

**OPINION
59-273**

March 17, 1959 (OPINION)

TAXATION

RE: Refund Motor Fuel Tax - Unclaimed Refunds - Aviation Gasoline
Fuel Tax

This is in reply to your request for an opinion dated January 22, 1959.

You state that the aeronautics commission has requested that you pay over to them all of the unclaimed refund taxes on aviation fuel. You ask for an opinion whether or not you are required to or may pay these unclaimed refunds as set out in section 57-5001 to the aeronautics commission.

The laws pertaining to gasoline taxes and refunds have been numerous and have been modified many times over the past years. To go into the history and evolution of the present gasoline tax laws and refund statutes would be of no real help in the instant matter. The question at hand can be narrowed down to the statutory provision 57-5001 of the 1957 Supplement of the N.D.R.C. of 1943 and the constitutional provision of Article 56.

Section 57-5001 of the 1957 Supplement is as follows:

REFUND OF TAX PROVIDED FOR. After December 31, 1946, any person, firm or corporation who shall buy or use any motor vehicle fuel as defined in subparagraph 2 of section 57-4101, Revised Code of North Dakota for 1943, for agricultural or industrial purposes, except motor vehicle fuel used in motor vehicles operated or intended to be operated in whole or in part upon any of the public highways of the state of North Dakota on which the motor vehicle fuel tax has been paid, shall be reimbursed or repaid within the time hereinafter provided, the amount of such tax paid by him upon the presentation to and the approval of the state auditor of a claim for refund. Those aviation gasoline fuel taxes collected, upon which no refund is claimed and those revenues remaining as unclaimed refunds under the provisions of the statutory refunds on aviation gasoline and aviation motor fuels are hereby appropriated, in accordance with the time limitations as provided by law, and used exclusively for construction, reconstruction, repair, maintenance and operation of small landing strips near highways and communities in this state and for the purchase of necessary land required therefor and shall be administered and expended by the state of North Dakota aeronautics commission for the above purpose."

The material portion of this section is as follows:

. . . . Those aviation gasoline fuel taxes collected, upon

which no refund is claimed and those revenues remaining as unclaimed refunds under the provisions of the statutory refunds on aviation gasoline and aviation motor fuels are hereby appropriated, . . . and used exclusively for construction, reconstruction, repair, maintenance and operation of small landing strips near highways and communities. . . ." (Emphasis supplied)

The underscored language suggest that there is some other statutory provision upon which the unclaimed refunds are transferred. No information is furnished nor does a search disclose that any legislation was proposed or introduced pertaining specifically to refunds on aviation gasoline in the 1953 Legislature the year when the underscored language was enacted. This brings us to the question: Just what does the underscored language do? Does it qualify, describe or is it merely surplusage language? A search reveals no other statutory refund on aviation gasoline or motor fuel. In a sense this leaves the underscored language in the similar position of a "dangling modifier."

It is well established principle of law that every enactment by the Legislature has a purpose and meaning and is not a mere idle Act.

This brings us to the purpose and intent of the 1953 amendment as set out above. The purpose is not too difficult to determine, but the underscored language does raise the question stated above. If the underscored language refers to the general refund provision under the "agriculture and industrial purposes" phrase in the statute quoted above, it can be considered to be descriptive and not qualifying. If the underscored language were deleted in its entirety we would arrive at the same result as if such language were considered descriptive. This would make the underscored language surplusage. However, under the principle that every legislative act has a purpose and meaning the construction that the underscored language is descriptive would be favored. Considering the statute separately and alone, it is easily concluded that its purpose is to permit the state auditor to transfer the unclaimed refund on aviation gasoline and motor fuel to the aeronautics fund.

After arriving at this conclusion we are compelled to refer to Article 56 of the North Dakota Constitution which is as follows:

1. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, after deduction of cost of administration and collection authorized by legislative appropriation only, and statutory refunds, shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways."

The North Dakota Supreme Court has had occasion to state the purpose and general provisions of Article 56. The court said that the revenues obtained under this article were dedicated for a specific purpose, 70 N.D. 782 and 74 N.D. 465. The court specifically said in

74 N.D. page 496 that:

Article 56 was not intended to be an idle gesture. It sought to deal with a condition and not merely to announce a theory. According to its terms the revenue therein specified is definitely and unequivocally segregated from all other public revenues and dedicated solely to the construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred for such purposes. It prohibits the appropriation and use of any of such revenue for general governmental purposes or for any purposes other than those stated."

Under this expression by the court there is left little doubt as to what Article 56 was intended to accomplish.

The term "revenue" is defined to mean an item of income, a source of income, and the annual or periodical yield of taxes, excise, custom and etc. which the state collects for public use.

The word "revenue" is broad and general and includes all public moneys which the state collects and receives from whatever source and in whatever manner. 161 N.W. 264, 100 Neb. 747.

On page 494 of volume 74 of the North Dakota Reports, the court further stated that Article 56 freezes all the revenue derived from gasoline and motor fuel excise and license taxation for use for public highway purposes. The unclaimed refund most certainly would fall within the general meaning of the term "revenue." It would necessarily follow that such revenue is dedicated as set out in Article 56.

We then come to the exceptions. One exception is the cost of administration which is not involved in this question and for that matter raises no problem. The other exception is "statutory refund." The term "statutory" means pertaining to law, authorized by statute (law), and conforming to law. The term "refund" means to repay, reimburse, to pay back, restore, or give back. Thus the term "statutory refund" would mean to pay back to the person who made the payment as authorized by law or to give back as prescribed by law and under the conditions set out by law. Any refunds claimed under the statute must be filed within a certain time. If not filed within a certain time, no refund can be made. The product of unclaimed refunds as stated would fall in the same general category of revenue derived pursuant to the taxes received on gasoline. It is a well known principle that the right to tax also includes the right to refund or to return and also the right to prescribe the conditions under which a return or refund can be made.

The instant question does not involve the returning the money but involves the transferring of unclaimed refunds. It is assumed that gasoline and motor fuel is refundable under the agriculture and industrial phrase except for such fuel used for pleasure purposes. We are, however, at the moment not too concerned with this provision.

From the foregoing it is readily noted that there is grave doubt whether the transfer of the unclaimed refunds to the aeronautics fund

would be constitutional under the provisions of Article 56. We are aware that the North Dakota Supreme Court in 74 N.D. 244 restated the general principle of law that a legislative enactment is presumed to be constitutional and in case of doubt as to its constitutionality the doubt must be resolved in favor of its validity. We are also aware that under the North Dakota Constitution it requires a majority of four members of the five member Supreme Court to declare a statute unconstitutional.

We could conclude that merely and solely under the statutory provisions the unclaimed refunds could be transferred to the aeronautics commissioner. However, the statute appears to be in conflict with the Constitution. The Constitution being paramount the statute must yield.

It is our opinion based on the foregoing that a serious doubt exists whether the statutory provision relating to transferring unclaimed aviation gasoline tax refunds to aeronautics commission is constitutional.

In view of this it might be well to obtain a declaratory judgment to determine the validity of the statute and the rights of the respective parties under the statute and Constitution. In other words a judgment to determine whether highway department or aeronautics commission is entitled to the unclaimed refunds.

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