

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

NYT-G-07(1)M
Miscellaneous Tax
NYT-G-07(5)S
Sales Tax
August 13, 2007

Refunds or Credits for Sales and Excise Taxes on Credit Card Purchases of Automotive Fuel by Government Entities

An oil company franchisor (“oil company”) asked whether it is eligible to apply for a refund or take a credit for purposes of the sales and excise taxes imposed by or pursuant to Articles 12-A, 13-A, and 28 of the Tax Law where it is an assignee of a retail station’s accounts and where the fuel was purchased by a government entity using a credit card (“government credit card”) issued by a third party credit card company. This NYTG examines whether a third party, such as the oil company, may request a refund or take a credit for sales and excise tax on behalf of the exempt government entity.

Facts

A number of credit card companies issue credit cards to government entities for use by the government entities’ employees to buy fuel at independently owned retail stations for the government entities’ own use and consumption. At the time the fuel is purchased, the government entities’ employee uses the credit card and the retail station issues the employee a receipt that shows the full amount for the transaction, including the excise and sales taxes. (As a practical matter, it is not possible for the retail station to back out the taxes at the time of sale, as the taxes are generally prepaid and are built into the pump price.) On its sales and excise tax returns, the retail station reports the transaction as if the transaction were taxable, and the retail station remits to the Department the amount of tax that was not previously prepaid on such fuel.

The oil company has a standing agreement with the retail station to buy its credit card receivables for the full amount of the transaction minus a discount. It also has an agreement with the credit card company, under which the oil company is reimbursed for the amount of the transaction minus the sales and excise taxes on the transaction and minus a discount. The credit card company does this because it has marked the account as being a tax-exempt one. The credit card company then bills the government entity net of taxes; that is, the credit card company deducts from the bill to the government entity the portion of any charge by the retail station attributable to sales and excise taxes. When the oil company submits its monthly return reporting its own tax liability for the importation and distribution of fuel, the return includes a credit against the liability for the taxes for which the credit card company did not reimburse the oil company because the sale was to the exempt organization.

In other cases, the credit card company transacts directly with the retail gas station and seeks the refund from the Tax Department, without the involvement of an oil company.

Analysis

Under Tax Law section 1139(a), only three limited categories of persons are eligible to receive a sales tax refund; persons required to collect tax, purchasers who paid tax to a person

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required to collect tax, and bulk sale purchasers. The issue of whether the list of potential refund applicants in Tax Law section 1139(a) is exhaustive arose in the Court of Appeals decision in (*G.E. Capital Corp. v Tax Appeals Tribunal*, 2 NY 3d 249 (2004)). The issue in that case was the validity of the Tax Department's sales tax bad debt refund regulation, which limits the right to refund to the actual vendor that experienced the uncollectible receipt, and specifically provides that no refund would be available "for a debt which has been assigned to a third party" (Sales Tax Regulation section 534.7(b)(3)). In the course of upholding that regulation, both the Tax Tribunal and the Court of Appeals determined that the categories of persons eligible to file refund claims in section 1139(a) are exclusive. The Tribunal emphasized that, administratively, it was important to limit the field of refund applicants to just these parties, because "[a]bsent this connection between an applicant, the person responsible for collecting the tax and the underlying transaction, the field of potential refund or credit applicants pursuant to section 1139(a)(i) would be virtually limitless and the orderly administration of the sales tax rendered unworkable, at best (Tax Appeals Tribunal, (Dec.27, 2001))." The Court of Appeals echoed this sentiment in its decision, holding that the bad debt regulation was rational and that

"the regulatory restriction at issue corresponds with a provision in the general sales tax refund statute, Tax Law § 1139, which addresses the procedure for filing a refund claim. Section 1139(a) ... identifies three types of sales tax refund applicants, each of whom paid sales taxes (either to the retail vendor, who then forwarded the taxes to the Division, or directly to the Division) (2 NY3d at 256)."

Under the Court of Appeals' narrow reading of Tax Law section 1139(a) in the *G.E. Capital* case, the categories of persons eligible for sales tax refunds are limited to those expressly set forth in Tax Law section 1139(a). The Court of Appeals also rejected the taxpayer's argument that the broad assignment provisions in General Obligations Law §13-101 required the Department to recognize assignments of sales tax refund claims.

Refund claims arising out of the use of government credit cards are not limited to the sales tax, but also involve Article 12-A and 13-A taxes ("excise taxes"). Whenever a refund applicant has a refund claim for sales tax arising out of a government credit card sale of fuel, it will also have an excise tax refund claim because the sale to the government entity is exempt from both taxes. The excise tax articles and regulations limit the categories of persons eligible to receive a refund with respect to an exempt sale of fuel to a government entity. Those eligible to receive such a refund are the seller who purchased tax-included fuel and then sold it to the government entity, and any government entity that paid any excise tax (Tax Law secs. 289-c[c][i]; 301-c[b]; Reg. Sec. 415.3(f)(1)). In addition, Tax Law sections 289-f, 315(b) and 1142(11) grant the Department broad authority to administer the sales taxes and the excise taxes jointly, as the same issues involving enforcement of the sales tax would be present in the administration of the excise taxes. Because the underlying rationale for limiting the potential pool of applicants to those allowed by the sales tax law would logically flow through to the

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excise taxes, the Tax Appeals Tribunal applied reasoning similar to that used by the Court of Appeals in the *G.E. Capital* case in narrowly construing which parties are eligible to apply for a bad debt claim under the excise tax.

“While logic may suggest that there is little distinction in the ultimate disposition of the motor fuel sold by petitioner to Bayview between a sale directly to a filling station and a sale for resale to a filling station ... the decision to allow a refund only in limited circumstances is a legislative prerogative and not one which we are at liberty to expand upon. Further, we cannot supply our own judgment in place of the Legislature's (RAD Energy Corp., TAT [Dec. 30, 2004]).”

This reasoning is applicable to any refund or credit, and is not limited to the refunds or credits taken because of a bad debt.

Accordingly, in light of the above decisions interpreting the Tax Law, the Department has concluded that a third party (such as a credit card company or the oil company) is not entitled to a refund or credit of the taxes paid on the fuel. Only the vendor (the retail gas station) making the sale or the government entity itself, as the exempt purchaser, is eligible to receive a refund or credit of any tax paid on the fuel.

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