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B-156561, Jun. 22, 1965

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TO MAJOR J. J. CLUBA:

BY FIRST INDORSEMENT DATED APRIL 15, 1965, THE FINANCE CENTER, UNITED STATES ARMY, INDIANAPOLIS, INDIANA, FORWARDED YOUR LETTER DATED MARCH 3, 1965, WITH ENCLOSURES, SUBMITTING FOR ADVANCE DECISION A VOUCHER IN THE AMOUNT OF $39.89, COVERING A CLAIM OF THE SINCLAIR REFINING COMPANY, ATLANTA, GEORGIA, REPRESENTING THE MISSISSIPPI GASOLINE TAX DEDUCTED FROM A PAYMENT MADE TO THAT COMPANY FOR GASOLINE PURCHASED UNDER A FEDERAL SUPPLY SCHEDULE CONTRACT.

YOU STATE THAT DOUBT AS TO THE VALIDITY OF PAYMENT ARISES BECAUSE OF THE POSSIBILITY OF DISCRIMINATION AGAINST THE UNITED STATES.

IN VIEW OF THE TAX CLAUSE CONTAINED IN THE FEDERAL SUPPLY SCHEDULE CONTRACT INVOLVED, YOU ARE AUTHORIZED TO PAY SINCLAIR REFINING COMPANY THE AMOUNT CLAIMED, IF OTHERWISE CORRECT AND THE VOUCHER IS RETURNED HEREWITH.

AS TO WHETHER THE GASOLINE TAX IN QUESTION IS DISCRIMINATORY, THE RECORD DISCLOSES THAT PRIOR TO JULY 1, 1964, MISSISSIPPI LAW EXEMPTED FROM THE SEVEN CENTS PER GALLON STATE GASOLINE TAX, GASOLINE SOLD TO THE FEDERAL GOVERNMENT OR ANY OF ITS DEPARTMENTS, AGENCIES OR INSTRUMENTALITIES FOR THE USE OF THE ARMED FORCES. (SECTION 10013-39, RECOMPILED VOLUME SEVEN A -1952, MISSISSIPPI CODE, 1942, ANNOTATED.) THE MISSISSIPPI CODE (SECTION 10014-01) ALSO LEVIES A TAX OF SEVEN CENTS PER GALLON ON GASOLINE SOLD TO MUNICIPALITIES WITHIN THE STATE BUT PROVIDES FOR A REFUND "OF ONE CENT (1 CENT) PER GALLON LESS THAN THE TAX ACTUALLY PAID ON GASOLINE WHICH IS USED SOLELY FOR MUNICIPAL PURPOSES" INCLUDING MUNICIPALLY OWNED MOTOR VEHICLES USED WITHIN THE BOUNDARIES OF SUCH MUNICIPALITY OR NOT MORE THAN TEN MILES BEYOND SUCH BOUNDARIES.

EFFECTIVE JULY 1, 1964, SECTION 10013-39 WAS AMENDED SO AS TO MAKE SUBJECT TO THE STATE GASOLINE TAX, SALES OF GASOLINE FOR USE OF THE ARMED FORCES WHEN DELIVERED IN QUANTITIES OF LESS THAN 4,000 GALLONS. NO CHANGE WAS MADE IN THE GASOLINE TAX LAW, AS FAR AS PERTINENT HERE, TO THE ENTITLEMENT OF MUNICIPALITIES TO REFUNDS OF THE GASOLINE TAX.

THE FEDERAL COURTS HAVE HELD UNCONSTITUTIONAL STATE LAWS WHICH DISCRIMINATE AGAINST THE UNITED STATES BY IMPOSING ON THE UNITED STATES, OR THOSE WITH WHOM IT DEALS, TAXES WHICH ARE NOT IMPOSED ON THE STATE OR ITS POLITICAL SUBDIVISIONS OR THOSE WITH WHOM THEY DEAL, IN THE ABSENCE OF SOME SIGNIFICANT DIFFERENCE, WHEN THE GOVERNMENT'S INTERESTS ARE WEIGHTED IN THE BALANCE. SEE MOSES LAKE HOMES V. GRANT COUNTY, 365 U.S. 744; PHILLIPS CHEMICAL CO. V. DUMAS INDEPENDENT SCHOOL DISTRICT, 361 U.S. 376; UNITED STATES V. DEPARTMENT OF REVENUE OF STATE

OF ILL., 191 F.SUPP. 723, 202 F.SUPP. 757, 371 U.S. 21; COMPTROLLER OF TREAS. V. PITTSBURGH-DES MOINES ST. CO., 189 A.2D 107. IN KNAPP-STILES INC. V. MICHIGAN DEPARTMENT OF REVENUE, 122 N.W. 2D 642, THE COURT HELD UNCONSTITUTIONAL A STATE TAX LAW WHICH EXEMPTED FROM THE TAX, CONTRACTORS' PURCHASES OF MATERIALS WHICH ARE MADE A PART OF OR ARE CONSUMED IN IMPROVING REAL ESTATE FOR POLITICAL SUBDIVISIONS OF A STATE, AMONG OTHERS, BUT DID NOT EXTEND TO MATERIALS PURCHASED BY CONTRACTORS FOR LIKE USE BY THE UNITED STATES OR ITS INSTRUMENTALITIES, AGENCIES OR CORPORATIONS (OR TO THE STATE OF MICHIGAN, ITS DEPARTMENTS OR INSTITUTIONS). IN THAT CASE THE COURT STATED:

"NO REASONABLE BASIS APPEARS TO SUPPORT A CLASSIFICATION FOR USE TAX EXEMPTION PURPOSES WHICH DISTINGUISHES BETWEEN THE UNITED STATES OF ITS INSTRUMENTALITIES, AGENCIES OR CORPORATIONS AND THOSE DEALING OR CONTRACTING THEREWITH, ON THE ONE HAND, AND, ON THE OTHER, THE STATE'S POLITICAL SUBDIVISIONS AND THOSE DEALING OR CONTRACTING WITH THEM. THAT SUCH DISTINCTION IS ARBITRARY, UNREASONABLE AND DISCRIMINATORY IS EVIDENT.'

THE FEDERAL COURT DECISIONS ARE BASED UPON THE PRINCIPLE THAT A TAX TO BE CONSTITUTIONAL MUST TREAT ALL IN THE SAME CLASS ALIKE, AND, SINCE A STATE, ITS POLITICAL SUBDIVISIONS AND THE UNITED STATES ARE GOVERNMENTAL ENTITLES A STATE MAY NOT TREAT THE UNITED STATES (OR THOSE WITH WHOM IT DEALS) FOR TAX PURPOSES DIFFERENTLY THAN IT TREATS ITSELF OR ITS POLITICAL SUBDIVISIONS (OR THOSE WITH WHOM THEY DEAL), IN THE ABSENCE OF SOME SIGNIFICANT REASON FOR TREATING ONE GOVERNMENTAL ENTITY DIFFERENT FROM ANOTHER. BOTH THE UNITED STATES AND MUNICIPALITIES IN MISSISSIPPI ARE GOVERNMENTAL ENTITIES, AND IT IS EVIDENT THAT UNDER THE MISSISSIPPI LAWS INVOLVED HERE ALL GOVERNMENTAL ENTITIES ARE NOT TREATED THE SAME.

IT IS CLEAR THAT UNDER MISSISSIPPI LAW ALL SALES OF GASOLINE TO THE GOVERNMENT FOR USE BY OTHER THAN THE ARMED FORCES ARE SUBJECT TO THE SEVEN CENTS PER GALLON STATE GASOLINE TAX AND GASOLINE SOLD FOR USE BY THE ARMED FORCES AND DELIVERED IN QUANTITIES OF LESS THAN FOUR THOUSAND GALLONS IS SUBJECT TO THE SAME TAX. IT IS ALSO CLEAR THAT UNDER MISSISSIPPI LAW MUNICIPALITIES, IN EFFECT, PAY ONLY ONE CENT PER GALLON TAX ON GASOLINE RATHER THAN SEVEN CENTS, SINCE THE STATE LAW AUTHORIZES A REFUND OF "ONE CENT (1 CENT) PER GALLON LESS THAN THE TAX ACTUALLY PAID" ON GASOLINE USED FOR MUNICIPAL PURPOSES. IN OTHER WORDS THE MUNICIPALITIES ARE ENTITLED TO A REFUND OF SIX CENTS PER GALLON.

WHERE A TAX IS LEVIED UPON VENDORS AND A VENDEE IS GRANTED AN EXEMPTION OR ENTITLED TO A REFUND, THE PRACTICAL EFFECT AS FAR AS THE VENDEE IS CONCERNED WOULD REMAIN PRECISELY THE SAME. THUS, THE LANGUAGE OF THE COURT QUOTED ABOVE WOULD APPEAR TO HAVE APPLICATION IN THE INSTANT CASE. THAT IS TO SAY ON THE PRESENT RECORD WE CAN PERCEIVE NO REASONABLE BASIS TO SUPPORT A CLASSIFICATION FOR GASOLINE TAX REFUND PURPOSES WHICH DISTINGUISHES BETWEEN THE UNITED STATES, OR ITS INSTRUMENTALITIES ON THE ONE HAND AND ON THE OTHER THE MUNICIPALITIES OF MISSISSIPPI. IT IS OUR OPINION THAT TO THE EXTENT THE MISSISSIPPI TAX LAWS ENTITLE THE MUNICIPALITIES OF THAT STATE TO A REFUND OF GASOLINE TAXES PAID BY SUCH MUNICIPALITIES, SUCH LAWS DISCRIMINATE AGAINST THE UNITED STATES. HENCE, IN LIGHT OF THE ABOVE-CITED COURT DECISIONS THE GASOLINE TAX ASSESSED AGAINST THE UNITED STATES WOULD APPEAR DISCRIMINATORY, AT LEAST TO THE EXTENT OF THE REFUND THE MUNICIPALITIES ARE ENTITLED TO UNDER THE LAWS INVOLVED.

WE ARE REFERRING THE MATTER TO THE DEPARTMENT OF JUSTICE FOR CONSIDERATION OF ACTION TO OBTAIN A DECLARATORY JUDGMENT OF INVALIDITY OF THE GASOLINE TAX AND ENJOIN COLLECTION OF SUCH TAX ON SALES OF GASOLINE TO THE UNITED STATES.