STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

August 1, 2014

Opinion No. 14-74

Distribution of Federal Gasoline Tax Revenues

QUESTIONS

If the Federal Government continues to impose and collect gasoline-tax revenue and deposits that tax revenue into the federal Highway Trust Fund until September 30, 2016, and Congress fails to enact a transportation appropriations bill before October 1, 2014, to authorize that tax revenue to be apportioned and redistributed to Tennessee:

1. Would the Federal Government be required by federal law or the U.S. Constitution to pay to the State of Tennessee its federal share of the cost of state federal-aid highway projects located within Tennessee?

2. Would the Federal Government be obligated under federal law or the U.S. Constitution to reimburse the State for any increase in the State's share of the cost of a federal-aid highway project located in Tennessee?

3. Is there authority for Tennessee highway users to remit the federal gasoline tax to the State?

4. Is there authority for the gasoline-tax revenue to be sent to the State by the Federal Government without being deposited into the federal Highway Trust Fund?

5. If the answer to Question 3 or 4 is yes, is there authority for the State to hold such federal-gas-tax revenue in escrow until such time as Congress passes a transportation appropriation bill reauthorizing the expenditure of such revenue from the Highway Trust Fund?

6. If the answer to Question 5 is yes, is there authority for the State to use the gasoline-tax revenue it receives to pay the federal share of federal-aid highway projects located within Tennessee?

OPINIONS

1. and 2. Yes. In the event that the current federal transportation legislation expires on September 30, 2014, without any new legislation being passed, the Federal Government will remain contractually liable for the payment of funds that have been obligated (and thus the reimbursement of eligible costs that have been incurred) pursuant to project agreements executed before October 1, 2014.

3. No. Because the federal gasoline tax is a federally imposed tax, there is no authority for any taxpayer to remit that tax to anyone other than the Federal Government.

4. No. There is no authority for the gasoline-tax revenue to be sent to the State by the Federal Government without being deposited into the federal Highway Trust Fund.

5. Not applicable.

6. Not applicable.

ANALYSIS

In 2012, Congress enacted the current transportation legislation that assists states in financing state highway projects, "Moving Ahead for Progress in the 21st Century Act," or "MAP-21." P.L. 112-141, July 6, 2012; *see* 23 U.S.C. §§ 101 *et seq*. MAP-21 is the authorizing legislation that maintains the Federal-aid Highway Program ("FAHP") and sets the ground rules under which the FAHP operates, including authorizing the total amount of funds available to the program for each fiscal year and determining how those funds are to be distributed. *See* U.S. Dep't of Transp., Fed. Highway Admin., FHWA-PL-07-017, Financing Federal-Aid Highways 5 (Mar. 2007).[1] FAHP programs are financed from the federal Highway Trust Fund. *Id*. at 10. The 2012 legislation reauthorized the imposition of federal gasoline taxes through September 30, 2016, and the transfer of the revenue derived from these taxes into the Highway Trust Fund. *See* 26 U.S.C. §§ 4081(a), 9503(b). It also reauthorized, until September 30, 2014, the making of expenditures from the Highway Trust Fund in order to meet FAHP obligations that the Federal Government has incurred. *See* 26 U.S.C. § 9503(c). Pursuant to MAP-21, the Federal Government was required for Fiscal Year 2014 to apportion authorized highway funds to states in proportion to the gasoline-tax payments attributable to a state's highway users. *See* 23 U.S.C. § 104(c)(2).

[1] Available at http://www.fhwa.dot.gov/policy/olsp/financingfederalaid/.

1. and 2. The financing cycle for the FAHP begins when Congress develops and enacts surface-transportation authorizing legislation such as MAP-21. Financing Federal-Aid Highways at 8. Passage of authorizing legislation, however, is just the first step. Funds must be made available for obligation, and for most programs within the FAHP, this occurs through a special form of budget authority called "contract authority," which means that sums are made available for obligation upon passage of the authorizing legislation without further annual appropriations. *Id.* at 9. Funds authorized for a fiscal year are available for distribution through apportionment on the first day of the fiscal year (October 1). *Id.* at 11. Although funds are "distributed" to a state, no cash is actually disbursed at this point. Instead, the state is notified that it has federal funds available for its use. *Id.* The state then has the opportunity to request the Federal Government to approve the obligation of funds through the execution of project agreements, by which the Federal Government promises to reimburse it. *Id.* The Federal Government then makes payments to the state for the Federal share of costs as they are incurred on projects. *See* 23 U.S.C. § 121.[2]

As noted above, the Federal Government's authority to make expenditures from the Highway Trust Fund expires on September 30, 2014; after that date, expenditures from the Fund are authorized only to liquidate obligations made before October 1, 2014. 26 U.S.C. § 9503(b)(6). As this provision suggests, though, the expiration of this expenditure authority (and the failure to enact any new reauthorizing legislation) will have no effect on the Federal Government's contractual obligations to provide previously obligated funds to the states. *See* Financing Federal-Aid Highways at 15 ("An obligation is a commitment—the Federal government's promise to pay a State for the Federal share of a project's eligible cost."). Applicable federal regulations require that "the Federal-aid share of eligible project costs shall be established at the time the project agreement is executed." 23 CFR § 630.106 (f)(1). "The execution of the project agreement shall be deemed a contractual obligation of the Federal government under 23 U.S.C. 106 and shall require that appropriate funds be available at the time of authorization for the agreed Federal share, either pro rata or lump sum, of the cost of eligible work to be incurred by the State." 23 CFR § 630.106(c). Thus, to the extent that a project agreement is executed for a particular project prior to October 1, 2014, the Federal Government would be contractually obligated to provide the obligated funds to the State. And since "[t]he FAHP is a reimbursable program," Financing Federal-Aid Highways at 17, this means that the Federal Government would be obligated to reimburse the State for any eligible highway-construction-project costs it has incurred.

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[2] "[A]ctual cash reimbursements by the Department of the Treasury cannot be made until they are appropriated." Financing Federal-Aid Highways at 24; *see also* 26 U.S.C. § 9503(c)(1) ("amounts in the Highway Trust Fund shall be available, as provided by appropriation Acts, for making expenditures before October 1, 2014, to meet those obligations of the United States heretofore or hereafter incurred which are authorized to be paid out of the Highway Trust Fund under the MAP-21").

3. The federal motor-fuel tax is a per-gallon excise tax levied on producers of gasoline, diesel, and other special fuels. *See* 23 U.S.C. § 4081; *see also Gurley v. Rhoden*, 421 U.S. 200, 205 (1975). Thus, although MAP-21 calls for the apportionment of the gasoline-tax revenues based upon the number of Tennessee highway users, Tennessee highway users are not the actual taxpayers for purposes of the federal gasoline excise tax. *See Ammex, Inc. v. United States*, 367 F.3d 530, 534 (6th Cir. 2004). In any event, because the gasoline tax is federally imposed, there is no basis upon which any taxpayer could remit that tax to anyone other than the Federal Government.

4. Pursuant to federal law, the revenue derived from the federal gasoline taxes must be deposited into the federal Highway Trust Fund. 26 U.S.C. § 9503(b). The same federal law authorizes and governs expenditures from the Highway Trust Fund. *See* 26 U.S.C. § 9503(c). There is no other federal authority governing the disposition of federal-gasoline-tax revenues.

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