

**OPINION
58-278**

December 4, 1958 (OPINION)

TAXATION

RE: Special Fuels Tax - River Ferry Fuel Not Subject to

Re: Special Fuels Tax - Application to Fuel Used in Ferry Boats

This is in regard to the application of the Special Fuels Tax Act (Chapter 57-52 of the 1957 Supplement to the N.D.R.C. of 1943) to fuels purchased and used in the operation of a ferry across the Missouri River between Williams and Mckenzie Counties in this State.

The tax concerned is imposed upon the sale of delivery of special fuel to any fuel user, on a per gallon basis. (Section 57-5204 1957 Supp.) Fuel delivered into tanks attached to heating appliances is exempted from imposition of the tax. Provision is made for the refund of the tax upon special fuels as defined in the Act used for agricultural or industrial purposes (Section 57-5001 1957 Supp.).

It would appear that taxes of this type actually constitute a tax or charge imposed upon the use of the highways (See: 60 C. J. S. 456, Motor Vehicles Section 140). Generally the proceeds of the tax are earmarked for use of highway maintenance and construction (Section 57-5220 1957 Supp.). While a ferry is a moving public highway upon water (See: Patterson v. Wollman, 8 N.D. 608) and while a navigable river is statutorily deemed to be a public highway (Section 47-0115 of the N.D.R.C. of 1943) it is, we believe, obvious that this is not the type is intended to be imposed nor can the funds derived from said tax be expended upon construction or maintenance of navigable waters.

For the above reasons and considering particularly the question of whether application of such a tax to operation of ferries crossing navigable streams would give the operator of the ferry equal protection of the laws, it is the opinion of this office that the special fuels tax act is not intended to be and is not applicable to fuel used in the operation of ferry boats across the Missouri River and that, therefor, the refund here concerned should be made.

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