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Federal Taxation: Deductibility of the Florida Gasoline Tax for Federal Income Tax Purposes

Bart L. Cohen

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MORRIE BENSON
EDWARD S. RESNICK

LEGISLATIVE NOTES

FEDERAL TAXATION: DEDUCTIBILITY OF THE FLORIDA GASOLINE TAX FOR FEDERAL INCOME TAX PURPOSES

Florida Statutes §208.04 (1941)

In 1931 the Legislature of Florida provided for a gas tax of six cents upon each gallon of gasoline, or other like product of petroleum, sold by the dealer or distributor in Florida.¹ Amended in 1937,² it stated that the intent and purpose was that the levy be upon the consumer, and that the dealer act merely as agent of the state in the collection of the tax. It was further provided that the tax "*shall* be added to the purchase price." Again revised in 1941,³ the statute presently in force provides specifically for a consumer tax but is directed toward the "*first* sale or transfer" of the product within the state. Moreover, the adding of the tax by the dealer to the purchase price has been made permissive by replacing the word "shall" in the previous act with the word "may." These changes came about during the general revision and compilation of the laws of Florida by the Attorney-General,⁴ and the Legislature

¹Fla. Laws Spec. Sess. 1931, c. 15659, §1.

²Fla. Laws 1937, c. 18298, §1; FLA. COMP. GEN. LAWS §1167-29(a) (Supp. 1940). Italics supplied.

³FLA. STAT. §208.04 (1941). Italics supplied.

⁴This revision was provided for by Fla. Laws 1939, c. 19140, and approved by Fla. Laws 1941, c. 20719.

either failed to detect this important change or decided not to object to it.⁵

Under the Internal Revenue Code⁶ every taxpayer is allowed deductions for "all" taxes imposed upon him, with certain specific exceptions. State gasoline taxes are not excepted and, therefore, are deductible. The question does arise, however, as to who may deduct such taxes. The general rule⁷ is that, for a taxpayer to be entitled to a deduction, he must show that the tax was "*imposed upon him*" by the taxing authority. An exception to this rule has been provided for under the Internal Revenue Code⁸ whereby a consumer in computing his federal income tax may deduct the amount of the retail sales tax which he pays to the dealer upon whom the tax is imposed. However, when the amount of a tax is deducted as a business expense, under another section of the Code,⁹ it is not to be deducted again as a tax.¹⁰ The Treasury Department, through its Income Tax Unit, has ruled upon the gasoline tax statutes of the various states, holding that the tax is deductible by the consumer in forty-one states and the District of Columbia, either as (1) a retail sales tax or (2) as a tax imposed upon the consumer in the first instance;¹¹ whereas, the consumers of gasoline in seven states and Hawaii are denied this valuable tax benefit.¹²

Florida is one of the seven states in which the gas tax is not deductible by the consumer. This has not always been the case. From 1937 until 1944 the consumer of gasoline in Florida could deduct the amount of the tax that he paid each year. This deduction was allowed by the Income Tax Unit,¹³ which emphasized the provision of the Florida statute¹⁴ stating that "*the purpose and intent of this provision [is] that*

⁵FLA. H. R. JOURNAL 1468 (1941). and FLA. SEN. JOURNAL 696 (1941), wherein action upon Senate Bill No. 726 was taken, indicate that all readings of this material as revised were waived.

⁶INT. REV. CODE §23(c)(1).

⁷Small v. Commissioner, 27 B. T. A. 1219 (1933).

⁸INT. REV. CODE §23(c)(3).

⁹INT. REV. CODE §23(a)(1)(A).

¹⁰INT. REV. CODE §23(c)(3).

¹¹2 P-H 1948 FED. TAX SERV. ¶13,126. Only the Tennessee statute, TENN. CODE ANN. §1128 (Michie) has been construed in this way; I. T. 3616, 1943 CUM. BULL. 136.

¹²2 P-H 1948 FED. TAX SERV. ¶13,125.

¹³I. T. 3113, 1937-2 CUM. BULL. 86. The Income Tax Unit stated that the tax, up until the 1937 amendment to the Florida gas tax statute, had been upon the dealer.

¹⁴Fla. Laws 1937, c. 18298, §1; FLA. COMP. GEN. LAWS §1167-29(a) (Supp. 1940).

the tax is in fact a levy on the consumer." But in 1944 the Income Tax Unit reversed this former ruling in holding that the Florida gas tax is a levy upon the dealer.¹⁵ The Income Tax Unit stated that the basis of its contention was the holding to the same effect by the Florida Supreme Court in *United States v. Lee*.¹⁶ This administrative ruling also pointed out that the Florida gas tax did not meet the requirements of a retail sales tax as set out under the Code and its subsequent interpretation.¹⁷

In *United States v. Lee* the Government sought to enjoin Lee, the Comptroller of Florida, from the collection of the state gasoline tax on its purchases within the state. It contended that the Florida gasoline tax was a tax upon the consumer and that this would be an unconstitutional burden upon the United States.¹⁸ The Florida Supreme Court, in affirming the lower court's denial of the injunction, held that the Florida gas tax was a dealer tax and not one imposed upon the consumer, the United States, and therefore did not contravene the Constitution. The Court decided that, although the 1937 statute may have imposed a consumer tax, it had been superseded in 1941 by the statute presently in force. Though admitting that the statute expressly stated that, "This levy of the tax is upon the consumer," the Court ruled that the levy was inconsistent with a consumer tax, since it made the adding of the amount of the tax to the price of the gasoline permissive, and that, although the financial burden might ultimately fall on the consumer, the tax was imposed upon the dealer. In concluding its opinion, the Court stated that subsequent legislation¹⁹ "left no doubt" that the intent of the Legislature was to impose a tax upon the dealer in gasoline.

To bring order into the chaos of Florida gas tax law, it is necessary for the Legislature of Florida to take firm and well-directed steps. These measures must be directed toward the establishment of a state gasoline tax that is fair to the state, to the dealer, and to the consumer. Congress has blazed a clear trail which, when followed, leads to a complete solution. This goal is the construction by the Government, for federal income tax purposes, of the state gasoline tax as a retail sales tax. Florida, in attaining this end, would be marching down a path already well trodden by

¹⁵I. T. 3636, 1944 CUM. BULL. 103.

¹⁶*United States v. Lee*, 153 Fla. 94, 13 So.2d 919 (1943).

¹⁷INT. REV. CODE §23(c)(3); I. T. 3616, 1943 CUM. BULL. 136.

¹⁸*West v. Oklahoma Tax Comm'n*, 68 Sup. Ct. 1223, 1226 (1948); *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

¹⁹Fla. Laws 1943, c. 21757; FLA. STAT. ANN. §208.45, which provides that the dealer is to be exempt from the gas tax for gasoline sold to the United States.

LEGISLATIVE NOTES

117

legislative brogans in that this method of motor fuel taxation has been adopted by forty states and the District of Columbia.²⁰ The Internal Revenue Code sets forth four requirements²¹ that must be met by a tax statute so that it may be construed as a retail sales tax. These are: (1) that the payor of the tax be engaged in selling tangible personal property or in furnishing services, at retail, directly to the purchaser or consumer; (2) that the tax be imposed with respect to the final sale before consumption or use; (3) that the amount of the tax be a certain sum per unit; and (4) that the amount of the tax be separately stated from the price when the product is sold at retail. The present Florida statute would need only minor changes in form, these being in regard mainly to (2) and (4) *supra*. The special additional one-cent gas tax statute²² in Florida could also be modified to conform to the foregoing requirements. By such changes in the statutes, Florida's fiscal remuneration would not be changed one iota, inasmuch as Florida, even prior to *United States v. Lee*, had specifically exempted gasoline sales to the Federal Government from the operation of the tax termed in that case a levy for the privilege of selling gasoline.²³ The resultant change in the administration of the tax would amount merely to a shifting of the burden of filing monthly returns²⁴ from the wholesaler or distributor to the retailer. This so-called burden is evidently not unduly onerous, since an overwhelming majority of states seem to be well satisfied with the method. The purchaser need not be furnished with a sales slip or invoice of his purchase.²⁵ Moreover, he may approximate the amount of tax that he has paid.²⁶ Under this type of levy the retailer, as well as the consumer, is entitled to deduct the tax under the Code, since the tax is, in different senses, imposed upon each.²⁷ It is actually remitted to the Government by the dealer, yet it is passed on separately and in full, as the very same tax, to the consumer, who ultimately pays:

²⁰2 P-H 1948 FED. TAX SERV. ¶13,126.

²¹INT. REV. CODE §23(c)(3).

²²FLA. STAT. §208.44 (1941).

²³See note 19 *supra*.

²⁴FLA. STAT. §208.06 (1941).

²⁵U. S. Treas. Reg. 111, §29.23(c) (1943), as amended by T. D. 5458, 1945 CUM. BULL. 45.

²⁶*Miller v. Commissioner*, 150 F.2d 823 (C. C. A. 2nd 1945); *Cohan v. Commissioner*, 39 F.2d 540 (C. C. A. 2nd 1930); *Nelson v. Commissioner*, 6 T. C. 772 (1946).

²⁷INT. REV. CODE §23(c)(1),(3). 2 P-H 1948 FED. TAX SERV. ¶13,125 indicates that this is the general practice in the 40 states having a retail sales tax on gasoline.