Larry E. Meyers, Director
Income and Excise Audit Division
Department of Revenue

October 31, 1991

661-91-0590

269-5255

Motor fuel tax (AS 43.40)

David T. LeBlond
Assistant Attorney General
Oil, Gas & Mining - Anchorage

You have requested advice about the motor fuel tax imposed under AS 43.40, in light of previous attorney general opinions and Revenue hearing decision 87-07. In particular, you have asked whether a motor fuel use tax may be imposed on fuel consumed by interstate transportation carriers, principally water transportation carriers, under existing law. If not, you have asked what changes in regulations or statutes are required in order to impose the tax.

As discussed below, a use tax may not be imposed on fuel consumed by interstate transportation carriers without at least adopting a new regulation, and it would be advisable to first amend the motor fuel tax statutes.

Although some of the previous analyses of the motor fuel tax are flawed, it is now established policy that the motor fuel use tax is not applicable to fuel consumed by interstate carriers. Notice, in the form of a new regulation at least, is required before this interpretation of the motor fuel tax, and the existing tax policy of the state, may be changed. Because the existing policy is based on statutory interpretation that the legislature did not intend to impose a use tax on fuel consumed by interstate transportation carriers, and legislative intent is not clear, a statutory change to authorize imposition of the tax is the best way to resolve the issue.

INTRODUCTION

As discussed in memorandums of March 17, 1986, from Assistant Attorney General Richard D. Monkman to James R. Ayres of the governor's office, and of September 15, 1987, from Assistant Attorney General Deborah Vogt to Revenue Commissioner Malone, the motor fuel taxes imposed by AS 43.40.010 are compensating sales and use taxes. AS 43.40.010(a) levies a sales tax on motor fuel sold or otherwise transferred within the state.

AS 43.40.010(b) levies a use tax on motor fuel consumed by a user (within the state) on which the sales tax has not been paid. As pointed out in the Monkman memorandum, this is a well-established state tax scheme.

The Monkman memorandum speaks only in general terms about the sales and use tax on motor fuel, and in general the advice is sound. The memorandum states that, under AS 43.40.010(b), interstate transportation carriers may be required to pay a use tax on motor fuel consumed within Alaska. The Monkman memorandum notes that Revenue had begun taking action to collect this use tax. It states that this is not a change in policy but is simply effective application of long-standing policy of collecting taxes.

A year later, on March 19, 1987, a Revenue hearing officer issued Revenue hearing decision 87-07, which rules that the use tax may not be imposed on fuel consumed by interstate water transportation carriers because they are not "users" under the statutory definition.

The subsequent Vogt memorandum was evidently requested in light of questions which were raised in the administrative hearing process. It addresses a number of issues. First, the Vogt memorandum advises that a motor fuel use tax on fuel consumed within the state by interstate transportation carriers is constitutional. Second, it advises that a credit for out-of-state sales taxes is constitutionally required and concludes that existing Alaska law does not authorize a credit, thus precluding imposition of the tax. Enabling legislation for credits is recommended if Revenue intends to impose the use tax on fuel consumed by interstate carriers. Third, the Vogt memorandum reiterates the hearing officer's conclusion that existing law does not impose the motor fuel use tax on interstate carriers, as a matter of statutory interpretation, because interstate carriers are not "users," and in addition the Vogt memorandum concludes that it could not have been the legislative intent to impose the use tax on interstate carriers because when the tax statutes were enacted interstate commerce was considered immune from state taxation.

Revenue hearing decision 87-07, and the Vogt memorandum, interpret the statutory definition of "user" more narrowly than is necessarily required. Arguably, at least, a broader interpretation is possible; and the conclusion could be reached that interstate transportation carriers are "users" of fuel consumed in transit. In addition, the Vogt memorandum fails to note existing statutory authority for allowing a credit for out-of-state sales taxes, which obviates the need for additional

enabling legislation to avoid the constitutional problem of double taxation.

Therefore, a use tax could be imposed on fuel consumed by interstate carriers, under existing statutes and regulations, as generally stated in the Monkman memorandum. However, contrary interpretations of the existing law in Revenue hearing decision 87-07 and the Vogt memorandum are now established tax policy, and preclude imposition of a use tax on fuel consumed by interstate carriers without notice or a statutory change. If a new regulation is proposed, transportation carriers will undoubtedly challenge the validity of a new interpretation that the existing statutes authorize the tax. Therefore, legislation to amend the statutory provisions and clearly impose a use tax on fuel consumed by interstate transportation carriers is the best way to resolve the issue.

DISCUSSION

The motor fuel tax.

> For tax purposes, "motor fuel" is defined, in part, as "fuel used . . . for the propulsion of a motor vehicle or aircraft, and fuel used in and on watercraft for any purpose." AS 43.40.100(2). There are numerous statutory exclusions from the definition based upon how fuel is used, and Revenue may adopt regulations prescribing other nontaxable uses. AS 43.40.100(2)(K).

The obligation to collect and remit the sales tax is imposed on a "dealer" who sells or otherwise transfers motor fuel in the state. AS 43.40.010(c). The use tax is imposed on a "user" who consumes motor fuel, who "shall likewise remit the tax accrued on motor fuel actually used by the user during each month." Id. Together, these corresponding sales and use tax levies impose the motor fuel tax on all fuel purchased or "consumed" for taxable purposes, e.g., "in and on watercraft for any purpose." AS 43.40.100(2)(B).

The sales and use taxes are "compensating" taxes because they work in harmony to tax all taxable motor fuel in the state without omission or double taxation. As pointed out in the Vogt memorandum, the incidence of the tax is either the sale or the use of fuel, but not both. By definition of "user," the use tax is not imposed on motor fuel on which the sales tax has been paid. Taxable motor fuel (meaning all fuel used for taxable purposes within the state) not sold or otherwise transferred within the state (subject to the sales tax), e.g., motor fuel

purchased out-of-state, is subject to the use tax when "consumed" within the state.

Analysis.

1. Statutory interpretation.

Revenue hearing decision 87-07 and the Vogt memorandum of September 15, 1987, have declared that under existing law the motor fuel use tax may not be imposed on motor fuel consumed by interstate transportation carriers.

The use tax is imposed on motor fuel consumed by a user. "User" is defined to include all persons who consume fuel within the state on which the sales tax has not been paid. In particular, a "user" is a person who "purchases the fuel out of the state and ships it into the state for personal use in the state." AS 43.40.100(4)(A) (emphasis added.) As the Vogt memorandum notes, Revenue decision 87-07 interpreted this definition of "user" as referring only to fuel "shipped" into the state as cargo and then used for taxable purposes, not to bunkered fuel purchased out-of-state and consumed within the state by a water transportation carrier.

The Vogt memorandum also reasoned that carriers are not "users" because the Alaska use tax was enacted at a time when interstate commerce was accorded tax immunity, and therefore it could not have been the legislature's intent to tax the consumption of fuel by interstate transportation carriers.

2. Constitutional issues.

As described in the Vogt memorandum, a use tax on motor fuel consumed within the state by an interstate carrier is undoubtedly constitutional under Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Interstate commerce is no longer tax immune.

With respect to compensating sales and use taxes, as the Vogt memorandum discusses, a use tax may discriminate against interstate commerce unless the state affords a tax credit or exemption for out-of-state sales taxes. The Vogt memorandum concluded that there is no statutory authority for granting a credit, and therefore a motor fuel use tax may not be imposed validly on fuel consumed within Alaska by interstate transportation carriers.

The motor fuel tax statutes do not authorize a credit. However, the Vogt memorandum overlooked other statutory

authority which does authorize a credit for out-of-state sales taxes. Article V of the Multistate Tax Compact, AS 43.19.010, states in part that "[e]ach purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the . . . legally imposed sales or use taxes paid by the purchaser with respect to the same property to another state." This provision obviates the problem identified in the Vogt memorandum. It authorizes a credit for any out-of-state sales tax paid by a taxpayer who is liable for a use tax for consumption of motor fuel within Alaska.

CONCLUSION

Arguably, existing Alaska law authorizes imposition of a motor fuel use tax on fuel consumed within Alaska by interstate transportation carriers, but as interpreted in Revenue decision 87-07 and the Vogt memorandum, the statutes do not authorize the tax. Thus, you should seek statutory changes specifically authorizing the tax before attempting to impose it.

DTL:crg