

VOLUME NO. 51

OPINION NO. 7

SCHOOL DISTRICTS - Refund of taxes paid by contractors on special fuels;
TAXATION AND REVENUE - Ownership of special fuel determined by who purchases the fuel outright, not through inclusion in a contract or bid price;
TAXATION AND REVENUE - Refund of taxes paid on special fuels;
TAXATION AND REVENUE - Public entity not entitled to refund of taxes paid on special fuels by services contractor;
MONTANA CODE ANNOTATED - Sections 15-6-201(1)(e), (2)(a), 15-70-301(16), -321, -356(2)(a).

HELD: A school district may not claim a refund pursuant to Mont. Code Ann. § 15-70-356(2)(a) of taxes paid on special fuels by a company which contracts with the district to provide bus service for the district's students.

August 4, 2005

Mr. Robert Zimmerman
Sanders County Attorney
P.O. Box 519
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Dear Mr. Zimmerman:

You have requested an opinion on the following question:

May a school district claim a refund of taxes paid on special fuels, pursuant to Mont. Code Ann. § 15-70-356(2)(a), even if the school district contracts with a bus company to transport its students?

The Legislature has empowered the Department of Transportation to collect taxes on "special fuels," defined in Mont. Code Ann. § 15-70-301(16) to include what is commonly known as diesel fuel. The legal incidence of the tax falls on the owner or operator of the motor vehicle

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using the special fuels. Mont. Code Ann. § 15-70-321. Mont. Code Ann. § 15-70-356(2)(a) provides:

The United States government, the state of Montana, any other state, or any county, incorporated city, town, or school district of this state is entitled to a refund of the taxes paid on special fuel regardless of the use of the special fuel.

Your letter informs me that the district contracts with independent contractors to provide transportation for students to and from school. The contractors own and operate the busses and also pay for the fuel used to operate those busses for transporting students.

By the terms of the statutes, the exemption is not available to the district on these facts. The tax is paid by the owner or operator pursuant to Mont. Code Ann. § 15-70-321. The refund is available to the district only for “taxes paid.” The district pays no tax under the scenario you outline, and the refund procedure therefore does not apply.

Your letter argues that the use of the property, not its ownership, is determinative, citing Steer, Inc. v. Department of Revenue, 245 Mont. 470, 803 P.2d 601 (1990). The case does not support the application of the refund statute to the district or its contractor here. Steer involved a claim that cattle were exempt from taxation as personal property because the income derived from them was used for charitable purposes. The Montana Supreme Court rejected the claimed exemption, relying principally on the rule that tax exemption statutes are to be construed strictly against the taxpayer. 245 Mont. at 477. The exemption statute at issue, Mont. Code Ann. § 15-6-201(1)(e) and (2)(a), exempted from tax “institutions of public charity,” and cattle are animals, not institutions. Accordingly, the Court, strictly construing the exemption, held that the cattle were subject to tax.

In your case, strict construction of the refund statute can lead to only one conclusion. The refund is available only if the district paid the tax. That is unquestionably not the case here.

Northwestern Improvement Co. v. Rosebud County, 129 Mont. 412, 288 P.2d 657 (1955), is likewise unhelpful. In that case, the Court considered the tax status of a building owned by a private company and leased to a school district for use as a public school. The applicable statute and constitutional provision provided an exemption from property tax for the property of a school district as well as any property “used exclusively for educational purposes.” Under that statute, the Court held that the exemption applied regardless of ownership. Here, the special fuel tax refund statute has no similar language.

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Montana Code Annotated § 15-70-356(2)(a) states that a school district is entitled to a refund of special fuels taxes paid “regardless of the use of the special fuel.” This provision does not alter the conclusion expressed above. Nothing in the language of this clause contradicts the clear operation of the statutory language placing the legal incidence of the tax on the owner or operator and limiting the refund to taxes paid. Applying the rule of strict construction, in my opinion the clause simply clarifies that when the district has paid a tax on special fuel, it may seek the refund regardless of the district activity for which the fuel was used.

The general argument that the district “pays” the tax by virtue of the fact that the contractor builds the cost of the fuel into the contract price charged the district is not persuasive. Courts have long been critical of the view that a governmental tax exemption may be passed through to the government’s contractor because the economic burden of the tax falls ultimately on the government. See, e.g., Alabama v. King & Boozer, 314 U.S. 1, 8-9 (1941) (“The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.”)

Recognition of such a tax immunity for special fuel taxes paid by those who contract with a school district would create a huge unintended loophole in the special fuels tax statute. Districts contract with all manner of entities for functions that require the use of special fuel. There is no evidence in the language of the statute to suggest, for example, that when the district enters into a contract for the construction of a school, the construction contractor or the district can receive a refund of the special fuels tax for the fuels used in the contractor’s trucks, backhoes, and road graders simply because the bid price included such overhead costs. If the legislature intended such a result, the rule of strict construction would require much clearer evidence than that which is available under these statutes.

THEREFORE, IT IS MY OPINION:

A school district may not claim a refund pursuant to Mont. Code Ann. § 15-70-356(2)(a) of taxes paid on special fuels by a company which contracts with the district to provide bus service for the district’s students.

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Very truly yours,

MIKE McGRATH
Attorney General

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