

Approved: March 11, 1997  
Date

MINUTES OF THE SENATE COMMITTEE ON ASSESSMENT AND TAXATION.

The meeting was called to order by Chairperson Audrey Langworthy at 11:00 a.m. on March 6, 1997, in Room 519--S of the Capitol.

Members present: Senator Langworthy, Senator Corbin, Senator Lee, Senator Bond, Senator Goodwin, Senator Hardenburger, Senator Harris, Senator Karr, Senator Praeger, Senator Steffes and Senator Steineger.

Committee staff present: Tom Severn, Legislative Research Department  
Shirley Higgins, Secretary to the Committee

Conferees appearing before the committee: Shirley Sicilian, Kansas Department of Revenue  
Tom Palace, Kansas Oil Marketers Association

Others attending: See attached list

The minutes of the March 5 meeting were approved.

**SB 249--Concerning the taxation of motor vehicle fuels; providing certain payments to native Americans.**

Shirley Sicilian, Kansas Department of Revenue, testified in support of **SB 249**. She explained the background leading to the introduction of the bill and summarized the two basic purposes of the bill. She stated that the Department believes, consistent with an Attorney General's opinion, the legal incidence of the motor-fuel tax is on the distributor. The proposed amendments in sections 2 through 8 of the bill would clarify any portion of the Kansas motor fuel tax act which could be possibly construed contrary to legislative intent that the legal incidence of the fuel tax rests with distributors. Another part of the bill involves a recognition that refunds cannot be provided to tribal members because they did not literally pay the tax. (Attachment 1)

Committee discussion of the bill's provisions followed. Ms. Sicilian emphasized that motor-fuel tax refund payments will not be made to individual tribe members but to the tribal government, although the amount of the payment would be based on fuel consumption by tribal members. Ms. Sicilian noted that the wording of the law is sufficiently open that, through rules and regulations, the Department could determine how much gas was sold to tribal members verses other persons by asking for receipts, or the Department could develop a formula to determine fuel consumption by tribal members versus consumption by non-tribal members. The refund payment would be based on the amount assumed to have been consumed by tribal members. Ms. Sicilian stressed that current law authorizes the tax. The intent of the bill is to clarify that authority. She concluded by reviewing the clarifying sections of the bill as outlined in her written testimony.

Tom Palace, Kansas Oil Marketers Association, followed with testimony in support of **SB 249**, noting that remittance of the tax to the state by distributors lightens the economic impact on tribal members, and the technical amendments make it clear that the state will hold the distributor responsible for paying the motor-fuels tax and further strengthen the level playing field for both the retailer and the tribes that sell motor fuels. (Attachment 2)

Senator Langworthy announced that there would be no meeting on Friday, March 7, or Monday, March 10.

The meeting was adjourned at 11:40 a.m.

The next meeting is scheduled for March 11, 1997.



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MEMORANDUM

**TO:** Senator Audrey Langworthy, Chair  
Committee on Assessment and Taxation

**FROM:** Shirley Klenda Sicilian  
Kansas Department of Revenue

**DATE:** March 6, 1997

**SUBJECT:** Senate Bill 249

Senator Langworthy, and members of the Senate Committee on Assessment and Taxation, thank you for this opportunity to present information on Senate Bill 249.

**I. BACKGROUND**

The Kansas motor fuel tax act taxes fuel at the distributor level. Prior to 1995, it was unclear whether distributors selling motor fuel to tribal retailers on Indian reservations could claim an exemption based on the Supremacy Clause whereby the United States of America and its agencies are exempt from state taxation. In 1995, the legislature determined that because the tax is at the distributor level it is not imposed on tribal retailers or tribal members, and the exemption does not apply. The legislature also recognized a need to level the competitive playing field for retailers on and off the reservation. Therefore, that year, legislation was adopted which expressly disallowed tax-free fuel sales to retail dealers located on an Indian reservation in Kansas.

Objections were raised as to whether the department could actually enforce collection of this tax on Indian reservations and the secretary of revenue requested an attorney general's opinion for clarification. The attorney general's opinion, issued in August of 1995, explained the test for determining the state's authority to tax motor-vehicle fuels sold by an Indian tribe's retail stores on a reservation is whether the legal incidence of the tax falls on non-Indian purchasers. If the legal incidence of the tax falls on the tribe or its members, the state cannot tax sales made on the reservation. However, "if the legal incidence of the tax rests on non-tribal members, the state may impose the tax and require the tribe to perform functions to assist in collection of the tax..."<sup>1</sup> After a review of the Kansas motor fuel tax act, the attorney general found the legal incidence of the tax to be on the distributor, not the retailer or the ultimate consumer, and up-held the legislation.<sup>2</sup>

95-80

In September of 1995, the department began enforcement of the law for distributors selling to retailers on reservations. That same month, several lawsuits were filed contending, contrary to

<sup>1</sup> Attorney General Opinion No. 95-80.

<sup>2</sup> *Ibid.* The attorney general did find that the incidence of the "additional tax" imposed by 79-3408 (c) fell on the retailer as well as the distributor, thus the state may not impose this tax on motor fuel in the possession of tribal retailers.

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Attachment 1

he AG's opinion, that the motor fuel tax actually falls on the retailer and thus cannot be collected. The tribes sought, and were granted, temporary injunctions to block the state's collection of the tax, pending the outcome of the lawsuit.

The department believes, consistent with the AG's opinion, that the incidence of the motor-fuel tax is on the distributor. In sections 2 through 8 of the bill, we are proposing amendments that would clarify any portion of the act which could possibly be construed contrary to the legislative intent that the legal incidence of the fuel tax rests with distributors. Part of the proposal involves a recognition that refunds cannot be provided to tribal members because they did not literally pay the tax. Therefore, section one of the bill provides an alternative means of compensating tribes for any economic impact of the fuel tax.

## II. SUMMARY OF THE PROPOSAL

Our bill has two basic purposes:

### A. Payments to federally recognized Indian tribes in Kansas.

First, section one of the proposed bill would authorize the secretary to provide financial payments to the several federally recognized Indian tribes in Kansas. The purpose of the payments is to relieve any downstream economic impact on tribal members from the imposition of tax at the distributor level. The form of payment would be based on the number of gallons of fuel purchased by tribal members from tribal retailers located on the tribal members' own reservation and on the amount of tax previously paid by the distributor per gallon. This section also makes clear the legislative intent that the legal incidence of the fuel tax remains with the distributor. Section seven of the proposed bill provides for funding of the proposed financial payments from the motor-vehicle fuel tax refund fund.

### B. Clarification that legal incidence rests with the distributors.

The second main purpose of the bill is accomplished in sections two through eight which clarify that the legal incidence of the current Kansas fuel tax (i.e. who is legally accountable to the State of Kansas to remit the tax) rests with the distributors selling fuel in Kansas.

Section 2 separates required payment of tax, penalty and interest from the record-keeping requirement. In both pending cases, plaintiffs have pointed to this existing language and have asserted that since the department could hold a retailer liable for tax, the legal incidence of tax falls on the retailer, and hence we cannot tax them in their status as federally recognized tribal retailers. This technical correction removes the word "retailer" from tax liability, but leaves the word "retailer" in the record keeping section. This comports with the holding in *Moe v. Salish and Kootenai* which held that states can require tribes to maintain records, even if the tribe is not liable for state tax.

Section 3 provides that, unless otherwise specified in K.S.A. 79-3408c, the incidence of this tax is imposed on the distributor of first receipt of the motor fuel. It clarifies that the 2.5% handling allowance to distributors is to cover ordinary losses which may have resulted from physical loss while handling such fuels. Again, these are technical changes to address pending litigation. Plaintiffs in both cases have tried to characterize the 2.5% handling allowance as a "collection fee" granted by the state to distributors for "collecting the fuel tax from retailers." In *Chickasaw Nation v. Oklahoma*, a similar provision in Oklahoma law was construed as just such a "collection fee," and the Court used that analysis, in part, to hold that the incidence of Oklahoma's tax actually rested with retailers. In the pending litigation, if the Kansas federal or state courts construe Kansas' handling allowance in the same manner, the allowance could be stricken in its entirety. This technical language change is to leave no doubt that the 2.5% allowance is for physical loss, wastage, shrinkage, evaporation, etc., and is not in any way a "collection fee." Moreover, the Court in *Chickasaw Nation v. Oklahoma* looked throughout the Oklahoma law for a specific sentence that imposed the tax on the distributor. Finding none, the Court then turned to the various provisions to construe just where the tax burden rested. This section makes it abundantly clear the incidence of tax rests with distributors.

Section 4 exempts any native American retailer located on a reservation, and native American tribes having licensed places of business or businesses located on the tribe's reservation, from the inventory tax when the tax rate increases, or refund when the tax rate decreases. This language comports with Attorney General opinion 95-80 that tribal retailers cannot be held liable for the inventory tax that occurs from time to time when fuel tax rates increase.

Sec. 5 provides that every distributor paying or liable for the tax may charge and collect an amount, including cost of doing business, that could include such tax as part of the selling price; and clarifies that the tax referred to, when the posted price of the fuel does not include the state and federal tax, is the tax that the dealer's distributor paid, or for which the distributor was liable. This amending language addresses the plaintiffs' assertion in the pending litigation that the fuel tax is a mandatory pass through, and thus it is they, not distributors, who bear the incidence of tax. The proposed language clarifies that the fuel tax paid by a distributor to the state is an overhead expense that may be passed through in the distributor's commodity pricing just like any other overhead expense (e.g. the distributor's property taxes, income taxes, etc.).

Section 6 changes language from "delinquent distributor, manufacturer, importer or retailer" and "taxpayer" to "person." This is in keeping with Sec. Two of the bill that the department may pursue any person for unpaid fuel tax. When read in conjunction with Sec. Two and Sec. Four, this section clarifies that the department cannot pursue any retailer for unpaid fuel taxes, except the inventory tax, and in such case, if the retailer is an Indian tribe, the department cannot pursue the tribe for even the inventory tax.

Section seven provides that the motor-vehicle fuel tax refund fund is to be used not only for the payment of all refunds, but also for payments to federally-recognized Tribes of Native Americans under section 1 of this act.

Section 8 repeals K.S.A. 1996 Supp. 79-3408g, that disallows the tax-free sales of gasoline and special fuels to retail dealers located on an Indian reservation in Kansas, if the fuel is sold and delivered to a nonmember of such reservation. The provision is unnecessary.



## KANSAS OIL MARKETERS ASSOCIATION

Convenience Store Association of Kansas

Testimony on Senate Bill 249  
Submitted by the Kansas Oil Marketers Association/  
Convenience Store Association of Kansas  
To The Senate Assessment and Taxation Committee

Chairperson Langworthy and members of the Senate Assessment and Taxation Committee: My name is Tom Palace. I am Executive Director of the Kansas Oil Marketers Association, a statewide trade association representing over 350 independent Kansas petroleum companies which distribute petroleum products at the wholesale and/or retail level. KOMA is also the flagship organization for the Convenience Store Association of Kansas (CSAK) and, as such, represents the interests of the owners and operators of convenience stores across the state.

We appreciate the opportunity to appear before you today in support of S.B. 249.

Basically there are two parts to SB 249. The first part allows for financial payments to several federally recognized Indian tribes in Kansas, and the second part provides technical amendments that clearly define the distributor as the responsible party to pay the state motor fuel tax.

The state has explained both issues to you as well and clarified why this bill needs to be passed, and I'm here not only to support the bill, but to give you some background information.

Let me begin by telling you that the distributors, the people that you see hauling fuel over the road, are one of the largest tax collectors for the state of Kansas. Last year, the distributors collected over \$300 million dollars in tax revenues for the state; approximately 30% of which goes to the state highway program. For every gallon of gas sold, there is an 18 cent state tax that is included in the price.

SB 249 lightens the economic impact on tribal members when distributors remit the tax to the state on selling fuel sold to tribal retailers. This section also provides for a formula as to how payments to the tribes will be calculated.

The technical amendments that this bill provides make it clear that the state will hold the distributor responsible for paying the motor fuels tax, and further strengthens the level playing field for both the retailer and tribes that sell motor fuels, that was established by this legislature in 1995.

Again, we appreciate the opportunity to appear before you today and will stand for any questions you may have.