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B-151095, May 9, 1963, 42 Comp. Gen. 631

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B-151095, MAY 9, 1963, 42 COMP. GEN. 631

TAXES - STATE - GASOLINE - RECOVERY PROCEDURE IRRESPECTIVE OF THE FACT THAT THE FEDERAL GOVERNMENT IS NOT LIABLE FOR THE GEORGIA MOTOR FUEL TAX IMPOSED ON GASOLINE PURCHASES FOR THE GEORGIA NATIONAL GUARD UNDER FEDERAL PETROLEUM SUPPLY CONTRACTS ON THE PREMISE THAT THE ACTIVITY IS A STATE AGENCY AND THAT GRANTS OF FEDERAL FUNDS LOSE THEIR IDENTITY AND BECOME STATE FUNDS, EVEN THOUGH SUPPLIES NECESSARY TO UNIFORM, ARM, AND EQUIP THE NATIONAL GUARD ARE PAID FROM APPROPRIATED FUNDS, DISBURSED BY AND SUBJECT TO THE CONTROL OF THE FEDERAL GOVERNMENT, REIMBURSEMENT OF THE TAX PAID BY THE SUPPLIERS OF THE GASOLINE BEING PROVIDED FOR UNDER THE CONTRACTS, THE SUPPLIERS SHOULD BE REQUIRED TO EXECUTE TAX EXEMPTION CERTIFICATES (STANDARD FORM 1094-REVISED) BEFORE REIMBURSEMENT IS MADE TO THEM, IN ORDER TO PROTECT THE INTERESTS OF THE UNITED STATES AND THE IMMUNITY OF THE NATIONAL GUARD FROM THE STATE TAX, AND THE CERTIFICATES REPORTED FOR COLLECTION PURSUANT TO 7 GENERAL ACCOUNTING OFFICE POLICY AND PROCEDURES MANUAL FOR GUIDANCE OF FEDERAL AGENCIES 4830.20.

TO LIEUTENANT COLONEL E. C. HEFFELFINGER, DEPARTMENT OF THE ARMY, MAY 9, 1963:

REFERENCE IS MADE TO YOUR LETTER DATED JANUARY 31, 1963, FILE AJACF B, SUBMITTING FOR ADVANCE DECISION THE CLAIM OF THE GULF OIL CORPORATION FOR $65 REPRESENTING GEORGIA MOTOR FUEL TAX ON A SALE OF 1,000 GALLONS OF GASOLINE FOR THE GEORGIA NATIONAL GUARD, COLUMBUS, GEORGIA, AND WHICH WAS WITHHELD FROM PAYMENT MADE TO THAT COMPANY ON JANUARY 21, 1963. THE CLAIM TOGETHER WITH THE SUPPORTING VOUCHER, RELATED DOCUMENTS AND PAPERS WAS FORWARDED TO THIS OFFICE BY LETTER DATED MARCH 18, 1963, FROM THE FINANCE CENTER, U.S. ARMY, INDIANAPOLIS, INDIANA.

THE PRIME ISSUE IN THIS CASE IS WHETHER PURCHASES OF GASOLINE FOR THE GEORGIA NATIONAL GUARD UNDER THE CIRCUMSTANCES HERE INVOLVED ARE PURCHASES BY THE FEDERAL GOVERNMENT FOR THE PURPOSE OF PAYMENT OF THE GEORGIA MOTOR FUEL TAX ON SALES OF GASOLINE. SALES OF GASOLINE TO THE UNITED STATES ARE EXEMPTED FROM THE GEORGIA MOTOR FUEL TAX BY SUBSECTION 92-1403 (D) OF THE CODE OF GEORGIA, ANNOTATED, 1962 SUPPLEMENT, WHICH READS AS FOLLOWS:

EXEMPTIONS AS TO FUEL IN CARGO LOTS OR INTENDED FOR EXPORT.--- PROVIDED, HOWEVER, THAT NO TAX IS HEREBY IMPOSED UPON OR WITH RESPECT TO THE FOLLOWING TRANSACTIONS:

(3) THE SALE OF MOTOR FUEL AND/OR KEROSENE TO THE UNITED STATES OF AMERICA, WHEN SAID MOTOR FUEL AND/OR KEROSENE SHALL BE PURCHASED AND PAID FOR BY THE UNITED STATES OF AMERICA.

CONCERNING THE STATUS OF THE GEORGIA NATIONAL GUARD FOR THE PURPOSE OF SUBSECTION 92-1403 (D), THE DEPUTY ASSISTANT ATTORNEY GENERAL OF THE STATE OF GEORGIA IN A MEMORANDUM OPINION ADDRESSED TO THE DIRECTOR, MOTOR FUEL TAX UNIT, STATE OF GEORGIA, DATED JUNE 20, 1962, STATED AS FOLLOWS:

I HAVE REVIEWED THE OPINION OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, A COPY OF WHICH WAS FORWARDED TO YOU ON FEBRUARY 12, 1962, RELATING TO THE TAX EXEMPT STATUS OF THE NATIONAL GUARD.

I FIND THAT THIS OPINION OF THE JUDGE ADVOCATE GENERAL REFERS ONLY TO THE EXEMPTION PROVIDED BY SECTION 4221 (A) (4) OF THE INTERNAL REVENUE CODE OF 1954 WHICH, OF COURSE, PERTAINS ONLY TO EXEMPTIONS FROM FEDERAL TAX. YOU ARE AWARE, THE ATTORNEY GENERAL HAS RULED THAT SALES TO INSTRUMENTALITIES OF THE STATE GOVERNMENT ARE NOT EXEMPT FROM THE PAYMENT OF THE GEORGIA MOTOR FUEL TAX. IT IS WELL ESTABLISHED THAT GRANTS OF FEDERAL FUNDS ONCE MADE TO A STATE BECOME STATE FUNDS FOR ALL PURPOSES, AND SINCE THE NATIONAL GUARD IS AN AGENCY OF THE STATE GOVERNMENT, IT IS MY OPINION THAT SALES OF MOTOR FUEL TO THE NATIONAL GUARD ARE NOT ENTITLED TO AN EXEMPTION FROM THE GEORGIA MOTOR FUEL TAX. SINCE THE DATE OF THAT OPINION, THE VARIOUS SUPPLIERS OF GASOLINE, INCLUDING THE GULF OIL CORPORATION, HAVE BEEN SUBJECTED TO A MONTHLY TAX ASSESSMENT ON ALL SALES OF GASOLINE FOR THE GEORGIA NATIONAL GUARD.

WE SAID IN OUR DECISION OF OCTOBER 28, 1933, 13 COMP. GEN. 118, THAT STATE TAXES UPON GASOLINE PURCHASED FROM FUNDS APPROPRIATED BY THE CONGRESS FOR NATIONAL GUARD ACTIVITIES WHICH ARE GOVERNED LARGELY BY FEDERAL STATUTES AND BY REGULATIONS ISSUED BY THE SECRETARY OF WAR WOULD CONSTITUTE AN INTERFERENCE WITH AN AGENCY OF THE FEDERAL GOVERNMENT. UNDER THAT DECISION THE NATIONAL GUARD HAS BEEN RECOGNIZED AS A FEDERAL INSTRUMENTALITY IN CONNECTION WITH THE PURCHASE OF SUPPLIES FROM FEDERAL FUNDS AND, THEREFORE, NOT SUBJECT TO ANY STATE OR LOCAL EXCISE TAXES EXCEPT WHERE THE INCIDENCE OF SUCH TAX, AS PROVIDED BY STATE STATUTE, IS ON THE VENDOR. SEE 33 COMP. GEN. 453 AND 32 COMP. GEN. 423.

THE OPINION OF THE DEPUTY ASSISTANT ATTORNEY GENERAL OF THE STATE OF GEORGIA THAT THE NATIONAL GUARD IS AN AGENCY OF THE STATE APPEARS TO BE BASED ON THE PREMISE THAT GRANTS OF FEDERAL FUNDS ONCE MADE TO A STATE BECOME STATE FUNDS FOR ALL PURPOSES. WE KNOW OF NO LAW OR JUDICIAL PRECEDENT WHICH WOULD SUPPORT A CONCLUSION THAT THE FEDERAL ANNUAL APPROPRIATIONS FOR NATIONAL GUARD OPERATIONS AND ACTIVITIES ARE GRANTS TO THE STATES. SEE, IN THIS CONNECTION, OUR DECISION OF JULY 26, 1948, 28 COMP. GEN. 54, IN WHICH, ON PAGES 56 AND 57, THERE IS CONTAINED A DEFINITION OF A FEDERAL GRANT TO A STATE. PERTINENT PART OF THAT DECISION IS AS FOLLOWS:

AS STATED IN YOUR LETTER, IT CONSISTENTLY HAS BEEN HELD WITH RESPECT TO FEDERAL FUNDS GRANTED TO A STATE THAT, WHEN SUCH FUNDS ARE RECEIPTED FOR BY THAT STATE, THEY BECOME STATE FUNDS AND, IN THE ABSENCE OF A CONDITION OF THE GRANT SPECIFICALLY PRESCRIBING TO THE CONTRARY, ARE TOTALLY DIVESTED OF THEIR IDENTITY AS FEDERAL FUNDS AND BECOME FUNDS OF THE STATE AND THE EXPENDITURE THEREOF IS SUBJECT TO THE LAWS AND REGULATIONS APPLICABLE TO THE EXPENDITURE OF STATE FUNDS RATHER THAN FEDERAL LAWS APPLICABLE TO THE EXPENDITURE OF APPROPRIATED MONEYS BY THE DEPARTMENTS AND ESTABLISHMENTS OF THE GOVERNMENT. 14 COMP. GEN. 916; 16 ID. 948; 17 ID. 593; 25 ID. 868.

ARTICLE I, SECTION 8, OF THE UNITED STATES CONSTITUTION CONFERS ON THE CONGRESS THE POWER TO PROVIDE FOR THE ORGANIZING, ARMING, AND DISCIPLINING THE MILITIA, AND FOR GOVERNING SUCH PART OF THEM AS MAY BE EMPLOYED IN THE SERVICE OF THE

UNITED STATES, RESERVING TO THE STATES, RESPECTIVELY, THE APPOINTMENT OF THE OFFICERS AND THE AUTHORITY OF TRAINING THE MILITIA ACCORDING TO THE DISCIPLINE PRESCRIBED BY CONGRESS. IN CONFORMITY WITH THAT AUTHORITY CONGRESS HAS ENACTED LAWS PROVIDING FOR THE SUPPLIES NECESSARY TO UNIFORM, ARM, AND EQUIP THE NATIONAL GUARD, AND HAS PROVIDED FUNDS FOR THAT PURPOSE BY ANNUAL APPROPRIATIONS. 32 U.S.C. 701, 702, AND 106. THE APPROPRIATION FOR THE OPERATION AND MAINTENANCE OF THE ARMY NATIONAL GUARD FOR THE FISCAL YEAR 1963 INCLUDED IN THE DEPARTMENT OF DEFENSE APPROPRIATION ACT, 1963, APPROVED AUGUST 9, 1962, 76 STAT. 322, READS, IN PERTINENT PART, AS FOLLOWS:

FOR EXPENSES OF TRAINING, ORGANIZING, AND ADMINISTERING THE ARMY NATIONAL GUARD, INCLUDING MAINTENANCE, OPERATION, AND REPAIRS TO STRUCTURES AND FACILITIES; * * * AND EXPENSES OF REPAIR, MODIFICATION, MAINTENANCE, AND ISSUE OF SUPPLIES AND EQUIPMENT (INCLUDING AIRCRAFT); $174,400,000, * * *

THE MONEYS SO APPROPRIATED HAVE BEEN AND ARE BEING DISBURSED BY AN OFFICER OF THE FINANCE CORPS, UNITED STATES ARMY, PURSUANT TO FEDERAL STATUTES, REGULATIONS PROMULGATED BY THE DEPARTMENT OF THE ARMY, AND DECISIONS OF THIS OFFICE. IN THIS CASE THE PURCHASE OF THE GASOLINE FROM THE GULF OIL COMPANY WAS CONSUMMATED UNDER A FEDERAL PETROLEUM SUPPLY CONTRACT AND THE PAYMENT WAS EFFECTED BY A CHECK DRAWN ON AND PAID BY THE TREASURER OF THE UNITED STATES FROM FUNDS ON DEPOSIT IN THE UNITED STATES TREASURY. FURTHERMORE, THE ACCOUNTING CONTROL AND AUDIT OF THE PURCHASE TRANSACTION, AS WELL AS THE EXAMINATION OF THE FINANCIAL ACCOUNTS OF THE INVOLVED DISBURSING OFFICER ARE EXERCISED BY DEPARTMENT OF THE ARMY PERSONNEL UNDER REGULATIONS OF THAT DEPARTMENT. IN VIEW THEREOF IT CANNOT BE SAID THAT THE APPROPRIATED FUNDS ALLOCATED FOR THE OPERATION AND MAINTENANCE OF THE NATIONAL GUARD IN THE STATE OF GEORGIA ARE GRANTS OF FUNDS TO THAT STATE. SIGNIFICANT IN THIS RESPECT ARE THE DECISIONS OF THE UNITED STATES COURTS HOLDING THAT CIVILIAN CARETAKERS OF NATIONAL GUARD PROPERTY LOCATED IN THE STATES ARE "EMPLOYEES" OF THE UNITED STATES WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. 1346 (B). SEE STATE OF MARYLAND V. UNITED STATES, 200 F.SUPP. 475 (W.D. PA., 1961), AND COURTNEY V. UNITED STATES, 230 F.2D 112 (2D CIR., 1956).

WE CONCUR IN AN OPINION OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, DATED AUGUST 13, 1962, JAGT 1962/6647, COPY INCLUDED WITH THE SUBMITTED FILE, CONCERNING THE IMPROPRIETY OF THE IMPOSITION OF A SOUTH DAKOTA GASOLINE TAX ON SALES OF GASOLINE TO THE NATIONAL GUARD. IT WAS POINTED OUT IN THAT OPINION THAT SUCH TAXATION WOULD RESULT IN THE NATIONAL GUARD UNITS OBTAINING LESS SUPPLIES AND MATERIAL WITH THE CONSEQUENT LOWERING OF THEIR LEVEL OF TRAINING AND PREPAREDNESS FOR THE PERFORMANCE OF BOTH THEIR STATE AND FEDERAL FUNCTIONS. ACCORDINGLY, WE MUST HOLD, NOTWITHSTANDING THE OPINION OF THE DEPUTY ASSISTANT ATTORNEY GENERAL OF THE STATE OF GEORGIA, THAT PURCHASES OF GASOLINE FOR THE GEORGIA NATIONAL GUARD MADE UNDER THE CIRCUMSTANCES HERE INVOLVED ARE NOT SUBJECT TO THE GEORGIA MOTOR FUEL TAX ON SALES OF GASOLINE.

HOWEVER, IRRESPECTIVE OF THE FACT THAT THE GOVERNMENT IS NOT LIABLE TO THE TAXING AUTHORITY FOR THE TAX INVOLVED, IT MAY BE REQUIRED TO PAY THE AMOUNT OF THE TAX TO A SUPPLIER OF GASOLINE. IT APPEARS THAT THE SALE OF THE GASOLINE ON NOVEMBER 6, 1962, BY THE GULF OIL CORPORATION FOR THE GEORGIA NATIONAL GUARD WAS MADE UNDER DEFENSE SUPPLY AGENCY CONTRACT NO. DSA-6-1165. SUBPARAGRAPH 22 (C) OF THE GENERAL PROVISIONS THEREOF PROVIDES AS FOLLOWS:

TAX REIMBURSEMENT BY GOVERNMENT:

THE GOVERNMENT WILL REIMBURSE THE CONTRACTOR FOR THE AMOUNT OF ANY SUCH FEDERAL EXCISE, STATE OR LOCAL TAX FROM WHICH THE GOVERNMENT, THE CONTRACTOR, OR THE TRANSACTIONS COVERED BY THIS CONTRACT ARE NOT EXEMPT AND WHICH THE CONTRACTOR IS, THEREFORE, REQUIRED TO PAY ON SUPPLIES FURNISHED HEREUNDER. AS USED IN THE PRECEDING SENTENCE, THE TERM "SUCH FEDERAL EXCISE, STATE OR LOCAL TAX" MEANS ONLY (I) FEDERAL EXCISE TAXES SPECIFICALLY EXCLUDED FROM THE CONTRACT PRICE BY A PROVISION OF THIS CONTRACT AND (II) STATE AND LOCAL TAXES EXCLUDED FROM THE CONTRACT PRICE PURSUANT TO THE PROVISIONS OF PARAGRAPH (B) OF THIS CLAUSE 22. INVOICES OR VOUCHERS SHALL SET FORTH THE AMOUNT OF ANY SUCH TAXES AS A SEPARATE ITEM AND SHALL IDENTIFY THE PARTICULAR TAX INVOLVED. WHENEVER REIMBURSEMENT OF A STATE OR LOCAL TAX MAY BE REQUIRED PURSUANT TO THIS PARAGRAPH (C), THE CONTRACTOR SHALL TAKE ACTION AS DIRECTED BY THE CONTRACTING OFFICER, AND THE CONTRACT PRICE SHALL BE EQUITABLY ADJUSTED TO COVER THE COSTS OF SUCH ACTION, INCLUDING ANY INTEREST, PENALTY, AND REASONABLE ATTORNEY'S FEES.

UNDER THE OPINION OF THE DEPUTY ASSISTANT ATTORNEY GENERAL OF THE STATE OF GEORGIA, WHICH WAS REAFFIRMED ON JANUARY 2, 1963, THE GULF OIL CORPORATION WAS LEFT WITH NO CHOICE BUT TO PAY THE TAX PURSUANT TO THE ASSESSMENT SERVED ON THEM AND SEEK REIMBURSEMENT FROM THE UNITED STATES IN ACCORDANCE WITH THE GENERAL PROVISIONS OF THEIR CONTRACT. IN VIEW OF THE CIRCUMSTANCES INVOLVED AND THE PROVISIONS OF SUBPARAGRAPH 22 (C) OF THE PETROLEUM SUPPLY CONTRACT, AS SET FORTH ABOVE, PAYMENT OF THE CLAIM APPEARS TO BE PROPER. ACCORDINGLY, THE VOUCHER, DOCUMENTS AND RELATED PAPERS ARE RETURNED AND PAYMENT MAY BE EFFECTED, IF OTHERWISE CORRECT.

SINCE IT APPEARS THAT UNDER THE OPINION OF THE DEPUTY ASSISTANT ATTORNEY GENERAL OF THE STATE OF GEORGIA THERE WILL BE A CONTINUED IMPOSITION OF THE GEORGIA MOTOR FUEL TAX ON SALES OF GASOLINE FOR THE NATIONAL GUARD UNTIL THAT OPINION IS REVERSED, OVERRULED, OR HELD INOPERATIVE EITHER BY JUDICIAL RULING OR OTHERWISE, AND IN ORDER TO PROTECT THE INTERESTS OF THE UNITED STATES AND PRESERVE THE IMMUNITY OF THE NATIONAL GUARD FROM THAT STATE TAX UNDER SUBSECTION 92-1403 (D) OF THE CODE OF GEORGIA, ALL SUPPLIERS OF GASOLINE OPERATING UNDER SIMILAR PETROLEUM SUPPLY CONTRACTS, INCLUDING THE GULF OIL CORPORATION, SHOULD BE REQUIRED TO EXECUTE TAX EXEMPTION CERTIFICATES (STANDARD FORM 1094-REVISED) IN CONNECTION WITH EACH AND EVERY SALE OF GASOLINE FOR THE GEORGIA NATIONAL GUARD BEFORE REIMBURSEMENT IS MADE TO THEM FOR THE GEORGIA MOTOR FUEL TAXES. SUCH EXEMPTION CERTIFICATES, TOGETHER WITH THE ONE INCLUDED IN THE FILE BEING RETURNED TO YOU AND THOSE NOW BEING HELD BY YOU OR IN THE POSSESSION OF THE UNITED STATES PROPERTY AND FISCAL OFFICER FOR THE STATE OF GEORGIA, SHOULD BE REPORTED TO OUR CLAIMS DIVISION IN ACCORDANCE WITH THE PROVISIONS OF 7 GAO 4830.20. SEE OUR DECISION OF SEPTEMBER 25, 1962, B- 149279, 42 COMP. GEN. 179. OUR CLAIMS DIVISION IN CONSONANCE WITH ESTABLISHED PROCEDURES WILL TAKE APPROPRIATE ACTION TO EFFECT COLLECTION OF THE AGGREGATE OF THE AMOUNTS SHOWN IN THE TAX EXEMPTION CERTIFICATES THROUGH SETOFF OR OTHERWISE FROM FUNDS THAT MAY BECOME DUE THE STATE OF GEORGIA FROM THE UNITED STATES.