

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(1)M
Miscellaneous Tax
May 8, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M020924A

On September 24, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Yellow Freight System Inc., 10990 Roe Ave., Overland Park, Kansas 66211. Petitioner, Yellow Freight System Inc., provided additional information pertaining to the Petition on October 29, 2002.

The issue raised by Petitioner is whether it is entitled to a refund of Diesel motor fuel taxes paid on its purchases of Diesel motor fuel consumed in idling motor vehicles while:

- 1) loading and unloading cargo on its customers' premises or its own terminal grounds; and
- 2) dropping and hooking trailers at its wholly owned terminals.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is an interstate motor carrier with headquarters in Overland Park, Kansas. Petitioner consumes millions of gallons of Diesel motor fuel annually in its operations. Several million gallons of fuel are consumed in the State of New York. A considerable amount of the fuel consumed in New York is consumed while Petitioner is idling its vehicles in order to keep the motors warm while loading and unloading cargo either on its customers' premises or on its own terminal grounds. Fuel is also consumed while idling at Petitioner's terminal when dropping full trailers and hooking up empty ones between trips.

Petitioner is seeking a refund of Diesel motor fuel taxes paid on its purchases of Diesel motor fuel used for the above described purposes. Petitioner claims these areas are private property or publicly owned property with restricted access (e.g., airport property). While access to such areas can be made available to the public, it is only through the discretion of the business owner and solely restricted to business activities. Therefore, Petitioner claims such use of the Diesel motor fuel should qualify as refundable non-highway use.

Applicable Law and Regulations

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

1. There is hereby levied and imposed with respect to Diesel motor fuel an excise tax of four cents per gallon upon the sale or use of Diesel motor fuel in this state.

TSB-A-03(1)M
Miscellaneous Tax
May 8, 2003

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. Provided, however, if the tax has not been imposed prior thereto, it shall be imposed on the delivery of Diesel motor fuel to a filling station or into the fuel tank connecting with the engine of a motor vehicle for use in the operation thereof whichever event shall be first to occur. The tax shall be computed based upon the number of gallons of Diesel motor fuel sold or used or the number of gallons of Diesel fuel delivered into the fuel tank of a motor vehicle, as the case may be. . . .

* * *

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

In addition to the tax imposed by section two hundred eighty-two-a of this chapter, a like tax shall be imposed at the rate of three cents per gallon upon sale or use within the state of Diesel motor fuel or upon the delivery of Diesel motor fuel to a filling station or into the fuel tank of a motor vehicle for use in the operation thereof. . . . (Emphasis added)

Section 282-c of the Tax Law provides, in part:

In addition to the taxes imposed by sections two hundred eighty-two-a and two hundred eighty-two-b of this chapter, a like tax shall be imposed at the rate of one cent per gallon upon the sale or use within the state of Diesel motor fuel or upon the delivery of Diesel motor fuel to a filling station or into the fuel tank of a motor vehicle for use in the operation thereof. . . . (Emphasis added)

Section 289-c of the Tax Law provides, in part:

* * *

2. . . . the intention of this article is to place the ultimate burden resulting from such tax, so far as possible, on persons who use the public highways of the state for operating motor vehicles thereon . . . and the following refunds are provided to that end, subject to the provisions of subdivision five of this section.

3. (a) Except as otherwise provided in paragraph (b) of this section, any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state . . . shall be reimbursed the amount of such tax in the manner and subject to the conditions herein provided. . . . (Emphasis added)

TSB-A-03(1)M
Miscellaneous Tax
May 8, 2003

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(c) All claims for reimbursement shall be in such form and contain such information, and be presented within such time as the state tax commission, by rules and regulations, shall prescribe . . . The claimant shall satisfy the department of taxation and finance that he has borne the tax and that the motor fuel has been consumed by him in a manner other than the operation of a motor vehicle upon or over the highways of this state. . . .

* * *

4. "Highway," within the meaning of this section, means a highway, street, avenue, road, alley, boulevard, parkway, or other similar thoroughfare.

Opinion

The Diesel motor fuel tax is imposed on the first sale or use of Diesel motor fuel to occur which is not exempt from tax under Article 12-A of the Tax Law. See Sections 282-a, 282-b, and 282-c of the Tax Law. A refund of the Diesel motor fuel tax paid is allowed for any fuel consumed "in any manner except in the operation of a motor vehicle upon or over the highways of this state." See Section 289-c(3) of the Tax Law. Petitioner is seeking a refund of the Diesel motor fuel tax paid on its purchases of fuel used in idling its vehicles to load and unload cargo and to drop off and hook up its trailers between trips.

The statute's reference to fuel used in the "operation of a motor vehicle" is not restricted to the vehicle's actual propulsion. See Matter of Central Greyhound Lines, Inc., v. Mark Graves et al, 274 AD 679. In that case, the court held that fuel used to air condition buses was considered used in their operation while fuel used for the purpose of warming the motors of buses *stored out of service* to keep them from freezing was not. Unlike the fuel used in idling the bus motors in Central Greyhound Lines, Inc., supra, the fuel used in idling Petitioner's vehicles is to keep them *ready for service* prior to their actual street or highway use, and there exists an operational interrelationship between the two. Moreover, in 1940 Op. Atty. Gen 195 it was opined that fuel used to warm up vehicles in winter before their actual street or highway use is within the meaning of its taxable use, because it is an essential incident to such use of the highways.

Therefore, the idling of Petitioner's vehicles is incidental to the operation of the vehicles upon or over the public highways. The Diesel motor fuel consumed by such idling is considered the same as the fuel used for the actual propulsion of the vehicle and is consumed for use on the highways of New York State. Such consumption does not qualify under Section 289-c(3) of the Tax Law for reimbursement of Diesel motor fuel tax paid. 1940 Op. Atty. Gen 195, supra. Accordingly,

TSB-A-03(1)M
Miscellaneous Tax
May 8, 2003

Petitioner is not entitled to a refund of the excise taxes paid on its purchases of Diesel motor fuel consumed in such manner.

DATED: May 8, 2003

/s/
Jonathan Pessen
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Technical Services Division

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