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FILE NO. S-938

TAXATION:
Motor Fuel Tax - Refunds
For Reefer Units

Honorable Paul J. Randolph
Illinois State Representative
Minority Co-Spokesman
House Revenue Committee
Room 2031 State Office Building
Springfield, Illinois 62706

Dear Mr. Randolph:

I have your letter wherein you state:

"In 1941 pursuant to Senate Bill 441, Section 13 of the Motor Fuel Tax Law was amended to provide refunds for the use of motor fuel for any purpose other than operating a motor vehicle upon the public highways.

The Department of Revenue has interpreted this amendatory act to mean that fuels not used to propel the motor vehicle on the highways as exempt from the Motor Fuel Tax Law. * * *"

You then relate how the Department of Revenue [on May 10, 1974] reversed this practice by denying refunds for fuel used on vehicles but not used to propel the motor vehicles on the highway. In particular, refunds for fuel used in the operation of reefer units on trucks and trailers were no longer allowed. You request my opinion on the following question:

> "Since the purpose of the Motor Fuel Tax Law is to tax operators for the privilege of operating vehicles on the public highways, may the Department of Revenue now revise its long-standing administrative practice and assess the motor fuel tax (by refusing to issue refunds) when the use is not to propel motor vehicles on the highways?"

Subsequent to receipt of your letter, I have received a letter and other materials from Robert H. Allphin, Director of Revenue, which have proven helpful in preparing a reply to your request.

Section 13 of "AN ACT in relation to a tax upon the privilege of operating motor vehicles upon the public highways and waters, based upon the consumption of motor fuel therein" (Ill. Rev. Stat. 1973, ch. 120, par. 429)

provides in part:

> "Any person other than a distributor or supplier, who loses motor fuel through any cause or uses motor fuel (upon which he has paid the amount required to be collected under this Act) for any purpose other than operating a motor vehicle upon the public highways or waters, shall be reimbursed and repaid the amount so paid. * * *" (emphasis added.)

The above language has remained unchanged since 1929 when the present Motor Fuel Tax Act was first enacted. (Laws of 1929, p. 625.) In 1943 under Senate Bill 441, (Laws of 1943, p. 1095), the administration of the Act was transferred from the Department of Finance to the Department of Revenue.

The Bulletin of the Department of Revenue announcing the change in taxation of fuel used for reefer units on trucks and trailers states:

> "A re-examination of a Court decision has resulted in the Department taking the position that motor fuel used in the operation of the above or similar types of equipment on the public highways of the State, even though not used in the actual propulsion of the equipment, constitutes a taxable use. The court attached no significance to the fact that motor fuel comes from the fuel supply

> tank of the motor vehicle itself or from a separate tank carried in or on the motor vehicle."

Recently, the Department of Revenue narrowed this position and ruled that refunds will be given for reefer fuel used in a semi-trailer or a non-self-propelled vehicle. However, fuel used in reefer units on trucks or self-propelled vehicles remains taxable.

It was previously the unwavering practice of the Department to provide refunds for all reefer units. This continuing practice of providing refunds for all reefer units must be treated as an interpretation of the statute by the Department.

The threshold issue, then, is whether the Department's prior interpretation of the statute as evidenced by its long-standing practice of providing refunds in these cases, is erroneous.

Central Greyhound Lines, Inc. v. Graves, 274 App. Div. 699, 87 New York Supplement (2nd) 441, which precipitated the change in interpretation by the Department in construing a statute nearly identical to our own, held that the meaning of

the phrase "operation of a motor vehicle" was not limited to the actual propulsion of the motor vehicle. The court held that fuel consumed in the air-conditioning units of buses and other common carriers was consumed in the operation of a motor vehicle, and that the construction of the statute by the Department had a reasonable basis in law. The New York case cited no authority, nor has it been cited by any other court in any other jurisdiction for such authority.

The meaning of the phrase "for any purpose other than operating a motor vehicle" is not clear on the face of the statute, and is susceptible of more than one meaning.

60 C.J.S., Motor Vehicles, §6(2) states:

> "Ordinarily, the word 'operation', when used in relation to motor vehicles, refers to the physical act of working the mechanism of the vehicle; the actual physical driving and handling of the motor vehicle; the manipulation of the controls of a car in order to move it as a vehicle; but it is not limited to the movement of the car alone, and includes such stops as motor vehicles ordinarily make in the course of their operation."

In Visintin v. County Mut. Ins. Co., 78 Ill. App. 2d 75, the Illinois Appellate Court held that "use" and "operate" a motor vehicle were not synonymous. The court,

citing a New Jersey Supreme Court case (Indemnity Ins. Co. of North America v. Metropolitan Cas. Ins. Co. of New York, 166 A. 2d 355) stated that "use" of an automobile denotes its employment for some purpose of the user, but that the word "operation" denotes the manipulation of the car's controls in order to propel it as a vehicle. "Use is thus broader than operate". P. 81.

Thus, a permissible and reasonable interpretation of section 13 would be that only fuel necessary to propel the vehicle through manipulation and control, including normal stops, would not be refunded. All other use of fuel (except, of course, fuel used on the waterways) would be refunded.

This reading of the statute is enforced by the settled rule of construction that taxing laws are to be strictly construed and they are not to be extended beyond the clear import of the language used. If there is any doubt in their application they will be construed most strongly against the government and in favor of the taxpayer. Gould v. Gould, 245 U.S. 151; Caterpillar Tractor Co. v. Dept. of Revenue, 29 Ill. 2d 564; Central Television Service Inc. v. Isaacs, 27 Ill. 2d 420; Oscar L. Paris Co. v. Lyons, 8 Ill. 2d 590.

Therefore, it is my opinion that the prior practice was a reasonable and permissible interpretation. Had the prior construction been erroneous, the Department clearly could have rectified the mistake. (Martin Oil Service Inc. v. Dept. of Revenue, 49 Ill. 2d 260, cert. den. 405 U.S. 923.) Since the interpretation was a correct one, further analysis is necessary to determine if the prior practice can now be changed.

In American Oil Co. v. Mahin, 49 Ill. 2d 199, the Illinois Supreme Court considered whether the Department of Revenue had authority to revise a rule which it determined to be a permissible interpretation and a reasonable and necessary exercise of discretion.

In holding that the Department could not revise the prior rule, the court based its decision on the following four factors which were present in the case:

> "* * * 1) at the time of the legislative enactment, the Department construed it differently; 2) it has been applied continuously and uniformly for a substantial period of time; 3) the Legislature has reenacted or amended the statute during the period of time without changing the particular wording; and 4) the court has decided that the rule

> was a reasonable and necessary exercise of discretion by the Department. * * *"

The first three of the four factors are very clearly present here, and on the fourth, as I have stated, it is my opinion that the prior practice was a reasonable and necessary exercise of discretion, and not erroneous.

The prior practice has been applied continuously and uniformly for a period of time going back to 1929.

Section 13 has been reenacted or amended 13 times since 1929, 12 times since 1949, without any change in the language presently under consideration.

An additional factor present here, though not present in the American Oil case, is that the legislature has annually appropriated money to be used solely for the purpose of providing refunds under section 13.

While the appropriations do not constitute approval or ratification of all expenditures under the appropriation bill, they at least imply approval because the legislators have had repeated opportunities to appraise themselves of the refund practices of the Department, and the purposes for which refunds were being approved.

It must be emphasized that the underlying rationale of the American Oil case is that great weight must be given to a long-standing administrative interpretation, of which the legislature was presumably aware, where the statute was not changed but rather reenacted countless times over a protracted period of time. The holding of the case is really nothing more than the employment of a rule of construction to solidify a permissible long-standing interpretation and raise it to the point of being the correct interpretation.

In view of the foregoing, it is apparent that the doctrine that the State cannot be estopped by the mistakes of its employees (People by Barrett v. Bradford, 372 Ill. 63) does not apply here because there was no mistake: the prior interpretation was a permissible and reasonable one.

Even if the statute is subject to two possible interpretations, history and time have elevated the long-standing practice to the only correct interpretation.

However, it is doubtful whether another construction of the statute would ever have been proper.

If "operating a motor vehicle" was meant to mean more than propelling it on the highway, then a truck with a reefer unit weighing the same as a truck without one would pay more tax, assuming an equal amount of fuel is used to propel each vehicle. Yet in each case the effects upon the highway and the privilege of driving the vehicle would be comparable. Since trucks with reefer units impose the same burden upon highway use as other vehicles of equal weight, there is no reason to believe that the legislature intended to impose additional taxes on that type of vehicle.

The latest decision by the Department of Revenue to refund tax paid on reefer fuel used in a semi-trailer, but not on fuel used for a reefer unit on a truck also raises constitutional questions of due process and equal protection. Classifications in tax statutes must be based upon real and substantial differences between persons taxed and those not taxed. (People ex rel. Holland Coal Co. v. Isaacs, 22 Ill. 2d 477.) The designation of persons composing a class may not be arbitrary and uniformity may be violated by including

those in fact not within the class as well as by excluding those properly within it. (Ohio Oil Co. v. Wright, 386 Ill. 206.) Since there is no difference in the use of fuel for a reefer on a semi-trailer and on a truck, refunding the tax only for semi-trailers is of questionable validity.

For reasons stated, it is my opinion that the Department of Revenue does not have power or authority to alter or reverse its prior interpretation and practice.

Very truly yours,

ATTORNEY GENERAL