

CHAPTER 78.*

MOTOR FUEL TAX LAW.

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78.01 Definitions, citation. The words and phrases used in this chapter shall be construed for the purpose thereof as follows, except in those instances where the context clearly indicates a different meaning:

- (1) This act may be cited as the "Motor Fuel Tax Law."
- (2) "Association" means a partnership, limited partnership, or any other form of unincorporated enterprise owned by two or more persons.
- (3) "Corporation" means a corporation or joint stock association organized under the laws of this state, the United States or any other state, territory, foreign country or dependency.
- (4) "Jobber" means every person, firm, association, or corporation, other than a wholesaler, engaged in business as a jobber, broker or merchant dealing in motor fuel.
- (5) "License" means a license to act as a wholesaler of motor fuels.
- (6) "Motor fuel" means and includes Class 1 motor fuel and Class 2 motor fuel as hereinafter defined. Class 1 motor fuel shall mean (a) all products commonly or commercially known or sold as gasoline (including casing-head and absorption or natural gasoline) benzol, benzene or naphtha regardless of their classification or uses; and (b) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as a fuel in internal combustion engines which has a flash point of less than 110 degrees Fahrenheit when tested in the Tagliabue closed cup or when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American society of testing materials designation D-86) shows not less than 10 per cent distilled (recovered) below 347 degrees Fahrenheit or not less than 95 per cent distilled (recovered) below 464 degrees Fahrenheit. Class 2 motor fuel shall mean all combustible gases which exist in a gaseous state at 60 degrees Fahrenheit and at a pressure of 14.7/10 pounds per square inch absolute, and other products not included within the foregoing provisions of this subsection; provided, however, that only those quantities of said combustible gases and said other products which are sold for use or used to propel motor vehicles upon the public highways, and in machinery and equipment in connection with the construction, repair and maintenance of the public highways, shall be subject to the tax imposed by this chapter.

(7) "Blending" means the mixing together by any process whatsoever, of any one or more products of petroleum, with or without other products, and regardless of the origi-

*Revisor's Note: Section 78.34 (created by chapter 337, laws of 1943) transferred to the department of taxation all powers and duties theretofore imposed by chapter 73 upon the state treasurer. Section 5 of said chapter 337 reads: "SECTION 5. The revisor of statutes is authorized and directed to revise and change the statutes to conform with this act." The revisor has done as directed.

nal character of the product so blended, provided the resultant product so obtained is capable of use for the generation of power for the propulsion of motor vehicles, airplanes, or motor boats, except only such blending as may occur in the process known as refining by the original refiner of crude petroleum, and except also the blending of products known as lubricating oil in the production of lubricating oils and greases.

(8) "Blender" means any person who engages in the practice of blending, as herein defined.

(9) "Motor vehicles" means motor vehicles as defined in section 85.10, with the exception of farm tractors, as therein defined.

(10) "Person" means and includes every natural person, association or corporation. Whenever used in any clause prescribing and imposing a fine or imprisonment or both, the term "person" as applied to associations shall mean and include the partners or members thereof, and as applied to corporations, the officers thereof.

(11) "Department" means the state department of taxation of Wisconsin.

(12) "Wholesaler" means and includes any person (including the state of Wisconsin and any political subdivision thereof, but not including the United States of America or any of its agencies except to the extent now or hereafter permitted by the constitution and laws thereof):

(a) Making the first sale or other disposition in this state of any motor fuel, imported into this state from any other state, territory or foreign country, after the same shall have been received within this state within the meaning of this chapter;

(b) Consuming or using in this state any motor fuel so imported, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in this state within the meaning of this chapter; or

(c) Producing, refining, preparing, distilling, manufacturing, blending or compounding motor fuel in this state.

(d) Purchasing motor fuel in tank car lots from a refinery, marine terminal or pipe line terminal in this state.

(13) Except as hereinafter provided in subsection (15) of this section, motor fuel produced, refined, prepared, distilled, manufactured, blended or compounded at any refinery or other place in this state by any person shall be deemed to be "received" by such person thereat when the same shall have been loaded (1) at such refinery or other place into tank cars, ships, barges, tank trucks, tank wagons or other types of transportation equipment, containers or facilities, for ultimate destination within this state, or (2) placed in any tank or other container from which any sales or deliveries not involving transportation are made directly, but not before.

(14) Except as hereinafter provided in subsection (15) of this section, motor fuel imported into this state from any other state, territory or foreign country by vessel, and delivered in such vessel to any person, at a marine terminal in this state for storage, or so imported by pipe line and delivered to any person by such pipe line or a connecting pipe line at a pipe line terminal or pipe line tank farm in this state for storage, shall be deemed to have been "received" by such person thereat when the same shall have been loaded (1) into tank cars, ships or barges, tank trucks, tank wagons or other types of transportation equipment, containers or facilities at such marine or pipe line terminal or tank farm for ultimate destination within this state or (2) placed in any tank or other container from which any sales or deliveries not involving transportation are made directly, but not before.

(15) Motor fuel refined at a refinery in this state or motor fuel brought into this state by boat, barge or pipe line, and stored at a marine or pipe line terminal in this state, may be sold, shipped or delivered therefrom tax free in tank car lots to the holder of an unrevoked wholesaler's license issued as in this chapter provided, without liability on the part of the wholesaler for the tax thereon. Motor fuel so sold, shipped or delivered tax free shall thereupon be deemed to have been received by the purchasing wholesaler and such purchasing wholesaler shall be liable for the tax thereon and shall have all the rights and privileges and be subject to all the duties and liabilities of a wholesaler to the same extent as if he had imported such motor fuel from without the state.

(16) Motor fuel imported by any person into this state from any other state, territory or foreign country, other than by vessel for storage at refineries or marine terminals as hereinbefore set forth, or by pipe line for storage at pipe line terminals or pipe line tank farms as hereinbefore set forth, shall be deemed to be "received" in this state at the time and place where the same shall be unloaded, by the person who at such time shall be the owner thereof, but not before.

(17) Except as hereinbefore set forth, the word "received" shall be given its usual and customary meaning. [1933 c. 312 s. 2; 1935 c. 355, 510; 1939 c. 379, 498; 1941 c. 181; 1943 c. 337, 483]

Note: The gasoline tax imposed by chapter 78, Stats. 1931, is not upon property, but upon the owners and operators of motor vehicles used on the public highways "for the privilege thereof," and differs wholly as to character and the burdens intended to be discharged; consequently no unconstitutional double property taxation results because of the fact that a street railway company must pay the gasoline privilege tax, although its motor vehicles, as a part of its property, are taxable as a unit whole under chapter 76. Milwaukee E. R. & L. Co. v. Tax Commission, 207 W. 523, 242 NW 312.

Motor fuel tax imposed under chapter 78 is levied upon sales of gasoline and other motor vehicle fuels within meaning of Hayden-Cartwright act, permitting state to col-

lect such taxes on motor fuels sold for private use at post exchanges on military reservations. It is only where state has ceded land and exclusive jurisdiction thereof to federal government or where federal government has otherwise acquired exclusive jurisdiction that enabling legislation such as Hayden-Cartwright act becomes necessary in order for state to exercise its jurisdiction and to tax motor fuels sold on reservations for private use. 27 Atty. Gen. 452.

Motor fuel imported into this state by railroad tank car to be blended is "received" and subject to the motor fuel tax when unloaded in this state under (16) and (13) is not applicable thereto. 33 Atty. Gen. 52.

78.02 Tax imposed; collected; exceptions. (1) AMOUNT OF TAX AND HOW PAID. An excise or license tax of 4 cents per gallon, or fraction of a gallon, is hereby imposed on all motor fuel sold, used, or distributed in this state, except as otherwise provided, to be computed and paid as provided in this chapter, and except as otherwise provided, the wholesaler shall collect from the purchaser, and the purchaser shall pay to such wholesaler, the tax imposed by this chapter on each sale of motor vehicle fuel at the time of such sale, irrespective of whether such sale is for cash or on credit. Provided, however, that no tax is hereby imposed upon or with respect to the following:

(a) Motor fuel exported or sold for export from this state to any other state or territory or to any foreign country.

(b) Motor fuel sold to the United States of America or any of its agencies.

(c) Motor fuel sold to any post exchange or other concessionaire upon any federal reservation within this state, but the tax on such motor fuel shall be collected by the department from such post exchange or other concessionaire to the extent permitted by federal law.

(d) Class 2 motor fuel when not sold for use or used to propel motor vehicles upon the public highways, and in machinery and equipment in connection with the construction, repair and maintenance of the public highways.

(2) MOTOR FUEL USED FOR INDUSTRIAL PURPOSES EXEMPT; CONDITIONS. Users of motor fuel for industrial purposes, who buy, in original packages, motor fuel on which the tax has not been assessed, shall be exempt from payment of the tax upon obtaining authority for such exemption from, and posting bond with, the department in a sum approved by it, and by filing with it invoices of all such purchases, accompanied by affidavits certifying that the purchased motor fuel is to be used solely for industrial purposes. All users of motor fuel for industrial purposes shall certify that the purchased motor fuel will not be used in any company truck, tractor or automobile, nor in the truck, tractor, or automobile of any employe of said company, where said vehicle is used upon the public highway of this state. [1933 c. 312 s. 2; 1935 c. 26; 1939 c. 199, 379, 498; 1943 c. 337]

Note: Federal Land Bank of St. Paul is claim on required form at time of purchasing gas. 25 Atty. Gen. 633.

78.03 Wholesaler's license. (1) REQUIRED. No wholesaler shall produce, refine, compound, blend or manufacture motor fuel in this state for sale, distribution or use in this state, or import motor fuel into this state or receive motor fuel imported to him from without this state for sale, distribution or use in this state, or engage in the business of wholesaler within this state unless such wholesaler is the holder of an uncanceled license issued to him under this chapter.

(2) APPLICATION, CONTENTS, INVESTIGATION, REJECTION. To procure such a license every person shall file an application therefor with the department. The application shall be made upon a form prescribed, prepared and furnished by the department and shall set forth the name under which the applicant transacts or intends to transact business in this state, the location with the street number address of his place of business in this state, and such other information as the department may require. If the applicant has or intends to have more than one place of business within this state, the application shall state the location of each place of business. If the applicant is an association, the application shall set forth the names and addresses of the persons constituting the association, and if a corporation, the names and addresses of the principal officers thereof, and any other information prescribed by the department for purposes of identification. If such wholesaler is a corporation organized under the laws of another state, territory, or country, it shall also file with such application a certified copy of the certificate or license issued by the secretary of state of this state showing that such corporation is authorized to transact business in the state of Wisconsin. Said applicant shall also promise and agree, in his application, in consideration of the issuance of a license hereunder to strictly comply with all of the provisions of this chapter, and any and all regulations made by the department as here-

inafter provided to be made. The application shall be signed and sworn to under oath by the maker if a natural person, in the case of an association, by a member or partner thereof, and in the case of a corporation, by an executive officer thereof, or some person specifically authorized by the corporation to sign the application, to which shall be attached written evidence of his authority. The department shall investigate each application and in the event that any application for a license to transact business as a wholesaler in this state is filed by any person whose license shall at any time theretofore have been canceled for cause the department, or in case the department shall be of the opinion that such application is not filed in good faith, or that such application is filed by some person as a subterfuge for the real party in interest whose license shall heretofore have been canceled for cause, then in any of said events, the department after a hearing, of which the applicant shall have been given five days' notice in writing, and at which hearing, said applicant shall have the right to appear in person or by counsel and present testimony, shall have authority to refuse to issue to such person, a license to transact business as a wholesaler in this state. No person who is in default to this state for moneys due under this chapter for the sale, distribution or use of motor fuel, shall receive a license either directly or indirectly to act as a wholesaler.

(3) **BLENDER'S APPLICATION.** A blender in making application to engage in business as a wholesaler within this state shall, in addition to the above information, set forth the following on his application:

- (a) Name, quantity and general characteristics of the products to be blended.
- (b) Place where such blending is to be done.
- (c) The owner of the products to be blended.
- (d) Purpose of such blending and the intended disposition of such blended products.
- (e) Source from which the products to be blended are to be or were obtained.
- (f) Such other information as the department may deem necessary or advisable for the enforcement of this chapter.

(4) **ISSUANCE, DUPLICATES.** Upon the approval of the application and the bond hereinafter required, the department shall issue to each wholesaler an original license and as many duplicates thereof as there are wholesale places of business within this state set forth in his application.

(5) **LICENSE UNASSIGNABLE; NEW BUSINESS PLACES.** The license to act as wholesaler of motor fuels shall not be assignable, and shall be valid only for the wholesaler in whose name issued, and for the transaction of business at the places designated in the application, and said license shall at all times be conspicuously displayed at all the places of business designated in said application. Upon the opening of new places of business, the wholesaler shall immediately notify the department which shall issue a duplicate license which shall be displayed at such places of business. Upon the discontinuance of any place of business, the license issued therefor shall be immediately surrendered to the department.

(6) **BOND, SURETY, CONDITIONS, AMOUNT, FORM, RELEASE OF SURETY.** No license to act as a wholesaler of motor fuel shall issue upon any application until the person applying therefor has filed a surety bond with the department, payable to the state of Wisconsin, in such amount as shall be fixed by the department except that the amount shall never be more than the highest amount of tax paid by such wholesaler during one month. In the case of a new wholesaler, the amount of such bond shall not be more than the estimated highest amount of tax to be paid by such wholesaler in one month, as determined by the department. The premium on such bond and any additional bond required under subsection (7), shall be paid from the appropriation made by section 20.091 (2). In lieu of such bond, the applicant may file with the department good and sufficient security or a personal bond in such form and amount as the department may require. Provided that the bond or any other form of security or surety required by the department shall not exceed the highest amount of tax paid by such wholesaler in one month, and in any event maximum bond or any other form of security or surety required by the department shall not exceed \$100,000, and minimum bond or any other form of security or surety required by the department shall not be less than \$1,000. Every such bond shall have a good and sufficient surety to be approved by the department conditioned that the wholesaler will pay all motor fuel tax moneys, required by him to be paid under this chapter, at the times and in the manner provided in this chapter together with all penalties, costs and interest thereon, and further conditioned that the wholesaler will faithfully perform and comply with all the provisions imposed upon said wholesaler by this chapter, and regulations made and issued by the department pursuant thereto. Said bond shall be substantially in the following form:

KNOW ALL MEN BY THESE PRESENTS, that we (name of applicant) of the (city, town) of in the county of in the state of Wisconsin as principal, and (name of surety) of the (city, town) of in the county of in the state of Wisconsin, as surety, are held and firmly bound unto the state of

Wisconsin, in the penal sum of dollars lawful money of the United States, well and truly to be paid unto the state of Wisconsin, for the payment of which we bind ourselves, our executors, administrators, successors, and assigns, jointly, severally and firmly by these presents:

The condition of this obligation is such, that whereas the said principal has applied for, or has obtained a license to act as a wholesaler of motor fuel in the state of Wisconsin under the provisions of the motor fuel tax law, all of the provisions of which law and amendments thereto and regulations adopted pursuant thereto, are by reference made a part hereof.

Now, therefore, if said principal will pay all motor fuel tax moneys required by him to be paid under the provisions of the motor fuel tax law, at the times and in the manner provided in said motor fuel tax law, together with all penalties, costs and interest thereon, and will faithfully perform and comply with all the provisions of the motor fuel tax law and amendments thereto and regulations made and issued by the state department of taxation pursuant thereto, then this obligation shall be void, otherwise to remain in full force and effect. If the surety herein shall so elect, this bond may be conditionally canceled at any time by the surety herein filing with the wholesaler and the department of taxation of the state of Wisconsin a written notice of such conditional cancellation, but said surety, so filing said notice shall not be discharged from any liability already accrued or which may accrue under this bond before the expiration of 60 days after the said filing of said notice.

In witness whereof, we have duly executed the foregoing obligation this day of, A. D.

., Principal.
By

SURETIES.

If the surety upon said bond shall so elect, said bond may be conditionally canceled at any time by the filing by said surety with the wholesaler and the department written notices of such conditional cancellation, but said surety so filing said notices shall not be discharged from any liability already accrued or which may accrue under said bond before the expiration of 60 days after the filing of said notices, and if the wholesaler shall not within 60 days after receiving such notice file a new bond with the department and conditioned as required by law for the original bond, then his license to act as a wholesaler of motor fuels shall be automatically canceled. Whenever a new bond shall be furnished by a wholesaler as aforesaid, the department shall cancel and surrender the old bond of the wholesaler as soon as it and the attorney-general shall be satisfied that all liability under the old bond has been fully discharged.

(7) **ADDITIONAL BOND, WHEN REQUIRED.** In the event that liability upon the bond filed by any wholesaler shall be discharged or reduced, whether by judgment rendered, payment made or otherwise, or if in the opinion of the department the bond of any wholesaler theretofore given has become insufficient by the subsequent insolvency, death or removal of the sureties or any of them, or when for any cause any such bond shall be deemed insufficient as to sureties or amount, then the department shall require any such wholesaler to give and file additional surety or new bonds in the same manner and form and in the same amount and with sureties satisfactory to the department. If any such wholesaler shall fail to file such additional bond within 5 days after written notice from the department, then it shall be the duty of the department to forthwith cancel the license of said wholesaler.

(8) **DEPARTMENT'S DUTY AS TO SUFFICIENCY OF BOND.** The department not less than once each calendar month shall determine whether or not the amount of the bond filed by any wholesaler is sufficient to secure the payment by the wholesaler to the state of Wisconsin of all motor fuel tax moneys, penalties and interest due under the provisions of this chapter; and if the amount of any such bond is found insufficient, shall require a new bond in additional amount according and subject to the provisions in this section contained.

(9) **LIABILITY ON BOND CONTINUES.** The validity of any bond shall not be affected by the revocation of any license or by partial recovery upon the bond or by the execution of any new bond. [1933 c. 312 s. 2; 1935 c. 355, 510; 1939 c. 116, 135; 1941 c. 187; 1943 c. 337; 1943 c. 552 s. 18; 1945 c. 586]

Note: Under chapter 312, Laws 1933, state treasurer may accept personal bond of county highway committee members or other security furnished by county not in form of bond. 22 Atty. Gen. 581.

Receivers who are engaged in business as wholesalers under chapter 78 must file bond required by that chapter. 22 Atty. Gen. 723.

Under provisions of (6), Stats. 1933, state treasurer is to cancel and surrender old bond whenever new bond has been furnished by wholesale dealer in motor fuel, as soon as he and attorney-general are satisfied that all liability under old bond has been fully discharged. 23 Atty. Gen. 782.

78.04 Reports to department, frequency, form, contents, verification, tax collection, payment to state, computation, kerosene check. (1) For the purpose of determining the amount of his liability to the state for the tax herein imposed, each wholesaler shall, not later than the twentieth day of each calendar month, file with the department, on forms prescribed by it, monthly reports sworn to by the wholesaler which shall include the following:

(a) An itemized statement of the number of gallons as originally invoiced of all Class 1 motor fuel received during the next preceding calendar month by such wholesaler, which has been produced, refined, prepared, blended, distilled, manufactured or compounded by such wholesaler in the state of Wisconsin.

(b) An itemized statement of the number of gallons of all Class 1 motor fuel received by such wholesaler in this state from any sources whatsoever during the next preceding calendar month as shown by the shipper's invoices thereof, as originally invoiced, other than motor fuel falling within the provisions of paragraph (a), together with a statement showing the date of receipt of each shipment of such Class 1 motor fuel; the name of the person from whom purchased or received; the point of origin and the point of destination of each shipment; the quantity of each of said purchases or shipments; the name of the carrier; the number of each tank car, its initials, date of receipt, and the number of gallons contained in each car, if shipped by rail; or the name and owner of the boat, ship, barge or vessel, if shipped by water; or the make, license number and capacity of tank truck or tank wagon and the owner thereof.

(c) An itemized statement of the number of gallons, if any, of Class 1 motor fuel which such wholesaler has during the preceding calendar month (1) exported or sold for exportation from this state to any other state or to any foreign country, (2) sold to the United States government or any of its agencies, (3) sold to any post exchange or other concessionaire upon any federal reservation in this state. Such statement shall show the date of shipment, the car initials of and number of gallons contained in each tank car, if shipped by rail; the name and owner of the boat, barge or vessel, and the number of gallons contained therein, if shipped by water; the make, license number and owner of tank truck or tank wagon if such transportation is used; and shall set forth the name of the person to whom sold, point of shipment and point of delivery.

(d) An itemized statement showing the number of gallons of Class 2 motor fuel sold for use or used to propel motor vehicles upon the public highways and in machinery and equipment in connection with the construction, repair and maintenance of the public highways during the preceding calendar month other than sales for export or to the United States and its agencies or to concessionaires on federal reservations as provided in paragraphs (a), (b) and (c) of subsection (1) of section 78.02.

(2) A blender in addition to the above information shall show in his monthly return the following:

(a) The amount, name and character of each unblended petroleum product on the last day of the preceding calendar month.

(b) The amount, character and name of all blended petroleum products on hand on the last day of the preceding calendar month.

(c) The name, character and amount of each petroleum product received since date of last report, from whom received, place from which obtained, what means of delivery.

(d) Name, character and amount of products blended since date of last report and for what purpose.

(e) Amounts used by the applicant or license holder himself since date of last report and how used. Amounts disposed of by applicant or license holder other than by use since date of last report. How disposed of, and, if sold, to whom.

(f) Such other information as the department may require.

(4) (a) Every person, firm or corporation, not a wholesaler, who shall use any Class 1 motor fuel in this state or who has in his possession any Class 1 motor fuel (other than that contained in the ordinary fuel tank attached to a motor vehicle), upon which the said tax has not been paid by any wholesaler in this state, shall make returns, collections and payments on such motor fuel in the same manner as is provided for wholesalers.

(b) Every person, firm or corporation, not a wholesaler, who shall sell for use or use Class 2 motor fuel to propel motor vehicles upon the public highways (other than that which may have been brought into this state in the ordinary fuel tank attached to a motor vehicle) and in machinery and equipment in connection with the construction, repair and maintenance of the public highways upon which said tax has not been paid by any wholesaler shall on or before the twenty-fifth day of each month, make a return to the department, duly signed and sworn to, showing the amount of Class 2 motor fuel sold for use, or used during the preceding month, to propel motor vehicles upon the public highways and in machinery and equipment in connection with the construction,

repair and maintenance of the public highways and shall thereupon make payment of the tax herein provided, to the department in the same manner as is provided for wholesalers. If any person who shall sell for use, or use, Class 2 motor fuel to propel motor vehicles upon the public highways and in machinery and equipment in connection with the construction, repair and maintenance of the public highways shall be unable to produce a receipted invoice showing the name and address of the person from whom such Class 2 motor fuel was acquired, the date the same was acquired, the quantity thereof, and showing payment of the tax herein imposed with respect to such Class 2 motor fuel, it shall be presumed that no tax has been paid with respect to such Class 2 motor fuel.

(5) Said returns to the department shall be upon blanks prepared and furnished by it, and shall be sworn to by the wholesaler, owner, or managing agent in case of an individual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation, or by one of the principal officers in the case of a domestic corporation, and shall contain such other information as the department may require.

(6) Every wholesaler who sells or distributes any Class 1 motor fuel for any purpose or who sells for use, or uses, any Class 2 motor fuel to propel motor vehicles on the public highways and in machinery and equipment in connection with the construction, repair and maintenance of the public highways shall collect from the purchaser, at the time of such sale, 4 cents per gallon or fraction of a gallon on all such motor fuel sold, and any and all sums of money so paid by the purchaser to the wholesaler as taxes upon such motor fuel, upon which the tax imposed by this chapter has not theretofore been paid, shall be and remain public money, the property of the state of Wisconsin.

(7) Every wholesaler at the time of making every monthly return shall compute and pay to the department the full amount of the motor fuel tax for the next preceding calendar month, which shall be computed as follows: From the total number of gallons of Class 1 motor fuel received by the wholesaler within the state of Wisconsin during the next preceding calendar month, shall be made the following deductions:

(a) The total number of gallons of Class 1 motor fuel received by the wholesaler within this state and sold, used, or otherwise disposed of during the next preceding calendar month as set forth in paragraphs (a), (b) and (c) of subsection (1) of section 78.02; and

(b) That number of gallons of Class 1 motor fuel which shall be equal to two and one-half per cent of the total number of gallons of Class 1 motor fuel received by the wholesaler within this state, less any deductions allowed or taken in paragraphs (a), (b) and (c) of subsection (1) of section 78.02, during the next preceding calendar month to cover evaporation, shrinkage and unaccounted-for losses.

(8) To the remainder thus obtained shall be added the number of gallons of Class 2 motor fuel sold for use, or used, within this state during the preceding calendar month to propel motor vehicles upon the public highways and in machinery and equipment in connection with the construction, repair and maintenance of the public highways (except that sold as provided in paragraphs (b), (c) and (d) of subsection (1) of section 78.02) less two and one-half per cent thereof. The number of gallons thus obtained shall be multiplied by four one-hundredths and the resulting figure expressed in dollars shall be the amount of the motor fuel tax for such preceding month.

(9) Every wholesaler shall also at the time of making the monthly report provided for in this section, make report on form prescribed by said department and duly sworn to, showing all Class 2 motor fuel received, sold, used or distributed within the state together with such other information as the department may require. No tax shall be imposed or paid on Class 2 motor fuel so received, sold, used or distributed unless such Class 2 motor fuel is sold for use, or used to propel motor vehicles upon the public highways either alone or with some other product; but this report is required to prevent evasion and to make it possible to properly enforce this chapter. Provided, however, that the department may by regulation relieve any wholesaler of the duty of making monthly reports with respect to the receipt, sale, use and distribution of any product coming within the foregoing definition of Class 2 motor fuel which is sold, used or distributed by such wholesaler solely for purposes other than generating power for the propulsion of motor vehicles upon the public highways and in machinery and equipment in connection with the construction, repair and maintenance of the public highways and which is not sold, used or distributed for blending with other liquids to produce a fuel for the propulsion of motor vehicles upon the public highways, or in machinery and equipment in connection with the construction, repair and maintenance of the public highways, but such regulation shall not relieve such wholesaler from the duty of keeping records with respect to such product as required in sections 78.11 and 78.12 of this chapter.

(10) All busses, trucks, tractors and road machinery equipped with Diesel engines shall be registered with the department and the operators thereof shall report at the

same time as herein required of wholesalers the number of gallons of petroleum fuel and the names thereof used in such vehicles upon the highways of Wisconsin and shall also report from whom the Diesel fuel was purchased and the amount of the tax paid thereon to the person from whom purchased. [1933 c. 312 s. 2; 1939 c. 199, 379, 498; 1943 c. 300, 337; 1945 c. 553 s. 17; 1945 c. 505]

Cross Reference: See 14.425 for authority to destroy old motor fuel tax records.

78.05 User to pay tax, exemption. In each subsequent sale or distribution of motor fuel on which the tax of 4 cents per gallon has been collected as herein provided the amount so collected shall be added to the selling price, so that said amount is paid ultimately by the user of said motor fuel. However, no collection or payment shall be made in the case of the sale or use of any motor fuel which may not, under the constitution and statutes of the United States, be made the subject of taxation by this state. [1933 c. 312 s. 2]

78.06 Reports by wholesaler. (1) **FAILURE TO MAKE, PROCEDURE, PENALTIES.** If any wholesaler shall fail, neglect or refuse to make any report or return for any calendar month as required by this chapter, the department shall note such failure, neglect or refusal on its records, and shall estimate the motor fuel receipts or distributions of said wholesaler, and make and file such statement, report or return for said wholesaler, based upon such information as is available in its office or elsewhere, and the department shall determine the amount of motor fuel taxes due from said wholesaler, adding to said motor fuel taxes a penalty of 15 per cent thereof for failure, neglect or refusal to report, and said wholesaler shall be estopped from complaining of the amount of said estimate. The department shall send a written demand for payment to the wholesaler by registered mail addressed to said wholesaler at the address of the principal place of business of said wholesaler as given by him in his application for a wholesaler's license required to be filed under this chapter, within 10 days after said statement, report or return was due to be filed, and if such amount is not paid within 5 days from the date of the mailing of said demand, the license of said wholesaler shall be automatically suspended and the department shall proceed to collect such motor fuel taxes, penalties and costs in the manner herein provided.

(2) **FALSE REPORTS, TAX ESTIMATED, PENALTIES.** If any wholesaler shall make and file any false or fraudulent statement, report or return for any calendar month as required by this chapter, the department, upon discovering said false statement, report or return, shall note the same in its records and shall estimate the motor fuel receipts or distributions of said wholesaler and make and file such statement, report or return for said wholesaler, based upon such information as is available in its office or elsewhere, and the department shall determine the amount of motor fuel taxes still due from said wholesaler and shall add to said amount a penalty of 15 per cent thereof for filing such fraudulent or false report, plus interest on the whole amount due from said wholesaler to the state, and the amount so fixed shall be prima facie evidence of the correctness of said estimate. The department shall send a written demand for payment to the wholesaler by registered mail addressed to said wholesaler at the address of the principal place of business of said wholesaler as given by him in his application for a wholesaler's license, within 10 days after said false or fraudulent statement, report or return is discovered by said department, and if such amount is not paid within 5 days from the date of the mailing of said demand the license of said wholesaler shall be automatically revoked and canceled and the department shall proceed to collect such motor fuel taxes, penalties and costs in the manner herein provided.

(3) **DELINQUENT TAXES, COLLECTION.** Whenever any wholesaler has become delinquent in the payment of such tax then all taxes on all motor fuel received by such wholesalers since the date when the delinquency occurred shall forthwith become due and payable upon demand of the department. Thereupon all such additional taxes collected and unpaid shall be subject to collection in the same manner as a delinquent motor fuel tax and for such purposes the provisions of section 78.20 relating to attachment shall apply.

(4) **TAX EVASION PREVENTED.** Before any tax becomes due, if the department has reason to believe that any wholesaler intends or is likely to evade or attempt to evade payment of such tax when due, or intends or is likely to convey, dispose of, or conceal his property or abscond from the state, or do any other act which would render the state insecure in collecting such tax when due, the department may demand payment forthwith of all taxes upon all motor fuel received by said wholesaler, which shall immediately become payable and collectible as if delinquent, and the property of such wholesaler shall be subject to attachment as provided in section 78.20. [1933 c. 312 s. 2; 1939 c. 379; 1943 c. 337]

78.07 Jobbers; registration, reports. (1) No person shall act as a jobber for the sale of motor fuel to be imported into and delivered to a purchaser in this state without

first registering as a motor fuel jobber with the department. Application for registration shall be upon forms prescribed by the department, shall be under oath and shall furnish such information concerning the applicant as the department may require.

(2) Between the first and twentieth of each calendar month every registered jobber shall make return to the department on such forms as it shall prescribe, showing all sales of motor fuel made by him during the preceding month. [1933 c. 312 s. 2; 1943 c. 337]

78.08 Importation in vehicle tanks regulated; taxes. (1) Every person, firm or corporation, who purchases or obtains motor fuel outside of this state and operates any motor vehicle into this state upon the public highways of this state and transports motor fuel in the fuel tank or tanks attached or unattached to said motor vehicle for the sole purpose of operating said vehicle, shall pay the Wisconsin motor fuel tax on the gallons consumed by such motor vehicle while operated on Wisconsin public highways, except that this section shall not apply to any motor vehicle coming into this state with a motor fuel tank capacity not to exceed 20 gallons. Payment of the tax shall be made by purchase of motor fuel within Wisconsin of such gallonage as is equivalent to the gallonage consumed while operating such motor vehicle on the public highways of Wisconsin, or by direct remittance to the department. If deemed necessary to determine the amount of tax due or to prevent tax evasion, the department may require from any such person, firm or corporation reports on forms prescribed by it, and tax payments in the same manner as is provided in this chapter with respect to wholesalers. Every person, firm or corporation, required by this section to make returns and pay the tax herein imposed, shall be subject to all of the provisions of this chapter and all fines and penalties herein imposed for violations thereof.

(2) Every person, firm or corporation regularly or habitually operating motor vehicles upon the public highways of any other state and using in said motor vehicles gasoline purchased or obtained in this state, shall be allowed a credit or refund equal to the tax on said gasoline actually paid to the state in which it is used, but not to exceed the tax imposed on said gasoline by the state, except that this subsection shall not apply to any motor vehicle going into such other state from this state with not to exceed 20 gallons of motor fuel in its tanks or with a motor fuel tank capacity not to exceed 20 gallons. No credit or refund shall be allowed under this subsection for taxes paid to any state which imposes a tax upon gasoline purchased or obtained in this state and used on the highways of such other state, and which does not allow a similar credit or refund for the tax paid to this state on gasoline purchased or acquired in such other state and used on the highways of this state. Every person claiming a credit or refund under this subsection shall, within 30 days after the tax to such other state is paid, file a report in such form as may be prescribed by the department, together with such proof of the payment of the tax and of the fact that it was paid on gasoline purchased or obtained within this state as the department may require. Any such claimant not required so to do under subsection (1) shall make and file returns in the same manner and containing the same information as required of persons, firms and corporations to whom subsection (1) is applicable. No refund shall be allowed under this subsection on any claim or credit for taxes paid prior to July 1, 1943. The provisions of this subsection shall supersede any provision of this chapter in conflict therewith.

(3) The department is hereby empowered to enter into reciprocal agreements with the appropriate officials of any other state under which it may waive all or any part of the requirements imposed by this section upon those who use in Wisconsin gasoline or other motor vehicle fuel upon which the tax has been paid to such other state, provided that the officials of such other state grant equivalent privileges with respect to gasoline or other motor vehicle fuel used in such other state but upon which the tax has been paid to Wisconsin. [1933 c. 312 s. 2; 1935 c. 358; 1943 c. 337, 456; 1943 c. 553 s. 18, 19; 1945 c. 476]

78.09 Tank wagon operators to register; procedure; to give information, carry documents. (1) Every person other than a wholesaler who operates a tank wagon or truck upon the highways of this state, and who purchases or obtains motor fuel outside of this state and hauls, transports or delivers the said motor fuel or kerosene to persons or places in this state, or who purchases or obtains motor fuel or kerosene in one place within this state and transports, hauls or delivers the same over the public highways to another place in this state shall register with the department. Application for registration shall be upon forms prescribed by the department, shall be under oath and shall furnish such information concerning the applicant as the department may require. Said application shall specifically show the description of the car, bus, truck or other motor vehicle; the license number and state in which issued; the serial and motor number and the capacity in gallons of the fuel tank and other tank or tanks attached to said motor vehicle. The department shall furnish said person with a register number, and said person shall keep said number

conspicuously displayed upon said tank wagon or truck at all times. Every tank wagon or truck used upon the highways of this state to deliver or transport motor vehicle fuel or kerosene, subject to the motor vehicle fuel tax under the provisions of this chapter, shall have painted upon such tank wagon or truck in letters not less than 5 inches in height the name of the wholesaler owning or operating such tank wagon or truck.

(2) It shall be unlawful for said person, his agent or servant or driver to refuse at any time to divulge to the department or its duly authorized agents or employes any information demanded by said department, its agents or employes, concerning the specific kind or trade name of motor fuel or kerosene being transported, the amount of each product, in said tank wagon or truck, the name and address of the person from whom said motor fuel was purchased or obtained and the name and address of the person to whom said motor fuel or kerosene is being actually and in fact delivered.

(3) Said person so driving said tank wagon or truck shall have on his person the sales ticket, invoice, delivery ticket, bill of lading or other paper showing the name and address of the person from whom said motor fuel or kerosene was purchased or obtained, the kind and amount of each motor fuel or kerosene, and the name and address of the person to whom said motor fuel is being delivered and shall on demand of the department, its duly authorized agents or employes, present the same for examination by said duly authorized agent or employes whenever requested so to do. All such sales tickets, invoices, delivery tickets, bills of lading and other papers shall be kept for a period of three years and during such time shall be subject to inspection by the department. [1933 c. 312 s. 2; 1943 c. 337; 1943 c. 553 s. 20]

Note: Deputy oil inspector appointed under chapter 168, Stats. 1939, has no power as such to stop vehicle transporting more than twenty gallons of gasoline into Wisconsin, examine documents covering shipment, inspect gasoline and report to state supervisor of inspectors or to state treasurer origin and destination of shipment but such duties may be conferred on such deputies by treasurer in performance of his duties under 78.09, Stats. 1939. 28 Atty. Gen. 342.

78.10 Common carriers to report fuel transported monthly. (1) Every agent or employe of every railroad company, street, suburban or interurban railroad company, pipe line company, motor truck or motor tank car company, water transportation company, and every other common carrier, and every person transporting motor fuel or kerosene, either in interstate or in intrastate commerce, to points within this state, or to points without from points within this state, and transporting motor fuel or kerosene to a point in this state from a point without this state, or to a point without this state from a point within this state, who has the custody of books and records showing such transportation or deliveries, whether for storage, use, sale or distribution, shall report all such transportation or deliveries to the department on forms prescribed and furnished by it.

(2) Such reports shall cover monthly periods, and shall be submitted on or before the thirtieth day after the close of the month covered by the report; shall state the month for which the report is made; shall show the name and address of the person to whom deliveries of motor fuel or kerosene, have actually and in fact been made, the name and address of the originally named consignee, if motor fuel or kerosene has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each car, if shipped by rail, the date of delivery, the person to whom delivered and the manner in which such delivery is made and the quantity of each shipment in gallons classified as (1) gasoline, (2) casing-head or natural gasoline, (3) benzol, (4) benzine, (5) naphtha, (6) kerosene, (7) distillate, (8) other motor fuel. [1933 c. 312 s. 2; 1943 c. 337]

78.11 Record of sales and receipts; inventory of stocks kept; inspection thereof; prices posted. (1) Every wholesaler in motor fuel and every person, firm, corporation, association, copartnership or carrier, transporting, conveying or bringing motor fuel or kerosene into this state or transporting, conveying, or delivering motor fuel without from points within this state, shall keep a record of all purchases, receipts, sales and distribution of each kind or trade name of motor fuel or kerosene; such records shall at all times be subject to inspection by the department or its deputies or other officers duly authorized by the department.

(2) It is the duty of every wholesaler under this chapter to keep true and accurate records of all stocks of motor fuel or kerosene on hand. Every wholesaler shall take a physical inventory of motor fuel or kerosene on hand at the close of business on the last day of every calendar month thereafter.

(3) A blender shall also keep true and accurate records of all petroleum products on hand and shall take a physical inventory of petroleum products on hand at the close of business on the last day of every calendar month thereafter.

(4) Every wholesaler and jobber under this chapter shall keep records and books showing all purchases, receipts, sales, distribution and use of motor fuel or kerosene and such other pertinent records and papers as may be required by the department.

(5) Every wholesaler shall have the records of the inventory required to be made under this section and all other matters mentioned in this section available for the inspection by the department or its duly authorized agents or employes for a period of three years, and upon demand of the department or its agents or representatives every wholesaler shall furnish a statement under oath reflecting the contents of any record to be kept under this section.

(6) Every wholesaler and every other person selling or distributing motor fuel in this state shall keep posted in a conspicuous place, most accessible to the public at his place of business, and on every pump from which delivery is made directly into the fuel tank attached to a motor vehicle, a placard showing, in figures not less than one inch high, the net selling price per gallon of all grades of motor fuel and the amount of the license tax per gallon thereon. All sales shall be made at the posted price and delivery slips shall also show the net selling price per gallon of all grades of motor fuel and the amount of the license tax per gallon thereon. If the wholesaler or person has more than one place of business in this state, the wholesaler or person shall post said placard at all of his places of business. All prices posted shall remain in effect for at least 24 hours after they are posted. [1933 c. 312 s. 2; 1939 c. 332; 1943 c. 337]

Note: 78.11 (6), Stats. 1941, is not violated where gasoline dealer posts and sells at price which is set up to show and include net selling price per gallon, tax per gallon, and cash redemption value per gallon of trading stamps given in connection with sale. Same holds true where cash redemption value of stamps per gallon is not stated but is merely expressed in form of discount percentage. Posting of net selling price with tax added so as to reach total followed by subtraction of cash value of stamps in final posted figure results in violation. None of above situations is violation of 100.15 (1), 100.18, or ch. 189. 31 Atty. Gen. 53.

78.12 Records to be kept by jobbers. Every jobber shall keep a true and accurate record of all purchases of motor fuel or kerosene in such manner as to disclose the vendor, the quantity purchased, the correct description of the commodity and the means of transportation to said jobber, as well as all of the sales of such motor fuel or kerosene in such manner as to disclose the vendee, the quantity sold, the correct description of the commodity and the means of transportation from said jobber to the vendee. All such records required by this section shall be kept for a period of 3 years, at all times available for inspection by the department or its representatives who may require a statement from said jobber under oath reflecting the contents thereof. [1933 c. 312 s. 2; 1943 c. 337]

78.13 Visitorial and inquisitorial power of department; information and evidence not public; penalty for disclosing same. (1) The department, or any deputy, employe or agent appointed in writing, is authorized at any time during the business day to examine the books, records, papers, receipts, invoices, storage tanks and any equipment of every wholesaler, jobber or other person, purchaser or common carrier, pertaining to motor fuel, distillate or kerosene received, sold, shipped, or delivered as the case may be, to verify the truth and accuracy of any statement, report or return, or to ascertain whether or not the tax imposed by this chapter has been paid or to determine the financial responsibility of every wholesaler for the payment of the motor fuel taxes imposed by this chapter.

(2) The department shall have the power in the enforcement of the provisions of this chapter to hold hearings, to issue subpoenas duces tecum, to administer oaths to witnesses, to take the sworn testimony of any persons and cause it to be transcribed into writing, and shall have power to conduct such investigations as it may deem necessary. If any wholesaler, jobber, purchaser, or common carrier, or any other person shall refuse access to said books, records, papers, receipts, invoices, storage tanks and other equipment, and if any witness shall fail or refuse to obey any subpoena or subpoena duces tecum or fail or refuse to testify before said department, then said department shall certify the names and facts to any court of competent jurisdiction and said court shall enter such order against said wholesaler, or purchaser, or common carrier, or witness in the premises as the enforcement of this chapter and justice shall require.

(3) Any information obtained by the department as a result of the reports, investigations, examinations or verifications herein required to be made, shall be confidential, except when required to be disclosed in a court of law, and any person who shall divulge any such information shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$50 nor more than \$500 for each offense; provided, however, that this provision shall not be construed to mean that such information or evidence is privileged when used by the state or any representative thereof in any proceeding to collect the motor fuel tax or any prosecution for violation of any of the provisions of this chapter; and provided further that both the amount assessed against and the amount paid by any wholesaler, jobber or any other person of motor fuel license taxes shall be and remain records open to the inspection of the public, and may be published by the department. [1933 c. 312 s. 2; 1943 c. 337; 1943 c. 533 s. 21]

78.14 Refund for fuel destroyed, for fuel not used on highways; procedure, claim unassignable. (1) If, after the excise or license tax is remitted and paid, any motor fuel in possession of licensed wholesaler is destroyed by fire, lightning, storm, flood or accident not caused by the wilful act of such wholesaler or any employe thereof, before being sold or used by him, upon proper application therefor and proof of such destruction or loss satisfactory to the department, it shall refund the amount of tax so paid thereon. Such application or claim shall be filed with the department within 15 days after the motor fuel is so destroyed or lost.

(2) Any person who uses motor fuel, upon which has been paid the tax required to be paid under this chapter, for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats or airplanes, or who shall purchase or use any motor fuel for cleaning or dyeing or for any commercial use or purpose other than operating a motor vehicle upon the public highways of this state, shall be reimbursed and repaid the amount of the tax so paid upon making and filing a duly certified claim, witnessed by 2 witnesses or acknowledged before a notary public, with the department, upon forms prescribed and furnished by it. Such claim must be filed within 90 days after the purchase of the motor fuel, or the claim will not be allowed. The wholesaler or jobber shall, upon request, furnish each purchaser with the original invoice or bill stamped to indicate that it is an original, showing the quantity of motor fuel purchased, the date thereof, and the purchaser shall send such invoice to the department when making claim for refund. The claim shall state whether or not the applicant owns an automobile or truck or any other motor driven machinery or appliance which uses motor fuel; the total number of gallons of motor fuel purchased; the number of gallons of such fuel purchased on which refund is claimed; a detailed statement of the uses of such fuel on which refund is claimed, describing the machinery, equipment or appliance in which used, giving the serial or manufacturer's number of the motor and the approximate number of gallons used in each; or if such fuel were not used in any such machinery, equipment or appliance, then a description of the purposes for which the fuel was used with the approximate number of gallons used for each such purpose; a statement whether or not deduction has been made for motor fuel used in applicant's automobile or truck; and such other information as the department may deem necessary. The penalty provided in this chapter for presenting a false or fraudulent statement shall be printed in full on the form of statement. On the filing of such claim, accompanied by the paid invoice, the department shall determine the amount of refund due. The department may make such investigation of the correctness of the facts stated in such claim as it deems necessary. When the department has approved such claim, it shall pay the claimant the reimbursement herein provided, out of the moneys collected under the provisions of chapter 78 to be used for carrying out the provisions of this section. No refund shall be claimed by or allowed to any person on account of any motor fuel carried from this state in the ordinary fuel tank of a motor vehicle.

(3) The right of any person to a refund under this chapter shall not be assignable and the application for a refund shall be made by the same person who purchased the motor fuel as shown in the invoice by the person selling the same, and by no other person, and the proceeds or amount of such refund as determined by the department shall be paid to the person whose name appears on the seller's invoice and to no other person. [1933 c. 312 s. 2; 1935 c. 355; 1941 c. 119, 229; 1943 c. 300, 337; 1943 c. 553 s. 22]

Note: County is not entitled to refund of motor vehicle fuel tax paid on gasoline used in county trucks and tractors in plowing snow on public highways. 20 Atty. Gen. 1268.

Under (2) individual who uses motor fuel in farm truck for power purposes on farm is not entitled to refund of motor fuel tax. 22 Atty. Gen. 872.

County is not entitled to refund of state gasoline tax paid by it, when gasoline is used in recovery program projects. 23 Atty. Gen. 84.

Owner of truck which, while it remains on highways, pumps by means of small gasoline consuming pump oil from tank on chassis to household tank is not entitled to refund. 25 Atty. Gen. 293.

Sworn statement for tax refund under (2) deposited in post office on ninetieth day and received by state treasurer following day is not "filed" with state treasurer within ninety-day period and is therefore not in compliance with statute. 28 Atty. Gen. 151.

78.15 Notice by wholesaler discontinuing business; surrender license. Whenever any wholesaler doing business under this chapter ceases to be a wholesaler by reason of the discontinuance, sale, or transfer of his business, he shall notify the department in writing, within 10 days after the discontinuance, sale or transfer takes effect. Said notice shall give the date of discontinuance, and in the event of a sale or transfer of his business, the name and address of the purchaser or transferee thereof. Such wholesaler shall also within 10 days after the discontinuance, sale or transfer takes effect, make a return as required under section 78.04, pay all taxes that may be due the state hereunder, and all interest and penalties due the state and at the same time surrender to the department the license theretofore issued to him. [1933 c. 312 s. 2; 1943 c. 337]

78.16 Delinquent taxes; penalties. In case any motor fuel tax is not paid when due, a penalty of 15 per cent thereof shall immediately accrue. If such tax remains delin-

quent and unpaid for a period of one month from the date when due, then and in that event the department shall add an additional penalty of 2 per cent each month or fraction of a month that such tax remains delinquent and unpaid. The amount so added shall become a part of the tax and shall be collected and paid at the same time and in the same manner as such delinquent taxes; provided, however, that if said tax is not paid when due, according to the provisions of this chapter, the license of the wholesaler shall be automatically revoked; provided further, that if said tax is paid within 10 days after it becomes due, and the wholesaler shows that said delay was caused by accident, facts or circumstances wholly out of the control of said wholesaler, then said penalty may be waived, but unless said tax is paid when due and not later than 10 days thereafter as herein set forth, the department shall have no administrative discretion to waive said penalty of revocation of said license; provided further, that any penalties so collected under the provisions of this section shall be paid into the motor fuel tax fund and distributed as motor fuel taxes are paid in and distributed; provided further, that the penalties provided in this section shall be in addition to the penalties and remedies provided in any other provision of this chapter, and not in lieu thereof. [1933 c. 312 s. 2; 1935 c. 358; 1943 c. 337]

78.17 Suspension and revocation of licenses, department's discretion. (1) The department may suspend or, after hearing, revoke a motor fuel license whenever the holder thereof has failed to comply with any of the provisions of this chapter; and upon suspending or revoking any motor fuel license, shall request the holder thereof to surrender to him immediately all licenses or duplicates thereof issued to him, and the holder shall surrender promptly all such licenses to the department; provided, however, that the department shall have no administrative discretion in those instances where the wholesaler has failed to comply with the provisions of this chapter requiring the wholesaler to pay over to the state all public moneys paid to him and due this state as motor fuel taxes, interest and penalties under this chapter.

(2) Before the department suspends or revokes the license of any wholesaler, it shall notify said wholesaler in writing of the time and place when and where a hearing of the charges shall be had. Such notice shall contain a statement of the alleged violation of this chapter, and shall be served upon the wholesaler at least 10 days prior to said hearing, either by delivery of the same personally to the wholesaler, or by mailing the same by registered mail to the address of said wholesaler as shown in the application for a license theretofore filed by said wholesaler. At the time and place fixed in said notice, the department shall proceed to a hearing of the charges, and the wholesaler shall be accorded an opportunity to present in person or by counsel such statements, testimony, evidence and argument as may be pertinent to the charges or to any defense thereto. The department may continue such hearing from time to time but not to exceed a period of 60 days. After such hearing the department shall either rescind the order of suspension, or, good cause appearing therefor, shall continue the suspension or revoke the license. Provided, however, that no hearing shall be afforded and the department shall have no administrative discretion in those instances where the wholesaler has failed to comply with the provisions of this chapter, requiring the wholesaler to pay over to the state at the time of making and filing reports required by section 78.04 all moneys due to the state as motor fuel taxes, interests and penalties. [1933 c. 312 s. 2; 1935 c. 358; 1943 c. 337; 1943 c. 553 s. 23]

78.18 Payment of tax is condition precedent to action to test validity; procedure to recover taxes paid. No suit shall be maintained in any court to restrain or delay the collection by or payment of the tax herein imposed and to be paid by the wholesaler, upon any ground whatsoever, but the aggrieved wholesaler shall pay over all taxes, penalties and interest when due and in the manner provided in this chapter, and if paid under protest, shall at the time of making payment file a protest under oath setting forth the amount or part of said payment alleged to be paid over under protest and wrongfully collected by the department, and the reasons why the whole or said part thereof was wrongfully collected. If so paid under protest, the wholesaler may at any time within 90 days from the date of such payment sue the state in the circuit court of the county in which said wholesaler conducts his business in an action at law to recover the tax so paid with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully paid out for any reason, it shall be the duty of the secretary of state to issue his warrant on the state treasurer for the amount of such tax so adjudged to have been wrongfully paid, together with interest thereon, and the treasurer shall pay same out of the general fund. [1933 c. 312 s. 2; 1943 c. 337]

78.19 Fuel tax is preferred claim. Hereafter when the property of any wholesaler shall be seized upon any mesne or final process of any court of this state, or when the business of any wholesaler shall be suspended by the action of creditors or put into the hands of any assignee, receiver or trustee, then in all such cases all motor fuel tax moneys due the state from such wholesaler under the provisions of this chapter shall be

considered and treated as preferred claims and the state of Wisconsin shall be a preferred creditor and shall be paid in full. [1933 c. 312 s. 2]

78.20 Wholesaler in default not to sell fuel, action to collect tax and penalties, injunction, receiver, attachment, garnishment. (1) No wholesaler shall sell, distribute or offer for sale motor fuel, while in default of or delinquent in the payment of the whole or any part of such tax moneys, and in the event of the failure or refusal to pay such motor fuel tax moneys and the whole thereof, after demand made therefor by the department, such delinquent motor fuel tax moneys together with a penalty of 15 per cent of the amount of such delinquent tax moneys shall be recovered by and in the name of the state of Wisconsin, and the attorney-general or proper district attorney is authorized and directed to institute suit therefor in any court of competent jurisdiction against said wholesaler, or his surety, if any, or both. In the event such suit or attachment as hereinafter provided for is instituted, upon application made by the attorney-general or district attorney, the court may issue a writ of injunction, without requiring any bond, enjoining and restraining the defendant from selling, distributing or offering to sell any motor fuel subject to said motor fuel tax until any judgment and costs recovered in said suit or attachment has been paid, and the court shall, upon application by the attorney-general or district attorney, appoint a receiver of the property and business of the delinquent defendant for the purpose of impounding the same as security for any judgment which has been or may be recovered, and said motor fuel tax shall constitute a first and prior lien against the property of said wholesaler, including all property of whatsoever nature, belonging to him, whether used in his business or otherwise, and which lien shall be paramount and superior to any other lien, of whatever nature, against said property, whether attaching prior or subsequent to the time when said tax became due.

(2) Said motor fuel tax shall also be collectible and enforceable by a writ of attachment brought by the attorney-general or district attorney in the name of the state of Wisconsin against the lands, goods, chattels, credits, and other personal property of the wholesaler, and for the purpose of this chapter, said wholesaler shall be deemed to be a nonresident of the state of Wisconsin, and such attachment shall be governed in all respects by the provisions of law relating to attachments against nonresidents, but no attachment bond shall be required of the state of Wisconsin, nor shall an indemnity bond be required or demanded by any sheriff or constable serving such writ of attachment, and no sheriff or constable shall be liable in damages on account of levying any attachment when acting under the direction of the attorney-general or such district attorney.

(3) The sheriff or constable shall also summon the persons named in said writ as garnishees, and all other persons within his county whom the attorney-general or district attorney shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ. In any action or proceeding for the collection of the tax from the wholesaler which is due from him, or any penalties or interest, or costs imposed in connection therewith, an assessment by the department, made pursuant to this chapter, of the amount of the motor fuel taxes, or any penalties, interest or costs imposed in connection therewith, due from the wholesaler to the state of Wisconsin, shall constitute prima facie evidence of the claim of the state, and the burden of proof shall be upon the wholesaler to show that the assessment was incorrect and contrary to law; provided, that nothing in this section shall be construed as forfeiting or waiving any right to collect such motor fuel tax moneys by an action upon any bond that may be filed with the department under the provisions of this chapter, or by suit, or otherwise, and in case such suit, action or proceeding shall have been instituted for the collection of said tax, such suit, action or other proceeding shall not be construed as waiving any other right herein provided. [1933 c. 312 s. 2; 1943 c. 337]

Note: In action to foreclose lien claim on oil company's property, mere fact that company, in answer to state's cross-complaint, expressed willingness to give state lien on its property for unpaid gasoline taxes, is not controlling and does not change situation revealed by undisputed facts under which state was not entitled to lien. *Hilam, Inc. v. Petersen Oil Co.*, 217 W 86, 258 NW 365.

78.21 Embezzlement of tax moneys. If any wholesaler sells any motor fuel upon which the tax imposed by this chapter has become due and has not been paid, all tax moneys received by such wholesaler because of said sale are trust funds in his hands and the property of the state of Wisconsin. Any wholesaler who fails or refuses to pay over to the state the tax on motor fuel at the time required in this chapter, or who fraudulently withholds or appropriates or otherwise uses such moneys or any portion thereof belonging to the state, shall be deemed guilty of embezzlement and shall be punished as provided by law for the crime of embezzlement, irrespective of whether any such wholesaler has or claims to have any interest in such moneys so received by him. [1933 c. 312 s. 2; 1943 c. 300, 337]

Note: The provisions of 78.10, Stats. 1931, making a dealer's failure to pay over motor vehicle fuel taxes collected by him a misdemeanor, impose a penalty for mere non-payment, and do not preclude prosecution of the dealer for embezzlement where intent to defraud appears. *Anderson v. State*, 221 W 78, 265 NW 210.

78.22 Hours when delivery to storage tanks is permitted. No wholesaler or jobber or any other person selling motor fuel to the consumer shall receive and have delivered into the storage tanks or other equipment of said wholesaler, jobber or other person any motor fuel or kerosene between the hours of 9 o'clock P. M. and 5 o'clock A. M. without prior written consent of the department, and the receipt of any motor fuel or kerosene by said wholesaler, jobber or other person during said hours shall be prima facie evidence of a violation of the provisions of this chapter and an attempt to evade the payment of the tax herein imposed on motor fuel. [1933 c. 312 s. 2; 1943 c. 337]

78.23 Precedence of actions to enforce this chapter. All proceedings and hearings, civil or criminal, arising under this chapter shall have priority in hearing and determination over all other civil proceedings in any court except election contests, criminal and other cases in which the public is the moving party. [1933 c. 312 s. 2]

78.24 Duty of department to enforce this chapter; promulgate rules. It is hereby made the duty of the department to see that all of the provisions of this chapter affecting the collection of the motor fuel taxes herein imposed, are enforced and obeyed, and that all violations thereof are promptly prosecuted, and that all moneys received by wholesalers and in their hands as trust funds and due the state are recovered and collected. To that end the department is authorized to promulgate such reasonable rules and regulations relating to the administration and enforcement of the provisions of this chapter as may be deemed expedient, and such rules and regulations to govern its proceedings and to regulate the mode and manner of all investigations and hearings. [1933 c. 312 s. 2; 1943 c. 337]

78.25 Attorney-general and district attorney to prosecute; place of trial. (1) Upon request of the department, the attorney-general or proper district attorney shall commence and prosecute to final determination in any court of competent jurisdiction, any and all necessary action or actions at law, to enforce the provisions of this chapter.

(2) Any action brought under the provisions of this chapter may be brought either in the superior or circuit court for Dane county or in the proper court in the county wherein the defendant person, firm or corporation resides or has its principal place of business. The place of trial of said action shall not be changed from the county in which such action is commenced, except upon consent of the parties. [1933 c. 312 s. 2; 1943 c. 337]

78.26 Remedies and penalties are cumulative. It is expressly provided that all of the remedies, prosecutions and penalties under this chapter shall be cumulative of each other, and no action or suit for recovery of one penalty shall be or be construed to be a bar to or affect the recovery of any other penalty or be a bar to any criminal prosecution against any wholesaler, licensee, jobber or any other person under the provisions of this chapter. [1933 c. 312 s. 2]

78.27 Acts forbidden. No person shall commit any of the following acts:

(a) Display, or cause or permit to be displayed, or to have possession of, any license knowing the same to be fictitious, or to have been suspended, canceled, revoked or altered;

(b) Lend to, or knowingly permit the use by, one not entitled thereto, any license issued to the person lending it or permitting it to be used;

(c) Display or to represent as one's own any license not issued to the person displaying the same;

(d) Use a false or fictitious name or give a false or fictitious address in any application or form required under the provisions of this chapter, or otherwise commit a fraud in any application, record, or report or claim for refund;

(e) Use any false or fictitious name or give any false or fictitious address when purchasing or obtaining motor fuel from any source for sale or use in this state. [1933 c. 312 s. 2]

78.28 Tax levied is in lieu of all excise taxes; municipalities not to tax motor fuel. The license tax herein levied and provided for is in lieu of any excise, license, privilege or occupation tax upon the business of manufacturing, storing, selling, using or distributing motor fuel, and no city, village, town, county, township, or other subdivision or municipal corporation of the state shall levy or collect any such tax upon, or measured by, the sale, storage, receipt, distribution or use of motor fuel or any excise, license, privilege or occupation tax upon the business of manufacturing, storing, selling, using or distributing motor fuel. [1933 c. 312 s. 2]

78.29 State reciprocity as to information. The department shall, upon request duly received from the officials to whom are entrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which it may have rela-

tive to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel or kerosene, provided such other state or states provide for the furnishing of like information. [1933 c. 312 s. 2; 1943 c. 337]

78.30 Exemption of fuel for export. Said motor fuel license tax shall not be imposed on motor fuel when exported or sold for exportation from the state of Wisconsin to any other state or nation. Provided, however, that the motor fuel carried out of this state in the ordinary fuel tank of a motor vehicle shall not be, or be construed to be, motor fuel exported from this state within the meaning of this section. [1933 c. 312 s. 2]

78.31 Penalties. (1) **SELLING WITHOUT A LICENSE.** Each day in which any person shall engage in the business of wholesaler within this state without a license as required by this chapter shall constitute a separate offense, and for each such offense such wholesaler shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not to exceed \$5,000 or by imprisonment in the county jail for not less than 60 days nor more than one year, or by both such fine and imprisonment.

(2) **ATTEMPT TO ASSIGN LICENSE.** Any person assigning or attempting to assign a license to act as a wholesaler of motor fuels, or who fails to display conspicuously his license at his place of business, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of \$25 or by imprisonment in the county jail for not more than 10 days for each such offense.

(3) **FAILURE TO REPORT OR PAY.** Any person who fails or refuses to make report or payment as provided in section 78.04, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not to exceed \$5,000 or by imprisonment in the county jail for not less than one year nor more than 10 years or by both such fine and imprisonment.

(4) **OMNIBUS PROVISION.** Any person violating any provision of section 78.09, 78.11, 78.13, 78.14 or 78.22 shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$25 nor more than \$500 or by imprisonment in the county jail for not to exceed 6 months or by both such fine and imprisonment.

(5) **VIOLATION OF SECTION 78.27.** Except as otherwise provided in this chapter, any person violating any provision of section 78.27 shall be deemed guilty of a misdemeanor, unless such violation is by any other provision of law declared to be a felony, and upon conviction shall be punished by a fine of not less than \$100 nor more than \$500 and by imprisonment in the county jail for not to exceed 6 months. Such fine shall be in addition to any other penalty imposed by any other provision of this chapter. [1933 c. 312 s. 2; 1943 c. 337]

78.32 Severability of provisions to save constitutionality. If any of the provisions of this chapter includes transactions which are not taxable, or are in any other respect unconstitutional, it is the intent that so far as possible the remaining provisions of this chapter be given effect and the invalidity of any portion of this chapter shall not in any nature affect the validity of the remaining portions thereof. [1933 c. 312 s. 2]

78.33 Existing obligations to state are saved. The passage of this chapter shall not be taken or construed to relieve any wholesaler, person, firm, association or corporation whatsoever from the payment of any tax, penalty or interest due or owing to the state of Wisconsin under any laws in force July 1, 1933, or to affect or terminate any petitions, investigations, prosecutions, legal or other proceedings pending under such laws or to prevent the commencement of any legal proceedings for violation of such laws heretofore committed, or for the recovery of taxes, penalties, or interest due or owing to this state under such laws; provided further, that any and all matters, orders, hearings and proceedings pending before the state treasurer or before any court under any of the provisions of said laws or parts thereof shall be deemed to be continued with the same effect as though such law or part thereof was not hereby repealed. Nothing in this chapter shall be construed as imposing any penalty, civil or criminal, for violations of such prior laws other than the penalty prescribed in such laws. [1933 c. 312 s. 2]

78.34 Transfer of functions to department of taxation. (1) All the powers, functions and duties of the state treasurer under this chapter on June 30, 1943, are transferred to, vested in and imposed upon the state department of taxation.

(2) The personnel necessary to carry on the functions of administering the tax on motor vehicle fuel may be selected in whole or in part by the commissioner of taxation from the personnel in the state treasurer's office engaged in administering said tax just prior to June 21, 1943 or the said commissioner may select the personnel from eligible civil service lists or may transfer personnel now attached to the department of taxation. The records of the state treasurer's office relating to the administration of the motor vehicle fuel tax June 21, 1943 shall be transferred to the department of taxation and all equipment used with respect to said motor vehicle fuel tax functions shall be transferred to the

department of taxation. Any dispute relative to any of said records or equipment shall be finally determined by the superintendent of buildings and grounds. [1943 c. 337]

78.40 [Expired July 1, 1937; see 1935 c. 545 and 78.40 (8a), Stats. 1935]

79.01 to 79.18 [Renumbered sections 87.01 to 87.18]