

MEMORANDUM

TO: Tom Howells, President
Wisconsin Motor Carriers Association

FROM: William M. Conley
Tony H. McGrath

DATE: April 21, 2009

RE: Executive Summary - 2009 A.B. 75 - Motor Vehicle Fuel Tax and No Pass Through Provisions

- The proposed 2009 Wisconsin budget would levy a new tax of up to 3% of the “gross receipts” of motor vehicle fuel suppliers for the privilege of doing business in the State of Wisconsin. The proposal also contains a “no pass through” provision, which purports to prohibit the entities subject to the tax from passing the cost of the tax down the distribution chain and, ultimately, to consumers.
- Wisconsin’s “no pass through provision” is likely to suffer the same fate as a similar bill enacted by the New York legislature. Relying on U.S. Supreme Court precedent, the New York courts held that the “no pass through” provision was unconstitutional, and therefore invalid, because it discriminated against out-of-state consumers in violation of the “dormant” Commerce Clause of the U.S. Constitution. *Shell Oil Co. v. N.Y. State Tax Comm’n*, 458 N.Y.S.2d 938 (App. Div. 1983).
- In addition, the constitution’s Commerce Clause limits the ability of any state to regulate or tax transactions outside of that state. Because of this, Wisconsin cannot tax the sale of motor fuel if the sale occurs wholly outside its boundaries. National oil companies can easily manage their distribution chains to require that local/regional buyers take ownership of fuel before it enters Wisconsin, thereby avoiding the tax. This results in many Wisconsin-based businesses incurring both the cost of the tax and the cost to create a new distribution channel (for example, the cost of acquiring the fuel in Illinois and transporting it to Wisconsin).
- The authors of this Oil Franchise Tax anticipated the difficulty in collecting the tax from so-called “big oil.” That is why the legislation empowers the Department of Revenue to recover the tax from any person – not merely “big oil” – that possesses untaxed motor fuel (the *only* exception is for fuel in the tank of an automobile).
- Alternatively, “Big” oil companies may simply exit the Wisconsin market rather than incurring the cost of the tax (or the cost to litigate and defeat the tax in court). If the

supply of motor vehicle fuel in Wisconsin decreases, while demand stays constant, the price at the pump will increase.

- Finally, Wisconsin runs a financial risk by enacting the tax. If the proposed tax is declared unconstitutional, the state would have to refund any taxes paid, plus 9% interest. The cost of litigation, interest on any refunds, and a potential award of attorneys fees to the parties challenging the tax would create a significant liability for the state.