In the event of tax sale of property involved in a bankruptcy proceeding the purchaser of such property holding a tax certificate likewise does not stand in the relations of a creditor, since being subrogated to the rights of the state or taxing unit. This applies, however, to the actual taxes levied and interest thereon due and collectible by the state under state statute. Distinction is made in the decided cases, however, between interest (compensation) and penalties (punishment). The latter are held to be charges not collectible either by the state or by certificate holders, as not being considered a part of the tax.

In re Minoque, 39 F. (2nd) 239.
Dayton, Trustee, v. Stanard, Treasurer, 241 U. S. 588.
United States v. Childs, Trustee, 266 U. S. 304.

Since the tax, including interest, but excluding any charges which amount to penalties, is alone collectible in a bankruptcy court, it is clear that while the bankruptcy laws, including the provisions of the Frazier-Lemke Act, do not prevent state tax sales, they in effect do so, and tax sales, therefore, involving such property would hardly be practicable or serve any useful purpose.

Applicability motor vehicle fuel tax to gasoline purchased by government on construction project.

February 25, 1941.

Honorable Richard T. James,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of the 5th inst. in which you enclose letter from W. B. Short, Lieutenant Commander (CEC) U. S. Navy, Officer-in-Charge of Construction of U. S. Naval Ammunition Depot, Burns City, Indiana, reading as follows:

> "Reference is made to the question of state tax on motor vehicle fuels delivered to civilian contractors for use in connection with government projects under cost-plus-a-fixed-fee contracts.

"Please be advised that all such fuel purchased by the Maxon Construction Company and delivered to them at this station is for the exclusive use and benefit of the United States. Delivery to the Maxon Construction Company is taken by them as the construction agents for the Bureau of Yards and Docks of the Navy Department and not in their corporate capacity.

"There is enclosed herewith a copy of the purchase order form used by the Maxon Construction Company for all purchases of materials and supplies. Particular attention is called to Paragraph 2 of the printed conditions on the reverse thereof. You are advised that this is an exact statement of fact and that the title to such material is in the United States upon delivery and that the Maxon Construction Company, while having custody of such material, is not at any time directly or indirectly, actively or constructively, the owner thereof.

"No purchase order is issued by the Maxon Construction Company until and unless it has received the approval of the Officer-in-Charge of Construction or his representative. Since such approval is required by the terms of the contract it constitutes, by the terms of the contract, a part of the contract between the Maxon Construction Company and the vendor named in the purchase order. That is to say, the United States, represented by the Navy Department, Bureau of Yards and Docks, is actually a party to the contract.

"The Officer-in-Charge will furnish the proper Federal certificate for all motor vehicle fuels delivered to this project showing that it was received by the United States from the vendor named in the purchase order. None of the fuel purchased under the contract herein referred to will be used in vehicles or equipment not owned or leased by the United States.

"Under the conditions named above, it can readily be seen that motor vehicle fuels purchased for delivery to this project are purchased by and for the United States and are not subject to state taxes."

You request my official opinion as to the applicability of the Motor Fuel Vehicle Tax to motor vehicle fuel purchased by

the contractor for the use and consumption by him in the execution of his construction contract with the government, under conditions set forth in the above letter and as affected by the official opinion of the Attorney General of this State dated September 24, 1940, to your predecessor in office.

The latter opinion was based substantially upon the fact that the contractor was the purchaser of motor fuel in his own right and name and that he acquired title thereto. That opinion, upon the facts stated in the request for same, I hereby reaffirm.

The facts stated in the letter which you enclosed under date of February 5th, differentiate the present from the former case in the following particulars:

> First, that no purchase order may be issued by the contractor without the approval of the Officer-in-Charge of Construction or his representative;
>
> Second, that title to all material purchased by the contractor vests in the United States government immediately upon delivery to the contractor.

The purchase order blank submitted with your letter incorporates conditions appearing on the reverse side thereof. These conditions provide that the materials purchased are for the exclusive use of the United States government and that title thereto vests in the government.

Other conditions are set out but are not pertinent to the question here propounded.

While I have not been favored with a copy of the contract, the letter above quoted is authority for the fact that said contract embraces these conditions.

Former rulings of the Attorney General on this question are to the general effect that the United States government and its agencies are immune to taxation by the states.

See the following: Opinion of Attorney General 1934, page 391, Opinions of Attorney General 1936, page 332, Opinions of Attorney General 1933, page 332.

The Motor Vehicle Fuel Act is Title 47, Sections 1501 to 1531, inclusive, Burns' Revised Statutes 1933. This act from an analytical standpoint levies a tax despite the specific language thereof distinguishing it as a license for the use of motor vehicle fuel within certain restrictions. It is designed to raise revenue for the construction, maintenance and repair of roads and this would seem to be the distinction which differentiates it from a

fee. For the distinction between a fee and a tax see Attorney General's Opinions 1934, page 391, and authorities therein cited. Also in Gafill v. Bracken, Auditor, 195 Ind. 55, this act was treated as the Tax Act.

The act imposes the tax "on the use" of motor vehicle fuel. If the use of the fuel is obviously an agency that is unable to discharge the tax, the obligation to do so must rest upon the user thereof or the purchaser. That it is not the obligation of the dealer in motor vehicle fuels is conclusive from the provisions of the act, providing that he shall collect the tax and hold it in trust for the use and benefit of the state.

From the statements appearing in the letter of the Lieutenant Commander in Charge of Construction submitted with your letter, together with the order blanks incorporating conditions on the reverse side thereof likewise submitted, it is made to appear that the government purchases all gasoline necessary for use and consumption on this project and that it takes title thereto in its own name and that the contractor is simply the agent of the government in purchasing the same.

So that the tax, if and when imposed in this instance, would be laid directly upon the United States government.

The question, then, is this: Does the imposition of the tax directly interfere with the functioning of the government or its agencies? If it does then the tax is unlawful and improperly imposed under all of the decisions rendered by our courts upon this subject.

Many decisions have been rendered by the United States Supreme Court involving the right of states to tax the government and its agencies and visa versa. These cases are replete with distinctions, turning upon intra-state and inter-state commerce, and direct and indirect taxation of one by the other government and their agencies and the resulting interference in the functioning of either by the imposition of the tax.

Among those upholding the tax are the following: Trinitifarm Construction Company v. Grosjean, 291 U. S. 456, 54 Supreme Court 469, 78 L. Ed. 918; Silas Mason Company, Inc., et al. v. Henneford et al., 15 Federal Supplement 958; James v. Dravo Contracting Company, 302 United States 134; Graves v. New York ex rel. O'Keefe, 306 U. S. 466.

Those holding the government and its agencies immune to the tax are: Panhandle Oil Company v. Mississippi ex rel. Knox, 277 U. S. 218, 46 Supreme Court 451, 72 L. Ed. 857; Graves v. Texas Company, 298 U. S. 393, 45 Supreme Court

818, 80 L. Ed. 1236; James v. Dravo Contracting Company, 302 U. S. 134, 58 Supreme Court 208, 82 L. Ed. 155, 114 A. L. R. 318.

It seems to be taken as conclusive that a direct tax upon the government or its agencies is a direct interference with its proper functioning, as otherwise there could be no holding of immunity. The amount of the tax involved would seem to be immaterial so long as the power or authority was present by which the taxing authority could impose the same and the functioning of the government or its agencies thus curtailed and interfered with. That the government by its contract buys the supplies and materials necessary for the execution of the contract and thus avoids the payment of a tax is not open to criticism, as this serves to relieve it from an interference with its functioning while at the same time it effects a saving.

The distinctions brought out in the latter cases above cited were adhered to in the case of Standard Oil Company v. Lee, Comptroller of the State, Duvall Engineering Co. et al., Florida Supreme Court, December 20, 1940. The facts in this case were similar to those in that submitted by you except that by contract the government agreed to pay local and state taxes and the contractor purchased necessary gasoline in his own name, for which he was to be reimbursed by the government. However, it was forceably brought out in the opinion that the tax was laid on the contractor and only indirectly upon the government. Because the government had seemingly waived its immunity by agreeing to pay local and state taxes and because the tax was laid directly upon the contractor and only indirectly upon the government, the court held the tax valid.

That this was the controlling factor in the conclusion reached by the court is apparent from the opinion therein, a pertinent part of which is set out as follows:

> "In the cases relied on by appellees and cited above, the tax was upheld on the theory that the sale was to a private independent contractor with the federal government and being such for gain could not claim immunity from taxation for materials or labor furnished to the United States. And this is true whether the tax is on the gross or net receipts from the contract. The conditions named in the contract might in cases change this situation.
>
> "It is admitted that appellees are independent contractors with the federal government and that the con-

tract binds the latter to pay all state or local taxes imposed by law on the contractor. The United States government does not sell or buy the gasoline and is not a party to this litigation. If the gasoline sold under the contract is not exempt from the tax, appellant will be forced to collect it from the contractor, who in turn will be reimbursed by the United States. In view of the agreement by the United States to pay the tax as the contract provides, appellees urge that the United States took the position that it was ruled by the cases relied on by them."

From the foregoing considerations I have reached the conclusion that the imposition of the motor vehicle fuel tax directly upon the duly constituted agency of the United States government would be a burden directly interfering with the proper functioning of that agency and for these reasons would be unlawful.

CORPORATION LAW: Incorporation of hospitals under The Indiana General Not for Profit Corporation Act.

March 3, 1941.

Honorable Fred E. Shick,
Chief Corporation Counsel,
Office of Secretary of State,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your favor of the 1st inst. in which you submit the following question:

> "The question upon which this office desires your official opinion is whether the provisions of the 1935 General Not For Profit Corporation Act are available to persons desiring to associate themselves to own, maintain and operate hospitals in the State of Indiana or whether such persons must incorporate as provided in Chapter 84, Acts of 1923."