

Credit Card Purchases of Automotive Fuel by Governmental Entities

The questions asked are:

1. Whether an issuer of credit cards may purchase motor fuel and diesel motor for resale when a card holder utilizes the issuer's card to make payment to the retail vendor for the card holder's purchase of fuel from the retail vendor.
2. Whether an issuer of credit cards is eligible for a refund or credit of sales tax paid to the retail vendor of such fuel.

Company X provides fleet credit card services ("Cards") to governmental entities, private entities that are exempt from sales tax and businesses. Company X's customers purchase fuel from those retail service stations ("Merchants") which accept Company X's card. Company X subsequently bills the customer for the fuel purchased. In the case of governmental entities, Company X's billing excludes the sales tax imposed on the retail sale of automotive fuels.

Company X submitted a representative copy of its Merchant Agreement. Pertinent contract language in this agreement is set forth below.

Merchant Agreement

Company X provides Cards to customers that operate fleets of vehicles ("Card Program"), and Merchant desires to accept such Cards. The parties agree that the terms and conditions of this Merchant Agreement ("Agreement") will govern Merchant's participation in the Card Program effective _____ ("Effective Date").

* * *

2.1 Purchase by Company X. Merchant agrees to sell to Company X, and Company X agrees to purchase, fuel and non-fuel products as described in this Agreement. Company X will then immediately sell such fuel and non-fuel products to customers.

2.2 Honoring Cards. Merchant will promptly honor all valid and current Cards properly presented as payment for authorized merchandise and services at a Merchant Location ("Card Transactions"). Merchant will not establish minimum or maximum transaction amounts as a condition to honoring a Card, impose any surcharge on Card Transactions, or make any cash advances against a Card.

* * *

2.4 Card Acceptance Process. When a customer (“Cardholder”) seeks to use a Card to make a purchase, Merchant will: (a) require the Cardholder to input required information, including PIN and odometer reading; (b) input required information, including product code, quantity, and retail price; (c) maintain the posted retail price in the POS Equipment at all times; (d) provide the Cardholder with a copy of the receipt; and (e) use its reasonable efforts to retain or recover any Card, if advised to retain it in a response to an authorization inquiry or if Merchant has reasonable grounds to believe the Card is counterfeit, fraudulent, or stolen.

2.5 Title. As between Merchant and Company X, title to fuel passes to Company X when a Cardholder dispenses fuel into a vehicle or suitable container, and title to non-fuel products passes to Company X when a Card Transaction is authorized.

* * *

3.1 Fuel Cost Payment. Company X will pay Merchant for fuel purchased from Merchant in Card Transactions authorized as required under this Agreement (“Authorized Card Transactions”) in an amount equal to Merchant’s Laid-In-Cost, which is the sum of: (a) gross rack price for the fuel brand as reported in the Thursday Oil Price Information Service (“OPIS”) Petroscan posting for the appropriate geographic region, and (b) all applicable state and federal taxes and freight (based on common carrier rates) (“Laid-In-Cost”). The Laid-In-Cost will be calculated weekly.

3.2 Commission on Fuel Sales. In addition to the Laid-In-Cost, Company X will pay Merchant a commission on fuel purchased in Authorized Card Transactions equal to ___ cents per gallon of fuel sold by Company X to Cardholders (“Commission”), provided, however, that the sum of the Laid-In-Costs and Commission cannot exceed 100% of Merchant’s retail price for the fuel at the time of the Authorized Card Transaction.

3.3 Non-Fuel Payments. Company X will pay Merchant for non-fuel merchandise and services purchased in Authorized Card Transactions at Merchant’s retail price plus sales tax, less 10%.

* * *

3.6 Chargebacks. Company X may charge back any Card Transaction (authorized or not) made in violation of this Agreement, or for which the Cardholder or any other person obligated to pay has asserted a defense, claim, or offset against payment based on (a) any act, omission, or alleged wrongful conduct of Merchant or any employee or agent of Merchant, or (b) any other defense, claim, or offset against payment based on the quality or sufficiency of the merchandise or services that relate to such Card Transaction.

Company X may deduct any such chargeback amount from amounts due to Merchant or require Merchant to pay such amounts on demand.

* * *

10.5 Relationship of Parties. Nothing in this Agreement will be construed to create a joint venture, partnership, employment, or agency relationship between the parties for any purpose.

Company X also submitted a copy of its standard Client Agreement. Pertinent provisions of the Client Agreement are set forth below.

3.1 Establishment of Client Account. Upon issuance of the Cards, Company X will establish an Account for Client that will be used to pay for fuel and related products and services to be purchased through the use of the Cards.

3.2 Credit Limit. The aggregate spending limit for all the Cards issued to Client under the Account (the "Credit Limit") will be provided to Client in the Approval Letter. Company X may increase or decrease this Credit Limit at any time.

* * *

4.1 General Services. Company X shall provide the following services to Client under this Agreement:

4.1.1 Issue to Client the Card(s) upon Company X's approval of the Application.

4.1.2 Exercise reasonable commercial effort to establish and maintain a system of Merchant Locations for fueling and services where Client may make purchases with Cards pursuant to this Agreement.

* * *

4.2 Certain Limitations. The personnel (if any) at a Merchant Location are not the agents, servants, or employees of Company X and Company X shall not be responsible for the products or services rendered by any of the Merchants or any other liability or damage which arises from the action or negligence of the personnel of any of the Merchants, their agents or their employees.

4.3 Claims. All claims for defective fuel, products, or services must be made to the Merchant operating the Merchant Location where such fuel, products, or services were purchased. . . .

* * *

5.2 Title. As between Client and Company X, title to fuel purchased with the Card passes to Client when someone using a Card issued to Client dispenses fuel into a vehicle or suitable container and title to non-fuel products passes to Client when Client or someone using a card issued to client receives such non-fuel product.

* * *

10.1 Payment. Client hereby unconditionally promises to pay Company X, in lawful money of the United State of America and in accordance with this Agreement, all outstanding Obligations (as defined below) which may, from time to time, be owing to Company X by Client. As used herein, "Obligations" shall mean all outstanding sums owing to Company X by Client, including, without limitation, reimbursement for petroleum products obtained through Company X, payments for any products or services obtained using the Card(s), and interest, penalties, fees, service charges, costs and expenses (including attorneys' fees) and all other obligations under this Agreement or otherwise.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, . . .

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel or diesel motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of section eleven hundred two of this article except where a provision of this article relating to motor fuel or diesel motor fuel specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven

hundred two of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1131 of the Tax Law provides, in part:

When used in this part IV, (1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; . . .

Section 1133 of the Tax Law provides, in part:

(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

(b) Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid.

Section 1139 of the Tax Law provides, in part:

(a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the

applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor. . . .

* * *

(c) Claim for credit or refund of an overpayment of sales tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. . . .

Section 525.2 (a) of the Sales and Use Tax Regulations provides, in part:

(2) Except as specifically provided otherwise, the sales tax is a “transactions tax,” with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service

(3) Except as specifically provided otherwise, the sales tax is a “destination tax.” *The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.* (Emphasis added)

Opinion

Company X provides fleet credit card services to businesses, governmental entities, and exempt organizations. Company X executes contracts with Merchants, which are retail service stations that store and dispense fuel directly into motor vehicles. These Merchants agree to accept Company X’s fleet credit cards to effect payment for property purchased by the cardholders from the Merchant. Company X’s cardholders purchase fuel and other tangible personal property and services from those Merchants that accept Company X’s card. Each Merchant receives payment from Company X for the fuel purchased by use of Company X’s credit card. Company X subsequently bills each cardholder for the fuel purchased. In the case of governmental entities, Company X’s billing excludes sales tax imposed on the fuel.

Pursuant to the Tax Law, despite the fact that the seller is required to collect and remit sales tax, the ultimate consumer also bears the burden and liability for the sales tax. See section 1133 of the Tax Law. Section 1101(b)(5) of the Tax Law defines a sale in relevant part, as “Any transfer of title or possession, or both, . . . for a consideration.” A retail sale occurs when fuel is delivered directly into a motor vehicle. See section 1101(b)(4) of the Tax Law. Thus, filling stations offer motor fuel for sale at retail.

In the instant case, Company X enters into a Standard Merchant Agreement (Merchant Agreement) with Merchants that are retail service stations willing to accept the credit cards issued by Company X as payment for purchases of fuel and other tangible personal property and services. Despite contractual language providing that Merchant agrees to sell fuel to Company X, which fuel Company X purportedly will immediately resell to its credit card holders, nothing in the Merchant Agreement suggests that Company X at any time has exclusive title to or possession of the fuel. Nothing in the Client Agreement indicates that Company X is the seller of such fuel. Company X merely agrees to issue Cards to Clients and to maintain a system of Merchant locations where such Cards may be used to purchase fuel, products, or services. In fact, any claims for defective fuel, products, or services must be made to the Merchant from whom such fuel, products, or services were purchased. See sections 4.1, 4.2, and 4.3 of the Client Agreement. The contracts and Company X’s activities indicate that Company X is merely financing these purchases of fuel, products, or services.

The event triggering the transfer of title between the Merchant and Company X, and between Company X and the customer, under the Merchant Agreement and Client Agreement is the dispensing of the fuel into the customer’s vehicle. However, this event also transfers possession of fuel from the Merchant to the customer for consideration. This transfer of possession from the Merchant to the customer meets not only the definition of a sale, but also meets the definition of a retail sale. See sections 1101(b)(4)(i) and 1101(b)(5) of the Tax Law. Company X has no title or other rights to the fuel before or after the fuel enters the customer’s vehicle or other appropriate container. The Merchant, not Company X, is selling the fuel. The transfer of title to the fuel to Company X under the Merchant Agreement does not affect the Merchant’s responsibility to collect the sales tax when the fuel is pumped into the fuel tank of the customer. Clearly, the Merchant is the person required to collect tax with respect to sales to the customer. See section 1131 of the Tax Law. Thus, the transaction between Company X and the Merchant cannot be considered to be a purchase for resale for sales tax purposes. See *West Valley Nuclear Service, Inc. v Tax Tribunal*, 264 AD2d 101, which held that a government contractor’s purchases of materials and equipment were not for resale even though the government contract provided that title to the property purchased by the contractor passed directly to the government.

Company X is not eligible to claim a refund or credit of the taxes imposed and paid upon such fuels. Section 1139(a) of the Tax Law specifies three limited categories of persons who are

eligible for a sales tax refund, namely, persons required to collect tax, purchasers who paid tax to a person required to collect tax, and bulk sale purchasers. It has been determined that the categories in section 1139(a) are exclusive. See *G.E. Capital v Tax Appeals Tribunal*, 2 NY3d 249, 256 (April 1, 2004). Since Company X is not the seller or purchaser of the fuel for sales tax purposes, under existing law Company X is not eligible for a sales tax refund or credit for the taxes paid on such fuel.

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