

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-99(1)M
Motor Fuel Tax
Petroleum Business Tax
November 30, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M990730A

On July 30, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Bayside Fuel Oil Depot Corp., 1776 Shore Parkway, Brooklyn, NY 11214. Additional information related to the Petition was received on August 17, 1999.

The issue raised by Petitioner, Bayside Fuel Oil Depot Corp., is whether No. 2 fuel oil (high sulfur content) that is dispensed by Petitioner through a metered nozzle which is suitable for use in dispensing fuel into the fuel tank of a motor vehicle is subject to tax under Articles 12-A and 13-A of the Tax Law, where such fuel is dispensed in such manner into five-gallon cans, and only on an emergency basis, to a company that is commonly controlled with Petitioner.

Petitioner presents the following facts. Petitioner is a terminal operator which wholesales various oil products. Petitioner is affiliated with another company that is in the business of selling home heating products at the retail level ("Affiliate"). Petitioner states that both Petitioner and Affiliate are registered with the Department of Taxation and Finance as distributors of diesel motor fuel, and that both Petitioner and Affiliate are controlled by a common ownership. From time to time, situations arise whereby a customer of Affiliate runs out of home heating fuel and is in need of an emergency delivery. In the normal course of business, Affiliate would be able to send one of its trucks to make the necessary delivery. However, there sometimes exist circumstances under which a truck of Affiliate is not available to make such a delivery, especially during the winter months or over nights and weekends year-round. Under such circumstances, Affiliate, in order to provide its customers with good service, will often send a repairman with a small amount of fuel (usually five to ten gallons) to get the customer up and running until a truck is available to fill the customer's tank.

In these situations, the five to ten gallons of fuel will be sold by Petitioner to Affiliate. Such sales will be made through a pump that is fed by two 630,000-gallon storage tanks, which also feed the truck loading racks at Petitioner's facility, and the fuel will be dispensed into five-gallon fuel cans. Petitioner states that such fuel has not been previously subject to tax. Additionally, Petitioner states that Affiliate's records will show these small amounts of fuel were sold to Affiliate in this manner and that the amounts of fuel so sold will equal the amounts ultimately delivered to Affiliate's customers.

Applicable Law

Section 282-a(1) of Article 12-A of the Tax Law states, in part:

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There is hereby levied and imposed with respect to Diesel motor fuel an excise tax . . . upon the sale or use of Diesel motor fuel in this state. The excise tax is imposed on the first sale or use of Diesel motor fuel to occur which is not exempt from tax under this article. . . .

Section 282-a(3)(b) of Article 12-A of the Tax Law provides, in part:

The tax on the incident of sale or use imposed by subdivision one of this section shall not apply to . . . (ii) the sale of previously untaxed Diesel motor fuel which is not enhanced Diesel motor fuel to a person registered under this article as a distributor of Diesel motor fuel other than (A) a retail sale to such person or (B) a sale to such person which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle. . . . (emphasis added)

Sections 301-a and 301-j of Article 13-A of the Tax Law impose a base tax and a supplemental tax, respectively, on diesel motor fuel. Section 301-b(e)(1) of article 13-A of the Tax Law contains provisions regarding inter-distributor sales similar to those contained in section 282-a(3)(b)(ii) of article 12-A.

Section 67 of Chapter 261 of the Laws of 1988 provides as follows:

Legislative intent. It is the finding of the legislature that the present Diesel excise tax system results in administrative, collection and enforcement problems. To curb the evasion of tax and for ease of administration of this tax, the legislature proposes to place the incidence of taxation upon the first sale or use of Diesel motor fuel in the state subject to the qualifications stated within the law. It is the intent of the legislature that heating fuel, the sale of Diesel motor fuel to farmers for use in farming, and the sale of kero-jet fuel to an airline for use in its airplanes shall be exempt from taxation under article 12-A of the tax law. (emphasis added)

Important Notice N-88-50 concluded that diesel motor fuel being purchased by a consumer for home heating purposes may be sold by a retail service station exempt from the pass-through of the excise tax, provided that the quantity sold is less than ten (10) gallons and that the fuel is not dispensed into the fuel tank of a motor vehicle.

Section 301-c of Article 13-A of the Tax Law provides, in part:

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A subsequent purchaser shall be eligible for reimbursement of tax with respect to the following gallonage, subsequently sold by such purchaser in accordance with subdivision (a), (b), (e), (h), (j) or (k) of this section . . . , which gallonage has been included in the measure of the tax imposed by this article on a petroleum business:

(a) Diesel motor fuel used for heating purposes. Diesel motor fuel purchased in this state and sold by such purchaser to a consumer for use exclusively for residential heating purposes but only where (i) such diesel motor fuel is delivered into a storage tank which is not equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and such storage tank is attached to the heating unit burning such fuel, (ii) the tax imposed pursuant to this article has been paid with respect to such diesel motor fuel and the entire amount of such tax has been absorbed by such purchaser, and (iii) such purchaser possesses documentary proof satisfactory to the commissioner evidencing the absorption by it of the entire amount of the tax imposed pursuant to this article. . . .

Conclusions

The sale of fuel at issue herein from Petitioner to Affiliate would be subject to the tax under articles 12-A and 13-A at the time of the sale. In making such a sale, the fuel is delivered through a nozzle, which itself is suitable for use in fueling a motor vehicle, into a repository (*i.e.*, a five-gallon fuel can) from which the fuel can be dispensed into the fuel tank of a motor vehicle. Such a sale would not be entitled to the benefit of the exemption from tax for an inter-distributor sale (Tax Law, sections 282-a(3)(b)(ii) and 301-b(e)(1)). As a result, the fuel will be subject to the excise tax, imposed by Article 12-A. The fuel is also subject to (1) the base petroleum business tax under section 301-a of Article 13-A, imposed at the automotive-type diesel motor fuel rate; and (2) the supplemental petroleum business tax under section 301-j. As a result of the transaction with Petitioner, Affiliate would possess taxed, unenhanced diesel motor fuel, which it subsequently planned to sell to its retail customers for heating purposes.

Under the circumstances described herein, Affiliate would be able to sell the small quantities of fuel (*i.e.*, less than ten gallons) to its retail customers without passing through the Article 12-A excise tax, provided such sales are solely for heating purposes. This conclusion is consistent with both the legislative intent regarding the taxability of diesel fuel sold for heating purposes, and also with the conclusions reached in *Important Notice* N-88-50. Affiliate would be eligible for a refund of the excise tax paid on such fuel.

Additionally, the Article 13-A petroleum business taxes imposed on the fuel (both the base tax and the supplemental tax) need not be passed through to Affiliate's customers and Affiliate would

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be able to request a reimbursement of such taxes paid, pursuant to section 301-c(a) of the Tax Law, provided the fuel is sold for purposes of residential heating.

DATED: November 30, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.