OPINION
72-437

March 24, 1972 (OPINION)

Mr. Byron L. Dorgan

State Tax Commissioner

RE: Taxation - Refunds - Motor Vehicle Fuel Tax

This is in response to your letter in which you state that the Tax Department is faced with uncertainties in the application of Section 57-50-05.1 of the North Dakota Century Code relating to claims for refunds of taxes paid on motor fuel.

You ask for an opinion "whether the work performed by the subcontractor is 'paid for from public funds' within the meaning of Section 57-50-05.1 so as to prohibit payment by the state of any refund of motor vehicle fuel tax paid by the subcontractor on that fuel?"

The facts to be considered are: A prime contractor entered into a contract with the federal government to do construction work and the prime contractor subcontracted some or all of the work to a subcontractor. The subcontractor is paid by the prime contractor and claims refund on taxes paid by him on motor fuel he purchased and used in the project. We are assuming that the cost of the project is paid for from public funds of the United States government.

Section 57-50-05.1 provides as follows:

> "57-50-05.1. REFUNDS TO PRIVATE INDIVIDUALS OR CORPORATION PROHIBITED - EXCEPTION. No tax refund shall be paid to any person, firm or private corporation on any motor vehicle fuel used, except liquefied petroleum gas used for heating purposes, if the work performed by a person, firm or private corporation is paid for from public funds of the United States, state, county, city, village, township, park district or other municipality."

This section came into being initially by Chapter 406 of the 1963 Session Laws, which chapter also amended Section 57-50-05. The amendments apparently resulted from the Supreme Court decision in the case of Peter Kiewit Sons Company v. State, 116 N.W.2d. 619, in which the court held that under the then existing law the term "public funds" did not include federal funds. The present language is unmistakable and specifically recites "public funds of the United States" to be included in the term "public funds." It is interesting to observe that the Iowa Supreme Court in Wood Brothers Construction Company v. Bagley, 6 N.W.2d. 397, reached the conclusion that public funds included federal funds even though the statute was not as specific as the North Dakota statute.

The significant language in Section 57-50-05.1 is as follows:

> "No tax refund shall be paid * * * if the work performed * * *

is paid for from public funds of the United States, state, county, city, village, township, park district or other municipality."

In examining all of the provisions of Chapter 57-50 including the statue specifically mentioned, it becomes apparent that the Legislature intended to provide a uniform administration of the law and to avoid numerous unnecessary complications. In effect, the Legislature provided that where public funds are expended for the purchase of motor fuel, no refunds can be claimed. This treats everyone the same. We must also assume that the Legislature was aware of the various methods employed in financing certain projects on a matching, sharing, or other methods of funding projects or programs. It would be in some instances an impossible task to trace the various funds from the state or political subdivisions and federal government if this were an essential factor to determine the amount of funds expended or used in the purchase of motor fuel on a given project. We must assume that the Legislature was aware of these complications and as a result simply provided for no refund where public funds are expended for the purchase of motor fuel on the theory that the taxpayer ultimately will be bearing the burden in any event.

The transaction of paying necessarily includes a corresponding expenditure. This is true whether it be under economic theory, accounting theory, or just ordinary common sense. We are satisfied that the Legislature, in using the term "is paid for from public funds," meant that the ultimate expenditure or payment is made from public funds and was not concerned with the intervening or immediate transactions. The basic concern is whether or not the project was funded by public funds and whether or not public funds ultimately paid for the projects. To put it in another way, were public funds expended for the project?

A technical construction of the terms used in this section which would produce an absurd or ridiculous result or defeat the legislative intent is not favored. If the statute were construed so as to permit a contractor to subcontract, and then allow the subcontractor to claim a refund where the prime contractor would not qualify for a refund, it would be a circumvention of the legislative intent. If such construction were permissible, there would be nothing to prevent the prime contractor from using his funds to pay for the motor fuel or borrow money to pay for the motor fuel and subsequently replace such moneys with the federal funds that he received, and then claim a refund.

It is therefore our opinion in response to the specific question that where public funds are ultimately expended for a project, a claim for taxes paid on motor fuel cannot be honored or allowed even though the prime contractor had subcontracted for a project and the subcontractor actually made the purchase. The primary question to be answered is whether or not public funds were ultimately used to pay for the project or for the work performed or whether or not the project was funded and financed by public funds of the mentioned governmental entities.

The question and answer does not address itself to the fuel used for

heating purposes.

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