

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 16699
[Redacted],)	
)	DECISION
Petitioner.)	
_____)	

[Redacted]. (taxpayer) protests the Notice of Deficiency Determination (NOD) issued by the Idaho State Tax Commission (Commission) that denied taxpayer its claimed refund of \$1,960,273 for motor fuels taxes collected and remitted to the Commission for the period September 1, 1996 thru April 15, 1999 on sales of motor fuel to [Redacted], two motor fuel retail outlets owned and operated by the [Redacted] on the [Redacted].

The NOD was issued on May 9, 2002. The taxpayer timely protested by letter dated July 10, 2002. By letter dated August 21, 2002, the taxpayer indicated its desire that a decision be issued on written materials submitted by that time and any additional materials it might submit by September 30, 2002. On December 20, 2002, the Commission inquired by letter whether the taxpayer had any additional materials to submit. By letter of December 30, 2002, the taxpayer indicated that it did not intend to submit additional documents and that the Commission could proceed to issue its decision. This is that decision.

BACKGROUND

Motor fuel distribution typically begins with a refinery transporting fuel, usually through a pipeline, to a terminal. Distributors purchase fuel at a terminal. The distributor then sells the fuel to a retailer who in turn sells it to the consumer. Some distributors have their own retail outlets.

The profit margin at each level of the distribution chain is low. There is typically a \$.06 to \$.10 difference between the price the distributor pays for the fuel and the price the consumer pays at the pump. At \$.25 cents per gallon, the state motor fuels tax is high in comparison to the profit margins associated with the distribution chain. The economic burden of the motor fuel tax is passed down the chain and ultimately is borne by the consumer. Courts have accepted this fact. See, e.g. *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000).

There is a distinction between the economic burden of the tax and its legal incidence. The economic burden of the tax is borne by the consumer because it is the consumer's pocket from which the tax ultimately is paid. The legal incidence of a tax identifies the entity on whom the tax falls and to whom the state will look for payment. The Commission historically viewed the distributor as the entity bearing the legal incidence of Idaho's motor fuels tax. Indeed, both the United States Supreme Court and the Idaho Supreme Court held that the motor fuel tax statute in effect prior to the current statute did place the legal incidence of the tax on the distributor. [See, *American Oil Company v. P.G. Neill*, 380 U.S. 451, 85 S.Ct. 1130 (1965) and *V-1 Oil Co. v. State Tax Commission*, 98 Idaho 140, 559 P.2d 756 (1977).] The Commission viewed the tax as incurred either when the distributor took possession of the fuel at a terminal located in Idaho, or when the distributor transported the fuel into the state if the terminal was located outside the state.

In 2001, the Idaho Supreme Court held the Commission's understanding of the Idaho motor fuels statutes in error. In *Goodman Oil Company v. Idaho State Tax Commission*, 136 Idaho 53, 28 P.3d 996 (2001), *cert. denied*, 534 U.S. 1129 (2002), the Court held: (1) there was no federal legislation permitting states to impose their motor fuels taxes on the receipt or sale of fuel to Indians on their reservations, and (2) the legal incidence of Idaho's motor fuels tax fell on

the retailer. This had the effect of prohibiting the state from taxing the receipt of motor fuel by retail outlets located on Indian reservations when those outlets were owned either by the tribe on whose reservation the outlet was located, or by an enrolled member of that tribe. The *Goodman* decision resulted in numerous claims for refund of motor fuels taxes collected and remitted on sales to Indian owned outlets. This is one of them. The Commission upholds the denial of the taxpayer's refund claim for the following reasons.

REASONS FOR DENIAL

There are at least four independent reasons for denial.

A. The Legislature Amended the Motor Fuel Tax Statute to Place the Legal Incidence of the Tax on the Distributor and Made Such Amendment Retroactive to 1996.

The taxpayer's claim for refund depends upon the legal incidence of the tax falling on the Indian retailer. This is where the *Goodman* Court held it fell. After the *Goodman* decision was issued, however, the Idaho Legislature, in its 2002 Session, amended the motor fuel tax statute to place the legal incidence of the tax on the distributor. 2002 Idaho Session Laws, chapter 174. It made the amendments retroactive to July 1, 1996. This encompasses the period for which the taxpayer claims refunds are due.

B. Any Refund to the Distributor Must Be Passed Through to the Purchaser

Tax Commission Rule 180.02 requires that any claim for refund to the distributor must include a statement that the amount refunded to the distributor has been or will be refunded by the distributor to the purchaser. This rule recognizes the fact that the final purchaser, the consumer, bears the economic burden of the motor fuel tax. It is, therefore, only fair that the consumer receive the benefit of any refund. The distributor, after all, has already passed the tax on to the retailer who in turn has passed it on to the consumer. In this case, the taxpayer has not

identified any mechanism by which the consumer will be able to receive any refund paid. Because the distributor sold the fuel in question to retail outlets, he does not have direct contact with the consumer. It is, therefore, difficult to conceive of a way to get any refund paid to the taxpayer back into the hands of the consumers. Without such a mechanism, the taxpayer is not entitled to any refund.

C. The “Pass-On” Defense Precludes a Refund

The taxpayer is not entitled to a refund because it did not bear the economic burden of the motor fuels tax. It passed the economic burden of the tax on to the retailer who in turn passed it on to the consumer. Because motor fuels taxes are dedicated largely to repair and maintenance of highways, any refund [Redacted] receives will amount to a windfall for [Redacted] at the expense of the motoring public.

In order for the taxpayer to be entitled to a tax refund, it must show, as it has not, that it bore the burden of the tax and did not pass it on. This “pass-on” defense is most recently articulated and discussed in *Milwaukee Safeguard Insurance Company, et al. v. Selcke*, 324 Ill. App.3d 344, 754 N.E. 2d 349 (2001), *cert denied* 197 Ill.2d 565, 763 N.E. 2d 772 (2001), *cert denied* ____ U.S. ____, 122 S. Ct. 1952 (2002). Having reviewed the case, the Commission is persuaded that the Idaho Supreme Court will rule the “pass-on defense” applies as a matter of law in Idaho and that the taxpayer has the burden of establishing there was no windfall.

In *Milwaukee Safeguard*, insurance companies brought an action against the Illinois Department of Insurance seeking a declaration that the privilege tax imposed on foreign corporations violated the uniformity clause of the state constitution. The Illinois Supreme Court held it did and remanded the case for determination of remedies. The trial court ruled that the companies had passed on the tax burden to their policyholders and were not, therefore, entitled to

a refund. An interlocutory appeal followed. The appellate court held the pass-on defense applied as a matter of law and that taxpayers had the burden of establishing that they did not pass on the tax to another party.

Because it prevents obvious unjust enrichment, the Commission believes Idaho's courts will look with favor upon the "pass through," or "pass on" defense recognized in Illinois.

D. Even if the Above Reasons for Denial are Inoperative the Taxpayer is not Entitled to Any Refund Until Competing Claims For the Same Refund Dollars Are Adjudicated.

[Redacted] claims a refund of fuel tax remitted to Idaho on fuel it sold to Indian owned retail operations. The retail operator claims a refund of the same tax money. Even if a refund is owed, it is not owed twice. If any refund is due, it must first be determined to whom it is due before it is paid.

An explanation of the taxpayer's right to appeal this decision is included with this decision.

DATED this ____ day of _____, 2003.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2003, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted] Receipt No. [Redacted]
[Redacted]
