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Opinion No. 03-094

Tax-exempt fuel provided by metropolitan airport authority to independent contractor operating local transit service.

QUESTION

May a metropolitan airport authority provide tax-exempt fuel, at no charge, to an independent contractor operating a local transit service for a public and governmental purpose, using leased vehicles and operating wholly on property of the airport authority?

OPINION

Yes, provided that the independent contractor qualifies as a "local transit company" as defined by Tenn. Code Ann. § 67-3-1203(45) and both the airport authority and the independent contractor comply with Tenn. Code Ann. § 67-3-1501(b) and (d).

ANALYSIS

The facts as stated in the request are that a metropolitan airport authority, established pursuant to the provisions of Tenn. Code Ann. §§ 42-4-101 *et seq*., wishes to engage an independent contractor to provide local transit services to patrons of the airport authority through regular routes linking the authority's parking and terminal facilities. No passenger fares will be collected. The self-propelled coaches are to be operated by the independent contractor and leased by the authority with the understanding that the independent contractor will assume those lease payments during the term of any contract. It is further asserted that these transit operations are part of the operation of the airport authority and are for a governmental purpose. The airport authority wishes to provide its tax-exempt fuel to the independent contractor at no cost to the contractor.

This scenario involves the transfer of fuel from one entity that would certainly be entitled to a fuel-tax exemption to another entity that would under the proper circumstances be entitled to such an exemption if it were itself purchasing the fuel, but the statute creating those exemptions does not specifically address a transfer of fuel between two exempt entities. Nevertheless, allowing such a transfer without either entity incurring a fuel-tax liability appears to be consistent with the provisions and the general purpose of the exemption statute.

Chapter 3, Part 13 of Title 67 of the Tennessee Code imposes taxes on "all gasoline, fuel alcohol and substitutes therefor, imported into the state" and on "all gasoline or substitutes therefor refined, manufactured, produced, or compounded in this state" (Tenn. Code Ann. § 67-3-1301), as well as on "all diesel fuel and all other fuel other than gasoline that is suitable for use in a diesel-powered vehicle or which is used or consumed in this state to produce power for propelling motor vehicles" (Tenn. Code Ann. § 67-3-1302). Further provisions of this part impose additional taxes on "all petroleum products" (Tenn. Code Ann. §§ 67-3-1303 - 1305).

Tenn. Code Ann. § 67-3-1501 establishes an exemption from these taxes for governmental agencies. This section states, in subsection (a): "There shall be exempted from the taxes and fees imposed in part 13 of this chapter any governmental agency which holds an active exemption permit issued by the department." Tenn. Code Ann. § 67-3-1203 defines "governmental agency" for purposes of Section 67-3-1501:

> (35) "Governmental agency" means a department of a local, state or federal government, where such department is organized by and accountable to the authority of the executive, legislative, or judicial branch of that government; but does not include a private organization, association, or contractor, whether for profit or not, unless specifically identified in this chapter. . . .

A metropolitan airport authority is created pursuant to Tenn. Code Ann. § 42-4-104, subsection (a) of which states:

> Any city or metropolitan government having a population of not less than one hundred thousand (100,000), or any county including any such city, may create a metropolitan airport authority in the manner provided in this section.

Tenn. Code Ann. § 42-4-102 states:

> (a) It is hereby declared that airport authorities created pursuant to this chapter shall be public and governmental bodies **acting as agencies and instrumentalities of the creating and participating municipalities**, and that the acquiring, operating and financing of airports and related facilities by such airport authorities are hereby declared to be **for a public and governmental purpose and matters of public necessity**. (Emphasis provided.)

As this office has previously opined, a metropolitan airport authority is an agency and instrumentality of the creating and participating municipality. Op. Tenn. Atty. Gen. 01-167 (November 20, 2001). As such, a metropolitan airport authority is a department of a local government and is, therefore, a governmental agency for purposes of Tenn. Code Ann. § 67-3-1501. The airport authority itself is

entitled to the exemption provided in Tenn. Code Ann. § 67-3-1501, provided that the authority satisfies the additional requirements of that section.

Subsection (b) of section 67-3-1501 imposes the administrative requirement that a governmental agency acquire a valid exemption permit from the Commissioner of Revenue. Subsection (d) contains four mandatory substantive requirements. This subsection states:

> (d) In order to be entitled to the exemption, the governmental agency **shall receive, store, handle and use the petroleum products strictly** in the following manner:
> (1) Purchase only from a licensed importer, supplier or wholesaler, and in lots of at least five hundred (500) gallons except as provided in subsections (i) and (j). Delivery of such fuel shall be completed within seventy-two (72) hours following commencement of the delivery. The five-hundred gallon requirement may be met by the combined shipment of any petroleum products during the seventy-two hour period;
> (2) Store in a storage facility either owned or leased by such agency. In the event the facility is leased, it shall be separate and apart from the commercial storage facilities of any motor fuel vendor, and the storage facility must be kept under the exclusive control of the governmental agency at all times. In order for the leased facility to comply with the provisions of this subsection, a copy of the lease must be filed with and approved by the commissioner;
> (3) Remove from the storage facility in equipment either owned or leased by the governmental agency; and
> (4) **Use exclusively for governmental purposes, in equipment either owned or leased by the governmental agency and operated by governmental employees**. (Emphasis provided).

The facts presented here do not indicate whether the purchase and storage requirements of subsections (1), (2), and (3) will be met. Assuming that these requirements will be met, the remaining question is whether subsection (4) is complied with. Under the terms of subsection (4), the proposed use of the fuel by an independent contractor would not satisfy this requirement because the coaches would not be operated by governmental employees. If a governmental agency transferred its fuel to another person for a non-governmental purpose, such action would be in violation of Tenn. Code Ann. § 67-3-1501(e), which states that "[i]t is unlawful for any person to use petroleum products sold to a governmental agency for any purpose other than governmental." Under Tenn. Code Ann. § 67-3-1501(k), the governmental agency would then be subject to tax on the fuel it transferred and would lose its exemption. Subsection (h), however, provides an alternative to the requirement that the fuel be used in equipment operated by governmental employees:

> (h) An independent contractor operating a local transit company and providing local transit services is exempt from the petroleum products taxes and fees imposed in part 13 of this chapter, subject to the same restrictions imposed on governmental agencies under this part.

Tenn. Code Ann. § 67-3-1203(45) defines "local transit company":

> "Local transit company" means a person who is a scheduled, common carrier, public passenger, land transportation service, serving regular routes within a municipality and the territory adjacent thereto, or within a metropolitan government created under title 7, chapters 1-3, and who generates at least sixty percent (60%) of the total passenger fare from such routes; provided, that the operation is supervised, regulated, and controlled as a street railway company, under § 65-16-101, and all legislative and statutory provisions applicable thereto.

Tenn. Code Ann. § 67-3-1203(46) defines "local transit service" as "service furnished by a local transit company, as defined in this section." It is likely that the independent contractor described in the facts presented would qualify as a local transit company under these definitions. Provided that the airport parking lots and terminals are within or adjacent to the municipality or within the metropolitan government that created the airport authority, the location requirement of these definitions would be met. Tenn. Code Ann. § 67-3-1203(45) requires the municipal government to regulate the independent contractor as a street railway company under Tenn. Code Ann. § 65-16-101. In 2003, in Public Chapter 19, Section 1, the General Assembly repealed Title 65, Chapter 16. The General Assembly did not reenact any portion of this chapter, but the General Assembly also did not repeal Tenn. Code Ann. § 67-3-1203(45). Nor did the General Assembly repeal Tenn. Code Ann. § 55-4-223(c)(2), which contains definitions of both "local transit company" and "local transit service" that refer to regulation under Tenn. Code Ann. § 65-16-101. Thus, it appears that in repealing Title 65, Chapter 16 the General Assembly did not intend to remove the fuel tax exemption provided in Tenn. Code Ann. § 67-3-1501(h).

The requirement in Tenn. Code Ann. § 67-3-1203(45) that the "person . . . generate[ ] at least sixty percent (60%) of the total passenger fare from such routes" is problematic because this phrase is unclear. Interpretation of this phrase may be aided by reference to the original version of this law enacted in the Public Acts of 1978, Chapter 761. Section 61(g) of that Act stated:

> "Governmental purposes" includes the operation of local transit service by independent contractors operating a local transit company. As used in this paragraph, the term "local transit service" means scheduled common carrier public passenger land transportation service furnished by a local transit company within the territorial limits of the regulatory jurisdiction of the municipality or

> metropolitan government which is authorized to supervise, regulate and control the operations of such company, under Sections 65-1601 and all other legislative and statutory provisions applicable thereto; and the term "local transit company" means a person, firm, partnership or corporation, engaged in furnishing, and **at least sixty percent (60%) of the total passenger fare revenue of which** shall be derived from, scheduled common carrier public passenger land transportation service along the regular routes within a municipality and the territory adjacent thereto, or within a metropolitan government created under Sections 6-3701 — 6-3725, the operation of which is supervised, regulated, and controlled as a street railway company, under Section 65-1601 and all other legislative and statutory provisions applicable thereto. (Emphasis provided.)

The language "at least sixty percent (60%) of the total passenger fare revenue of which shall be derived from, scheduled common carrier public passenger land transportation service along the regular routes," etc., in this original version obviously was repeated when the original version was overhauled in 1997 and current Tenn. Code Ann. § 67-3-1203(45) was enacted. The difference in wording between the 1978 and 1997 versions does not seem to indicate a repeal of the original language, but rather a less artful wording of the same intent in the 1997 revision. The intent in both instances appears to have been that the local transit company is required to "generate[ ] at least sixty percent (60%) of [**its own**] total passenger fare from such routes," and not that only the dominant carrier is entitled to benefit from the exemption.

It must then be determined whether this provision in current Tenn. Code Ann. § 67-3-1203(45) applies when the local transit company does not collect any fares from passengers for the routes it serves for the airport authority. Assuming that the independent contractor receives compensation in some form from the airport authority for the airport routes and treating such compensation as the passenger fare for those routes, the independent contractor would satisfy the requirements of Tenn. Code Ann. § 67-3-1203(45), provided that the total passenger fares it receives from routes it serves as a "local transit company," including the compensation it receives from the airport authority, are at least sixty percent (60%) of its total fares. This reading is consistent with the clear purpose of Tenn. Code Ann. § 67-3-1501(h), which is to provide the exemption for independent contractors operating local transit companies for governmental purposes.

Although the facts presented do not fully explain the financial arrangement of the transportation service, as long as the conditions above are met the independent contractor would qualify as a "local transit company" and would be entitled on its own behalf to the fuel tax exemption. Because Tenn. Code Ann. § 67-3-1501(h) puts the qualifying local transit company in the shoes of the governmental agency, the fact that the coaches are at some point to be leased by the independent contractor would not affect the independent contractor's entitlement to the exemption.

This leaves the question of whether the exemption applies when the airport authority provides fuel that the airport authority itself purchases, pursuant to its own exemption permit, to the independent contractor. It is reasonable to conclude that this fuel would also be eligible for the exemption. Under Tenn. Code Ann. § 67-3-1501(b), the exemption applies to fuel purchased by a governmental agency provided that such fuel is "use[d] exclusively for governmental purposes." The apparent purpose of the alternative exemption in Tenn. Code Ann. § 67-3-1501(h) is to relieve the local government of the burden of operating a local transit company, as well as to promote the use of public transportation. Further, in transferring the fuel to a local transit company eligible for an exemption under Tenn. Code Ann. § 67-3-1501(h), the governmental agency would not strictly be in violation of Tenn. Code Ann. § 67-3-1501(e), because the fuel would still be used for a governmental purpose. The alternative exemption in Tenn. Code Ann. § 67-3-1501(h) describes an additional "governmental purpose," a point that was clearer before the 1997 revisions but nonetheless remains in the current language. Although the situation presented falls into something of a gap between subsections (d) and (h), a reading that would allow fuel donated by the governmental agency to the local transit company to be exempt from tax would most clearly give effect to the legislative intent behind the entire exemption section, Tenn. Code Ann. § 67-3-1501. Both the airport authority and the independent contractor would, of course, be required to comply with the permit requirements of Tenn. Code Ann. § 67-3-1501(b) and the fuel purchasing, storage, and use requirements of Tenn. Code Ann. § 67-3-1501(d).

Therefore, it is the opinion of this Office that a metropolitan airport authority may provide tax-exempt fuel, at no charge, to an independent contractor operating a local transit service for a public and governmental purpose, provided that the independent contractor qualifies as a "local transit company" as defined by Tenn. Code Ann. § 67-3-1203(45) and both the airport authority and the independent contractor comply with Tenn. Code Ann. § 67-3-1501(b) and (d).

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