



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

December 16, 1957

Hon. Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin 11, Texas

OPINION NO. WW-309
Re: Construction of Section
2(b) of Article 7065b,
V.A.C.S., as amended by
the Regular Session of
the 55th Legislature as
to the amount of tax to
be allocated to the
Comptroller for enforce-
ment purposes.

Dear Mr. Calvert:

You request the opinion of this office upon the
above captioned matter presented in your letter of November
8, 1957, as follows:

"We desire the opinion of your office
regarding the construction of Section 2(b)
of Article 7065b, Vernon's Annotated Civil
Statutes, as amended by Chapter 200, Regular
Session of the 55th Legislature.

"The said Section 2(b), as amended in
the first paragraph, reads as follows:

"Provided, that the tax on one and
one-half per cent ($1\frac{1}{2}\%$) of the taxable
gallons of motor fuel sold or distributed
in this State shall be allocated to the
persons selling, distributing, or handling
said motor fuel or the taxes collected
thereon, which said allocation or allowance
shall be deducted in the payment of said
tax to the State of Texas in the following
manner: The tax on one and one-half per
cent ($1\frac{1}{2}\%$) of said taxable gallonage shall
be deducted by the distributor who refines,
imports into, or produces motor fuel in
Texas and makes the first taxable sale or
distribution thereof; the tax on one and
four-tenths per cent ($1\frac{4}{10}\%$) of said
taxable gallonage shall be deducted by
the distributor who purchases motor fuel

tax free from another licensed distributor under authority issued by the Comptroller and makes a taxable resale or distribution thereof; and one-tenth of one per cent (1/10 of 1%) of the tax collected upon the resale or distribution of motor fuel purchased tax free by a distributor shall be set aside in the State Treasury for use by the Comptroller as hereinafter provided.'

"After allocating 1½% of the TAXABLE GALLONAGE to persons selling, distributing or handling motor fuel or the taxes collected thereon in paragraph one, cited above, the next paragraph provides that the above allocation or allowance. . . shall be apportioned among all persons selling, distributing or handling motor fuel or the tax collected thereon in this State as follows:

- I. " . . . 1/2 of 1% to the distributor who refines, imports into or produces motor fuel in Texas and makes the first taxable sale or distribution of said motor fuel.
- II. " . . . 1/2 of 1% to the wholesaler or jobber who pays the tax to a distributor on motor fuel purchased for resale . . .
- III. " . . . 1/2 of 1% to the retailer . . . making a sale or distribution of such motor fuel . . .
- IV. " Provided that the tax on . . . 9/10 of 1% of said taxable gallonage shall be apportioned to a distributor who performs functions both as a distributor and as a wholesaler or jobber by paying over to the State of Texas taxes collected upon the resale or distribution of motor fuel which has been purchased tax free . . . and thereafter resold or distributed at wholesale to retailers; . . .
- V. " . . . 1/10 of 1% of the tax collected and paid over to the State upon the resale or distribution of motor fuel purchased tax free by a distributor . . . shall be allocated to and set aside in the State Treasury

for use by the Comptroller in the administration and enforcement of the provisions of this Article.'

"The question concerns the wording of subdivision V above, which provides that 1/10 or 1% of the taxes collected and paid over to the State upon the resale of motor fuel purchased tax free shall be allocated to the Comptroller, instead of 1/10 of 1% of the taxable gallonage sold, as was originally allocated for such purpose.

"In other words a distributor reselling motor fuel purchased tax free deducts $1\frac{4}{10}\%$ of the taxable gallonage and pays over to the State the tax on 98.6% thereof, and if the statutory provisions setting out how the allocation or allowance shall be apportioned controls over the statutory allocation itself, then the Comptroller would only receive $1/10$ of 1% of 98.6% of the taxable gallonage.

"Will you please advise us whether the Comptroller is entitled to receive $1/10$ of 1% of the $1\frac{1}{2}\%$ taxable gallonage originally allocated, or will he be limited to $1/10$ of 1% of the tax paid over to the State on said taxable gallonage?"

We are primarily concerned with the construction and application of Section V which appears on page 2 of your letter, which provides:

V. ". . . $1/10$ of 1% of the tax collected and paid over to the State upon the resale or distribution of motor fuel purchased tax free by a distributor . . . shall be allocated to and set aside in the State Treasury for use by the Comptroller in the administration and enforcement of the provisions of this Article."

It is observed that $1\frac{1}{2}\%$ of the taxable gallonage is the maximum that may be allocated to the distributor, the wholesaler or jobber, and to the retailer or other person making a sale or distribution of such motor fuel to the person using or consuming such motor fuel or to a distributor who functions both as a distributor and as a wholesaler or jobber.

A portion of Section 2(b) reads as follows:

" . . . and one-tenth of one per cent (1/10 of 1%) of the tax collected upon the resale or distribution of motor fuel purchased tax free by a distributor shall be set aside in the State Treasury for use by the Comptroller as hereinafter provided. (Emphasis supplied.)

It becomes important to observe what is "hereinafter provided". The allocations numbered I to V inclusive are all, in the language of the Statute, "hereinafter provided".

When we apply simple mathematics to the allocations provided in I, II and III, we find that the maximum of $1\frac{1}{2}\%$ is absorbed, and IV provides that $\frac{9}{10}$ of 1% may be allocated to a distributor who likewise performs functions as a wholesaler or jobber. This would leave $\frac{6}{10}$ of 1% which could be allocated to a retailer under III, if subdivision IV becomes operative.

We must therefore construe Section V to mean what its literal language imports, that the $\frac{1}{10}$ of 1% allocated to the Comptroller for enforcement purposes is calculated upon the basis of $\frac{1}{10}$ of 1% of the taxes collected and paid over to the State after deducting the maximum total allocations of $1\frac{1}{2}\%$. In other words, it is $\frac{1}{10}$ of 1% of $98\frac{1}{2}\%$, which is the amount of tax actually paid over and collected by the State. If there be a conflict between that portion of the Statute preceding the phrase "as hereinafter provided" and what follows this phrase, the latter provision will control. Cox, et al., V. Drainage District No. 27 of Craighead County, et al., 187 S.W.2d. 887 (Sup. Cr't of Ark.)

S U M M A R Y

$\frac{1}{10}$ of 1% of the motor fuel tax collected and remitted to the State is the amount that should be allocated to the Comptroller for enforcement purposes. After authorized allocations are made, as provided in Section 2(b) of

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Article 7065b, V.A.C.S., 98 $\frac{1}{2}$ %
is the amount of tax that is
remitted to the State Treasurer,
and is the amount upon which 1/10
of 1% should be calculated.

Very truly yours

WILL WILSON
Attorney General of Texas

By 
L. P. LOLLAR
Assistant

LPL/fb

APPROVED:

OPINION COMMITTEE

George P. Blackburn, Chairman

John H. Minton,

Marietta McGregor Payne

B. H. Timmins, Jr.

REVIEWED FOR THE ATTORNEY GENERAL

By: James N. Ludlum