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B-135811, May 29, 1959

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B-135811, MAY 29, 1959

HEADNOTE-UNAVAILABLE PRECIS-UNAVAILABLE

MR. R. R. REYNOLDS

YOUR LETTER OF DECEMBER 9, 1958, REQUESTING RELIEF FOR CERTAIN PAYMENTS REPRESENTING THE NEW MEXICO STATE SALES TAX ON GASOLINE, HAS BEEN FORWARDED HERE BY 3D INDORSEMENT OF THE OFFICE OF THE CHIEF OF FINANCE DATED FEBRUARY 4, 1959.

AN EXAMINATION OF THE RECORD DISCLOSES THAT IN PAYMENT FOR GASOLINE PURCHASED FROM DEALERS DURING THE PERIOD APRIL 21, 1955, TO FEBRUARY 23, 1957, THERE WAS INCLUDED THE PAYMENT OF THE TAX OF 6 CENTS PER GALLON, TOTALING $5,518.63. THE RECORD ALSO DISCLOSES THAT PAYMENT OF SUCH TAX WAS CONTINUED NOTWITHSTANDING THAT ON SEPTEMBER 9, 1955, THE ATTORNEY GENERAL OF NEW MEXICO RULED THAT SALES BY DISTRIBUTORS TO THE FEDERAL GOVERNMENT WERE NOT TAXABLE. FURTHERMORE, PAYMENT OF THE TAX WAS CONTINUED AFTER NOVEMBER 4, 1955, EVEN THOUGH ON THAT DATE THE JUDGE ADVOCATE GENERAL OF THE ARMY RULED THAT SALES OF GASOLINE TO THE UNITED STATES WERE NOT SUBJECT TO THE NEW MEXICO SALES TAX.

WHEN THE MATTER WAS QUESTIONED IN OUR LETTER OF DECEMBER 10, 1957, IT WAS EXPLAINED IN THE REPLY OF THE DISTRICT ENGINEER, DATED DECEMBER 19, 1957, THAT -

"NOTWITHSTANDING EXPRESSED OPINIONS, PAYMENT OF THE NEW MEXICO GASOLINE TAX WAS CONTINUED UNTIL 23 FEBRUARY 1957 ON THE BASIS THAT NO SPECIFIC INSTRUCTIONS HAD BEEN RECEIVED TO CASE SUCH PAYMENTS AND THE GOVERNMENT WAS NOT RELIEVED OF THE LIABILITY UNTIL AMENDMENT OF SECTION 64-26-13, NEW MEXICO STATUTES ANNOTATED BY HOUSE BILL NO. 242, APPROVED 22 FEBRUARY 1957."

THE DIRECTOR, GASOLINE TAX DIVISION, BUREAU OF REVENUE, STATE OF NEW MEXICO, HAS DENIED ADMINISTRATIVE REQUESTS TO REFUND THE TAX ON THE BASIS THAT HE HAS NO AUTHORITY TO MAKE SUCH REFUND BY REASON OF A STATE STATUTE WHICH PROVIDES THAT NO REFUND IS AUTHORIZED TO BE MADE UNLESS CLAIM THEREFOR IS MADE WITHIN 6 MONTHS AFTER THE DATE OF SALE.

UNDER THE ACT OF AUGUST 11, 1955, 69 STAT. 687, 31 U.S.C. 82A-2, THE COMPTROLLER GENERAL IS AUTHORIZED TO GRANT RELIEF TO A DISBURSING OFFICER ONLY IF HE DETERMINES THAT PAYMENT INVOLVED WAS NOT THE RESULT OF BAD FAITH OR LACK OF DUE CARE ON THE PART OF SUCH DISBURSING OFFICER.

IT IS DIFFICULT TO UNDERSTAND WHY IT WAS THOUGHT PROPER TO CONTINUE SUCH PAYMENTS AFTER THE ABOVE-MENTIONED RULINGS WERE MADE,EVEN THOUGH SPECIFIC INSTRUCTIONS WERE NOT RECEIVED TO CEASE MAKING SUCH PAYMENTS. IT APPEARS TO US

THAT SUCH RULINGS ALONE SHOULD HAVE RAISED SUFFICIENT DOUBT AS TO THE PROPRIETY OF ANY FURTHER PAYMENTS. WE FEEL ALSO THAT SUCH OPINIONS SHOULD IMMEDIATELY HAVE PROMPTED THE CORPS OF ENGINEERS TO SEEK A REFUND OF THE TAX THERETOFORE PAID.

FOR THESE REASONS WE ARE UNABLE TO DETERMINE THAT THE PAYMENTS WERE NOT THE RESULT OF A LACK OF DUE CARE. ACCORDINGLY, ON THE BASIS OF THE PRESENT RECORD, RELIEF FOR THE PAYMENTS INVOLVED MUST BE DENIED.

YOU ARE ADVISED, HOWEVER, THAT WHILE SUCH PAYMENTS WILL BE REFLECTED IN THE SETTLEMENT OF YOUR ACCOUNT, FURTHER ACTION WITH RESPECT THERETO WILL BE HELD IN ABEYANCE PENDING THE OUTCOME OF OUR EFFORTS TO RECOVER THE AMOUNT FROM THE STATE OF NEW MEXICO.