, any more so than can an allowance of a specified amount per mile.)

The tax is not laid upon the United States Government, nor upon sales to the Government, nor upon uses made by the Government of fuel purchased. At the time of purchase by the beneficiary of gasoline used for the trip, as we understand the transaction, the fuel is not acquired for or in the name of the United States; the purchaser is not an agent of the United States and cannot bind it by the sale contract for the gasoline. In event the purchase is not for cash, we do not understand that anyone but the disability-claimant, as an individual, would be responsible for payment of the obligation. *Alabama v. King & Booser, supra*. If such be the case, it is apparent that upon completion of the sale, title to the fuel vests in the disability-claimant as an individual, and not in the United States. It is upon this sale that the tax attaches. Is the tax thus incurred a liability or burden imposed upon the Federal Government within the implied censure of our Federal Constitution? We think not. Insofar as the contract on account of which the tax must be paid under the present state of facts is concerned, the disability-claimant is an individual contractor, independent of the Federal Government, and not its agent or servant. The direct transaction on account of which the tax accrues is therefore not one burdening or affecting the Federal Government. *James v. Dravo Contr. Co., supra*; *Trinityfarm Contr. Co. v. Grosjean*, 291 U.S. 466, 78 L. Ed. 918, 54 S. Ct. 469; *Metcalf v. Mitchell*, 269 U.S. 514, 70 L. Ed. 384, 46 S. Ct. 172; *Cf., Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A.L.R. 583; *Graves v. Texas Co.*, 298 U.S. 393, 80 L. Ed. 1236, 56 S. Ct. 818; *Western Union Tel. Co. v. Texas*, 105 U.S. 460, 26 L. Ed. 1067. The independent transaction between the Federal Government and the beneficiary-claimant (more precisely, the fact that "actual cost" is the measure adopted by that separate undertaking as basis of reimbursement of the disability-claimant) because of which the Federal Government is put to consequential expense equal to the amount of the tax, does not transform the tax into a "burden" on the Federal Government within the forbidding Constitutional implications necessarily inherent in our Federal-State relationship. *Alabama v. King & Booser, supra*; *Curry v. United States, supra*; *James v. Dravo*

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Contr. Co., supra; Wilson v. Cook, ___ U.S. ___, 90 L. Ed. (Adv.) 609; Trinityfarm Contr. Co. v. Grosjean, supra; Metcalf v. Mitchell, supra.

By its action in reimbursing a beneficiary-claimant upon an "actual expense basis," Veterans' Administration does not acquire a right to refund of the gasoline tax, either upon the theory of Constitutional immunity of the Federal Government to State taxation or by establishment of a claim within the statutory provisions exempting from the tax gasoline sales to the Federal Government; the beneficiary-claimant had no such right to which it could succeed.

You are therefore advised that the claims for refunds founded upon the case outlined above should be declined.

Very truly yours

ATTORNEY GENERAL OF TEXAS

Gaynor Kendall
BY

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Assistant

APPROVED OCT 31, 1946
W. S. G.
ATTORNEY GENERAL OF TEXAS
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