

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

TSB-A-95 (1)M
Miscellaneous Tax
April 6, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M950525A

On October 31, 1994, a Petition for Advisory Opinion was received from Carmen M. Pariso, Inc., 273 S. Roycroft, Buffalo, New York 14225.

The issue raised by Petitioner, Carmen M. Pariso, is whether Petitioner's purchase of diesel motor fuel for use solely in off-road hi-lift tractors and cranes is exempt from the excise taxes on diesel motor fuel imposed under Sections 282-a, 282-b and 282-c of the Tax Law.

Petitioner currently maintains an off-road operation of a permanent nature wherein hi-lift tractors dredge sediment from the bottom of collection ponds maintained by a major public utility company. In addition, Petitioner maintains a landfill site wherein a crane is utilized to manage the landfill itself (i.e., moving and placing landfill materials). Each of these off-road sites contains a tank with a nozzle apparatus specifically designed to service these off-road vehicles. Petitioner has, and continues to pay excise tax on its purchases of diesel motor fuel for such vehicles.

Article 12-A of the Tax Law imposes three excise taxes on Diesel motor fuel.

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

Section 282-a. Imposition of excise tax on Diesel motor fuel.-- 1. There is hereby levied and imposed with respect to Diesel motor fuel an excise tax of six cents per gallon 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. 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

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3. (a) The tax imposed by this section shall not apply to the sale of untaxed Diesel motor fuel to or the use of such fuel by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter where such Diesel motor fuel is used by such organization for its own use or consumption.

(b) The tax on the incident of sale or use imposed by subdivision one of this section shall not apply to: (i) the sale to or use by the consumer of previously untaxed Diesel motor fuel which is not enhanced Diesel motor fuel and which is used

exclusively for heating purposes or for the purpose of use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, but only if all of such fuel is consumed other than on the highways of this state; provided, however, this exemption shall in no event apply to a sale of Diesel motor fuel 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; or (ii) the sale of previously untaxed 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 in the fuel tank of a motor vehicle; . . .

Section 282-b of Article 12-A of the Tax Law imposes an additional Diesel motor fuel tax. Section 282-b provides that "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 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. Except as otherwise provided in this section, all of the provisions of this article shall apply with respect to the additional tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-two-a . . . "

Moreover, Section 282-c of Article 12-A of the Tax Law imposes a supplemental Diesel motor fuel tax. Section 282-c provides that "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. Except for paragraph (b) of subdivision three of section two hundred eighty-nine-c, all provisions of this article shall apply with respect to the supplemental tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-two-a "

Section 282 of Article 12-A contains the definition for these taxes. Section 282.3 defines the term "motor vehicle" to mean "any vehicle propelled by any power other than muscular, except boats, road building machinery, power shovels, tractor cranes, tractors used exclusively for agricultural purposes and such vehicles as are run only on rails or tracks." (emphasis added)

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

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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, or in the operation of a pleasure or recreational motor boat upon or over the waterways of the

state, shall be reimbursed the amount of such tax in the manner and subject to the conditions herein provided except that there shall be no reimbursement of tax paid on motor fuel or diesel motor fuel taken out of this state in a fuel tank connected with the engine of a motor vehicle and consumed outside of this state. (emphasis added)

Section 1116 of the Tax Law provides, in pertinent part, as follows:

Sec. 1116. Exempt organizations -- (a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

In the instant case, Petitioner maintains tanks at several off-road sites to supply diesel motor fuel for hi-lift tractors and a crane. Such tanks are equipped with nozzle apparatus specifically designed to service these off-road vehicles. The hi-lift tractors are used to dredge sediment from the bottom of collection ponds maintained by a utility company. The crane is used to move and place landfill materials in a landfill managed by Petitioner.

Pursuant to Sections 282-a, 282-b and 282-c of the Tax Law, excise taxes are 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. Petitioner is not an exempt organization as described in Sections 1116(a)(1) or (2) of the Tax Law. Additionally Petitioner is neither purchasing Diesel motor fuel to be used exclusively for heating purposes nor for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam for sale. Therefore, Petitioner does not meet the exemption requirements set forth in Section 282-a(3) of the Tax Law. Accordingly, pursuant to Sections 282-a, 282-b and 282-c of the Tax Law, Petitioner may not purchase Diesel motor fuel exempt from the taxes imposed by Sections 282-a, 282-b and 282-c of the Tax Law.

It is noted, however, that pursuant to Section 289-c.3(a) of the Tax Law, any person who buys any motor fuel or diesel motor fuel on which the taxes imposed by Sections 282-a, 282-b and 282-c of the Tax Law have been paid and consumes the motor fuel or diesel motor fuel 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 taxes. Accordingly, since Petitioner is not consuming Diesel motor fuel in

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the operation of motor vehicles upon or over the highways of New York State, but in vehicles used exclusively for off-road operation, Petitioner is entitled to and may apply for a refund of the excise taxes paid on the purchase of Diesel motor fuel consumed in such manner.

It is noted that if there are company owned or controlled "on-highway" type vehicles in addition to those described in the request for advisory opinion, there should be adequate accounting for the fuel put into "on-highway" vehicles.

DATED: April 6, 1995

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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