

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 08-186

Tax-exempt fuel provided by county board of education to independent contractor

QUESTION

May a county board of education use its governmental entity exemption to purchase fuel for use by independent contractors who provide school bus transportation services?

OPINION

No. The county board's actions would not satisfy the exemption requirements stated in Tenn. Code Ann. § 67-3-401.

ANALYSIS

The facts as stated in the request for this opinion are that a county board of education wishes to use its governmental entity exemption to purchase fuel for use by independent contractors who provide school bus transportation services. Any such exemption would have to be granted by Chapter 3, Part 2 of Title 67 of the Tennessee Code, which 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. § 67-3-201), 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 that is used or consumed in this state to produce power for propelling motor vehicles" (Tenn. Code Ann. § 67-3-202). Further provisions of this part impose additional taxes on "all petroleum products" (Tenn. Code Ann. §§ 67-3-203 to 205).

Tenn. Code Ann. § 67-3-401 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 2 of this chapter any governmental agency that holds an active exemption permit issued by the department." Tenn. Code Ann. § 67-3-103 defines "governmental agency" for purposes of Section 67-3-401:

(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 county board of education is a “governmental agency” for purposes of Tenn. Code Ann. § 67-3-401. *State v. Polk County*, 54 S.W.2d 714, 715-16 (Tenn. 1932); *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 224 (Tenn. 1988); Tenn. Code Ann. Title 49 *passim*.

Tenn. Code Ann. § 67-3-401(d) establishes the primary requirements for the exemption. This subsection states:

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 gallons (500 gals.), 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 (d), 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.

The categories independent contractor and employee are strictly distinct. *See, e.g.*, Tenn. Code Ann. § 50-6-102(10) - (11) (workers’ compensation); *Goodale v. Langenberg*, 243 S.W.3d 575, 582 (Tenn. Ct. App. 2007) (employer’s tort liability). Because independent contractors, not governmental employees, would operate the school buses in your scenario, the use of fuel you describe would not qualify for the exemption under this subsection.

Tenn. Code Ann. § 67-3-401(g) provides that in certain circumstances motor vehicles operated by nongovernmental employees may qualify for the exemption. The use by independent contractors in school buses, however, does not satisfy the terms of this subsection, which states:

A motor vehicle used exclusively for the purpose of providing mass transportation services, paratransit service to or for the

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benefit of elderly and handicapped persons, or other specialized mass transportation services of a public transportation system or transit authority organized and existing under and by virtue of title 7, chapter 56, and operated by nongovernmental employees, shall be considered to have met the requirements of subdivision (d)(4)

...

School buses do not provide mass transportation services. Tennessee's statutes provide for the funding and regulation of school buses, Tenn. Code Ann. § 49-6-2101 *et seq.*, and of mass transportation services, Tenn. Code Ann. § 7-56-101 *et seq.*, separately and distinctly. A "public transportation system" is "for the hire of passengers," Tenn. Code Ann. § 7-56-101(a), which implies the general availability to the public that is characteristic of a common carrier, but the public at large is prohibited from "entering onto school buses," with certain limited exceptions, Tenn. Code Ann. § 49-6-2008.

School buses do not provide paratransit service to or for the benefit of elderly and handicapped persons. Paratransit services are "a form of special transportation service complementary to fixed bus services," *Midgett v. Tri-County Metropolitan Transportation District*, 74 F.Supp.2d 1008, 1011 n.1 (D.Or. 1999), specifically for the benefit of elderly and handicapped persons. *See* 42 U.S.C. § 12143. Likewise, school buses do not provide "other specialized transportation services," which can best be interpreted as other services that are similar to paratransit services.

Moreover, school buses do not provide any services of a public transportation system or transit authority organized and existing under and by virtue of title 7, chapter 56. This requirement extends to all of subsection (g). Subsection (g) appears, in fact, to be intended to work together with Tenn. Code Ann. §§ 7-56-101 *et seq.*, which provide for the establishment by municipalities and counties of public transportation systems and transit authorities to run those systems.

As discussed in Opinion No. 03-094, an additional provision for obtaining tax-exempt fuel exists under Tenn. Code Ann. § 67-3-401(h), which provides:

(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 2 of this chapter, subject to the same restrictions imposed on governmental agencies under this part.

Tenn. Code Ann. § 67-3-103(45) defines "local transit company":

"Local transit company" means a person that is a scheduled, common carrier, public passenger, land transportation service, serving regular routes within a municipality and the territory adjacent to the municipality, or within a metropolitan government

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created under title 7, chapters 1-3, and that 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 [repealed], and all legislative and statutory provisions applicable thereto.

Tenn. Code Ann. § 67-3-103(46) defines “local transit service” as “service furnished by a local transit company.” For the reasons stated in Opinion No. 03-094, a metropolitan airport authority may provide tax-exempt fuel 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 in Tenn. Code Ann. § 67-3-103(45).

As to an independent contractor providing school bus service for a county school board, however, it would appear that Tenn. Code Ann. § 67-3-401(h) does not provide an exemption because the independent contractor would not qualify as a “local transit company” as defined in Tenn. Code Ann. § 67-3-103(45). As a school bus operator, the independent contractor would not be a common carrier. *See Cartwright v. Graves*, 184 S.W.2d 373, 378 (Tenn. 1944); *Hawkins County v. Davis*, 391 S.W.2d 658, 663 (Tenn. 1965) (school buses not common carriers for tort liability purposes). Moreover, the independent contractor would not be serving regular routes within a municipality and the territory adjacent to the municipality. Although not defined specifically for purposes of this exemption, “municipality” is defined in the Tennessee Code provisions on municipal government:

“Municipality” or “municipalities” means any incorporated city or cities, or town or towns, and does not include any utility district, sanitary district, school district, or other public service district, whether organized under public or private acts . . .

Tenn. Code Ann. § 6-51-101(2). Neither the county nor its school board would fit this definition.

Therefore, it is the opinion of this Office that a county board of education may not provide tax-exempt fuel to an independent contractor operating a school bus service for the county board of education.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JONATHAN N. WIKE
Assistant Attorney General

Requested by:

The Honorable Bill Harmon
State Representative
24 Legislative Plaza
Nashville, Tennessee 37243