



**MATTHEW G. BEVIN**  
Governor

**FINANCE AND ADMINISTRATION CABINET**  
**DEPARTMENT OF REVENUE**  
501 HIGH STREET  
FRANKFORT, KENTUCKY 40620  
Phone (502) 564-3226  
Fax (502) 564-3875  
www.kentucky.gov

**WILLIAM M. LANDRUM III**  
Secretary

**DANIEL P. BORK**  
Commissioner

In the matter of:

[REDACTED]

Contact: Attn: [REDACTED]

[REDACTED]

FINAL RULING NO. 2016-46  
December 29, 2016

Special Fuels and Gasoline Tax Refund Claim for the  
December 1, 2008 through February 27, 2014 Tax Periods

### FINAL RULING

The [REDACTED] (" [REDACTED] ") has protested the Department of Revenue's ("Department") denial of multiple special fuel and gasoline refunds for the tax periods December 1, 2008 through February 27, 2014. The amount requested by [REDACTED] and denied by the Department totals \$ [REDACTED] in special fuels purchases and \$ [REDACTED] in gasoline purchases over the course of the tax periods.

[REDACTED] purchased the fuel through multiple transactions at retail service stations across the state as vehicles needed refueling. It is the position of the Department that [REDACTED] is not the appropriate party to request a refund of motor fuels tax paid. In fact, the tax is not imposed upon the [REDACTED] purchases of fuel at retail and the tax was required to be reported and paid before any fuel purchases were ever made by [REDACTED]. The Department is supported by KRS 138.220(1)(e), which states:

(e) The tax herein imposed shall be paid by the dealer receiving the gasoline or special fuel to the State Treasurer in the manner and within the time specified in KRS 138.230 to 138.340 and all such tax may be added to the selling price charged by the dealer or other person paying the tax on gasoline or special fuel sold in this state.

The Department holds that [REDACTED] is not a dealer within the state of Kentucky that received special fuels or gasoline and remitted payment to the State Treasurer. Furthermore, [REDACTED] did not purchase the fuels in question from a licensed dealer in Kentucky, the party liable for the tax. Since [REDACTED] did not directly pay the State Treasurer the motor fuels tax on either special fuels or gasoline, [REDACTED] is not the appropriate party to request such a refund. This position is also supported by KRS 134.580(2) which states:

(2) When money has been paid into the State Treasury in payment of any state taxes, except ad valorem taxes, whether payment was made voluntarily or involuntarily, the appropriate agency shall authorize refunds to the person who paid the tax, or to his heirs, personal representatives or assigns, of any overpayment of tax and any payment where no tax was due.

It is the Department's position that the legal incidence of the tax does not fall on [REDACTED]. The current approach to examining whether or not a state tax violates the constitutional or congressional federal tax immunity doctrine relies upon the "legal incidence" test. *See, e.g. Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3(1941); *United States v. State Tax Commission of Mississippi*, 421 U.S. 599, 95 S.Ct. 1972, 44 L.Ed.2d 404 (1975); *Comptroller v. World Inns, Inc.*, 310 Md. 154, 528 A.2d 477, 480 (1987) ("It is clear from United States Supreme Court precedent that constitutional intergovernmental tax immunity is only properly granted when the legal incidence of a state tax falls directly on the United States"). "At the risk inherent in generalities, perhaps it may serve a useful purpose to generalize that the 'legal incidence' of the tax will usually fall upon the statutorily designated taxpayer from whom the tax is collected unless it is clearly directed that the tax is passed on to another." Hartman, *Federal Limitations on State and Local Tax*, § 6:17 (2d ed. 2016).

Thus, the first factor that must be examined in order to determine where the legal incidence of the tax falls is; what party is statutorily liable for the tax. KRS 139.220(1)(e) provides that "[t]he tax herein imposed shall be paid by the dealer receiving the gasoline or special fuel..." (Emphasis added). Therefore, the plain language of the statute itself contemplates that the tax is imposed on the dealer. Furthermore, there is no provision in the taxing statute for the collection of the tax directly from the United States. Thus, it is the dealer, not the retailer, and certainly not the United States as a consumer, that is the party against which the tax is imposed and who is statutorily liable for the tax.

The next factor which must be examined in order to determine where the legal incidence of the tax falls is; whether the economic burden of the tax is required to be passed on to the United States. In *United States v. State Tax Commission of Mississippi, supra*, the Court held "that where a state requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." (Emphasis added). However, there is no provision in KRS 138.220 that would require

the tax be passed on to the retailer or the consumer. KRS 138.220(1)(e) provides, in pertinent part that "...all such tax may be added to the selling price charged by the dealer..." (Emphasis added). KRS 446.010(26) states that "[m]ay is permissive", and thus, not mandatory. The statutory liability for the tax here falls on the dealer and there is no requirement that the tax be passed on. Thus, the legal incidence of the tax does not fall on the United States.

Furthermore, the legislative intent behind KRS 138.220 supports the Department's position. In determining legislative intent, the courts "must look to the express language of the statute rather than surmising what may have been intended by the Legislature but was not expressed". See *Coy v. Metropolitan Property and Cas. Ins. Co.*, 920 S.W.2d 73 (Ky. 1995). As discussed above, the plain language of KRS 138.220 imposes the tax on the dealer. Moreover, the legislature did not require that this tax be passed on to the consumer. Therefore, the language of the statute itself shows that the Legislature did not intend this tax to be placed on the United States as a consumer.

██████ insists that the rights and obligations of the parties to the transaction on which the tax is imposed is relevant to determining where the legal incidence of the tax falls. It must first be noted that ██████ mistakenly believes that the transaction at issue is the consumer's purchase of the fuel from the retailer. However, the actual transaction being taxed is the receipt of the fuel by the dealer. KRS 138.220(1)(e) provides, in pertinent part, that, "[t]he tax herein imposed shall be paid by the dealer receiving the gasoline or special fuel..." (Emphasis added). Thus, this factor supports the Department's position, not ██████'s.

██████ insists that the ultimate economic burden of the tax here falls on the United States as a consumer. However, even assuming that the ultimate economic burden of the tax does fall on the United States, this would not be dispositive as to where the legal incidence of the tax falls. See *Gurley v. Rhoden* 421 U.S. 200, 204, 95 S.Ct. 1605, 1608, 44 L.Ed.2d 110 (1975). The Court in that case went on to adopt the Illinois Supreme Court's reasoning that "[t]he economic burden of the tax has no relevance to the issue before us." *Id.* at 207. (Emphasis added).

Under the current test for determining where the legal incidence of the tax falls, it is clear that the legal incidence of the tax falls on the dealer because that is where the statutory incidence of the tax is placed and there is no requirement that the tax be passed on. Even if the Department were to adopt the balancing test urged by ██████, the outcome would be the same. Only one of the five factors urged by ██████ is even potentially in its favor, and thus even assuming that the ultimate economic burden of the tax falls on the United States, the legal incidence of the tax would not.

It is also the position of the Department that any motor fuels refunds to ██████ for the tax periods December 1, 2008 through November 19, 2010 are not due because these tax periods are out of statute for a refund. Refund claims can only be made within four (4) years of the payment

date. [REDACTED] requested said refunds on [REDACTED], 2014. Therefore, any refund prior to [REDACTED], 2010 is out of statute. KRS 134.580(3) supports this position.

(3) No refund shall be made unless each taxpayer individually files an application or claim for the refund within four (4) years from the date payment was made. Each claim or application for a refund shall be in writing and state the specific grounds upon which it is based. Denials of refund claims or applications may be protested and appealed in accordance with KRS 131.110 and 131.340.

For the reasons stated above, the Department has properly denied the refund requested by [REDACTED]. [REDACTED] protest of that denial is hereby disallowed.

This letter is the final ruling of the Department of Revenue.

### APPEAL

You may appeal this final ruling to the Kentucky Claims Commission, Tax Appeals, pursuant to the provisions of KRS 131.110, KRS 131.340-131.365, 103 KAR 1:010 and 802 KAR 1:010. If you decide to appeal this final ruling, your petition of appeal must be filed at the principal office of the Kentucky Claims Commission, Tax Appeals, 128 Brighton Park Boulevard, Frankfort, Kentucky 40601-3714, within thirty (30) days from the date of this final ruling. The rules of the Kentucky Claims Commission, Tax Appeals, which are set forth in 802 KAR 1:010, require that the petition of appeal must:

1. Be filed in quintuplicate;
2. Contain a brief statement of the law and facts in issue;
3. Contain the petitioner's or appellant's position as to the law and facts; and
4. Include a copy of this final ruling with each copy of the petition of appeal.

The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.


Proceedings before the Kentucky Claims Commission, Tax Appeals are conducted in accordance with 103 KAR 1:010, 802 KAR 1:010 and KRS 131.340-131.365 and KRS Chapter 13B. Formal hearings are held by the Commission concerning the tax appeals before it, with all testimony and proceedings officially reported. Legal representation of parties to appeals before the Commission is governed by the following rules set forth in Section 3 of 802 KAR 1:010:

1. An individual may represent himself in any proceedings before the Commission where his individual tax liability is at issue or he may obtain an attorney to represent him in those proceedings;
2. An individual who is not an attorney may not represent any other individual or legal entity in any proceedings before the Commission;
3. In accordance with Supreme Court Rule 3.020, if the appealing party is a corporation, trust, estate, partnership, joint venture, LLC, or any other artificial legal entity, the entity must be represented by an attorney on all matters before the Commission, including the filing of the petition of appeal. If the petition of appeal is filed by a non-attorney representative for the legal entity, the appeal will be dismissed by the Commission;  
and
4. An attorney who is not licensed to practice in Kentucky may practice before the Commission only if he complies with Rule 3.030(2) of the Rules of the Kentucky Supreme Court.

You will be notified by the Clerk of the Commission of the date and time set for any hearing.

Sincerely,

DEPARTMENT OF REVENUE



Attorney Manager  
Office of Legal Services for Revenue

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED