



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**WAGGONER CARR
ATTORNEY GENERAL**

October 7, 1964

affirmed see C-401

Honorable Robert S. Calvert
Comptroller of Public Accounts
Austin, Texas

Opinion No. (C-328)

Re: Whether Article 10.03(3)
V.C.S. requires a supplier
to collect the tax on all
special fuels delivered to
statutorily defined dealers
or users who are not bonded,
or whether it requires the
supplier to collect the tax
only on deliveries made to
dealers and users who are
acting in the capacity of
non-bonded dealers or non-
bonded users as classified
by Article 10.11(1), V.C.S.
and related questions.

Dear Mr. Calvert:

We quote your letter requesting the opinion of this
office on the above captioned matter:

"We desire the opinion of your office as to
the following questions involving the sales of
special fuels to 'users' as that term is defined.

"'User', as defined by Article 10.02(8),
'means and includes every person who delivers
any special fuels into the fuel supply tanks
of motor vehicles owned or operated by him.
"User" also means any person who imports special
fuels into this State in fuel supply tanks of
motor vehicles owned or operated by him.'

"'Supplier', as defined by Article 10.02(6),
'means any person who delivers special fuels to
dealers or users (including locations of the
supplier) for redelivery by them into the fuel
supply tanks of motor vehicles.'

"Article 10.03(3), provides that, 'Every supplier shall collect the tax, at the rate imposed, on each gallon of special fuels delivered to non-bonded dealers or users and shall report and pay to this State the tax so collected. . . .'

"Article 10.06, provides in part as follows: 'Except in the case of tax-paid deliveries into the fuel supply tanks of motor vehicles, it is unlawful to make bulk sales of special fuels to any person who (1) is not licensed as a supplier, or (2) is not licensed as a dealer or user of special fuels, or (3) does not furnish a signed statement that none of the special fuels purchased will be delivered by him or permitted by him to be delivered into the fuel supply tanks of motor vehicles.'

"Article 10.09, provides that, 'Every person defined herein as a supplier, dealer or user shall secure from the Comptroller the kind and class of permit required herein to act in such capacities or to perform such functions.'

"Intrastate 'users' with whom we are concerned here are classified in Article 10.11(1) as follows:

'Non-Bonded Users are persons whose purchases of special fuels are predominantly for delivery by them into the fuel supply tanks of motor vehicles owned or operated by them.'

'Bonded Users are persons whose purchases of special fuels are not predominantly for delivery by them into the fuel supply tanks of motor vehicles owned or operated by them.'

"This office has before it two audits made from the records of bonded suppliers of special fuels which show that said suppliers have sold special fuels tax free in large quantities to persons who were operating in the capacity of bonded users, as classified above, but such persons were not licensed or did not hold permits as bonded users, which would have enabled them to purchase special fuels tax free.

"In one case, the supplier entered into an arrangement with the user to consign the special fuels to him and, after the fuel was used, he collected the tax from the user only on the fuel that said user was presumed to have delivered into the fuel supply tanks of his motor vehicles for use on the highway - which was not supported by records which a user is required to keep.

"In the other case, the supplier merely sold and delivered the special fuels tax free to a user whom he thought was licensed as a bonded user and was reporting and paying the tax on the highway use as a bonded user is required to do by Article 10.13(4).

"Since Article 10.03(3), quoted above, places the collection of the tax by the supplier upon each gallon of special fuels delivered to non-bonded users, this office has construed the law to mean that the supplier must collect the tax on all deliveries made to any person operating in the capacity of a non-bonded user as classified by Article 10.11 - which, if correctly construed, would require collection of the tax on special fuels delivered to a non-bonded user by consignment or otherwise.

"In these cases, the suppliers sold and delivered special fuels to users who were operating in the capacity of bonded users as classified by Article 10.11, but who were not licensed as bonded users, which made the sales unlawful under the terms of Article 10.06, above cited.

"Our questions are therefore as follows: Does Article 10.03(3), cited above, require a supplier to collect the tax on all special fuels delivered to statutorily defined dealers or users who are not bonded, or does it require the supplier to collect the tax only on deliveries made to dealers and users who are acting in the capacity of non-bonded dealers or non-bonded users as classified by Article 10.11(1) of the law?

"If you answer that said supplier is required to collect the tax only on deliveries made to users acting in the capacity of non-bonded dealers and users as classified by the said Article 10.11, then, will making of bulk sales of special fuels to persons acting in the capacity of bonded dealers and users who are not so licensed as bonded dealers or bonded users make the supplier liable for collection and payment of the tax to the State on such unlawful deliveries? Or, will such supplier merely be liable to punishment under the civil and criminal penalties of the law for such sales?"

Article 10.03(3) places a mandatory duty upon every supplier to collect the tax on each gallon of special fuels delivered to non-bonded dealers or non-bonded users and to report and pay to the State the tax so collected. We are therefore in accord with your construction that the supplier must collect the tax whether the special fuels were delivered to the non-bonded user or non-bonded dealer by consignment or otherwise.

We are further of the opinion that the tax must be collected even when said dealers and users were acting in the capacity of bonded dealers and bonded users but had not been properly licensed. This for the reason that said dealers and users were in fact non-bonded since they were not properly licensed.

Since the suppliers in the cases under consideration have failed to perform the mandatory duty of collection imposed by Article 10.03 and since the sales were therefore unlawful under Article 10.06, we think the suppliers are liable to the State for the amount of taxes due at the time of said deliveries. We are not here concerned with any possible recourse they may have against the parties to whom the unlawful deliveries were made.

Article 10.18 provides, in part, as follows:

"(1) If any person affected by this Chapter shall fail or refuse to comply with any provision of this Chapter or shall violate the same, or shall fail or refuse to comply with any rule and regulation promulgated hereunder by the Comptroller or shall violate the same, he shall forfeit to the State of Texas as a penalty the sum of not less than Twenty-five Dollars (\$25) nor more than Five Hundred Dollars (\$500). . . . Provided that in addition to such penalties, if any supplier, dealer or user does not make remittance for any taxes collected, or pay any taxes due the State of Texas by said supplier, dealer or user, within the time prescribed by law said supplier, dealer or user shall upon the first offense forfeit two per cent (2%) of the amount due; and if said taxes are not paid within ten (10) days from the date of notice in writing by the Comptroller that any taxes have not been reported and paid, an additional eight per cent (8%) shall be forfeited; provided that upon each subsequent offense during any calendar year of failing to remit taxes collected or due the State within the time prescribed by law, such supplier, dealer or user shall forfeit twenty-five per cent (25%) of the amount due. All past due taxes and penalties shall draw interest at six per cent (6%) per annum.

". . ."

The suppliers are likewise subject to the penalties provided by the provisions above quoted.

Article 10.23 provides penalties in those cases in which the taxes have been collected but willfully not paid to the State. Its provisions are therefore not applicable here.

S U M M A R Y

Every supplier must collect the tax on all special fuels delivered to non-bonded dealers or non-bonded users and pay to the State the tax collected. The tax must be collected whether delivery was by consignment or otherwise and even in

cases when said dealers and users were acting in the capacity of bonded dealers and bonded users but had not been properly licensed. Suppliers who fail to collect taxes due the State are liable to the State therefor and are likewise subject to the penalties imposed by Article 10.18, V.C.S.

Yours very truly,

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