

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

TSB-A-98(1)M  
Miscellaneous Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M970806I

On August 6, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Oneida Lake Petroleum Corp., P.O. Box 680, Mallory Road, Central Square, New York 13036. On March 12, 1998, Oneida Lake Petroleum Corp. submitted additional information related to the Petition.

The issue raised by Petitioner, Oneida Lake Petroleum Corp. is whether it may import "high sulfur diesel" fuel from Canada into New York State and sell such fuel for residential heating purposes without tax consequences under articles 12-A, 13-A and 28 of the Tax Law.

Petitioner presents the following facts. Petitioner intends to import a diesel product labeled "high sulfur diesel" (the "product") from Canada. According to Petitioner, high sulfur diesel is similar to No. 2 fuel oil, but has a higher cetane level and is used in Canada primarily to operate machinery. Petitioner would use its own trucks to take delivery of the product in Canada and import the product into New York State. Petitioner would then sell some of the product in New York State for residential heating purposes. Petitioner asks whether it must pay tax on the importation of the product and then apply for a refund on the heating sales, or if the transactions are exempt if the product is sold for residential heating purposes.

Applicable Law

Subdivision (16) of section 282 of Article 12-A of the Tax Law provides, in part:

"Enhanced Diesel motor fuel" shall mean the combined or blended product which has resulted from the act of enhancement (not the purchase of the ingredients to make the blend) and any product specifically designated "Diesel fuel" or "No. 1 Diesel fuel" or "No. 2 Diesel fuel" or any like industry designation commonly used to refer to a fuel used in the operation of a motor vehicle engine of the Diesel type which meets standard industry specifications for such fuel. . . .

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

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. 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: (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 . . . (iii) a sale or use of enhanced Diesel motor fuel to or by a consumer exclusively for the purposes of heating specified in subparagraph (i) of this paragraph but only if such enhanced 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, provided that each delivery of such fuel of over four thousand five hundred gallons shall be evidenced by a certificate signed by the purchaser stating that the product will be used exclusively for heating purposes. . . .

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 1102 of Article 28 of the Tax Law imposes a prepaid sales tax on diesel motor fuel. Additionally, section 1105 of Article 28 imposes a sales tax on retail sales of tangible personal property, including diesel motor fuel.

Section 301-b(d)(2) of article 13-A of the Tax Law contains an exemption from tax for sales of enhanced diesel motor fuel to consumers for residential heating purposes similar to that contained in section 282-a(3)(b)(iii) of article 12-A. However, sales of enhanced diesel fuel for non-residential heating purposes are not exempt from tax under article 13-A.

Section 1105-A(a) of article 28 of the Tax Law contains exemptions from the prepaid sales tax for sales to consumers for residential heating purposes similar to that contained in section 282-a(3)(b)(iii) of article 12-A. Sales for residential heating purposes may be subject to local sales and use taxes depending on the locality in which the sales take place. Sales for non-residential heating are not exempt under article 28.

#### Opinion

We reach the following conclusions regarding the issue raised by Petitioner.

The product is designated as a diesel product and is considered to be enhanced diesel motor fuel for purposes of the Tax Law. High sulfur diesel fuel is a variety of No. 2 diesel fuel possessing a sulfur level above 0.05 percent by weight (Glossary, Energy Information Administration/Petroleum Marketing Monthly, May 1998). Section 282(16) of Article 12-A specifically designates No. 2 diesel fuel as enhanced diesel motor fuel.

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There are no tax consequences under articles 12-A, 13-A and 28 of the Tax Law that would arise at the time of Petitioner's importation of the product from Canada. Any applicable taxes imposed under these articles would be imposed at the time of the first non-exempt sale or use of the product in New York State, not at the time of its importation. It is noted that, since the product is enhanced diesel motor fuel and must be sold as such, the provisions of the Tax Law allowing an exemption from tax for interdistributor sales are not applicable (Tax Law, §§ 282-a(3)(b)(ii), 301-b(e)(1) and 1102(a)(2)).

Sales of the product to consumers for residential heating purposes may be made exempt from the taxes imposed by articles 12-A, 13-A and 28, in accordance with sections 282-a(3)(b)(iii), 301-b(d)(2) and 1105-A(a), respectively. However, these sales may be subject to local sales and use tax depending on the locality in which the sales take place.

Sales of the product to consumers for non-residential heating purposes may be made exempt from tax under Article 12-A in accordance with section 282-a(3)(b). However, sales of the product for non-residential heating purposes would be fully taxable under articles 13-A and 28.

It should be noted that if any applicable taxes under articles 12-A, 13-A and/or 28 have not yet been imposed, such taxes would be imposed any time the product was sold and delivered to a filling station or other repository equipped with a hose or other apparatus by which the product could be dispensed into the fuel tank of a motor vehicle, or if the product were otherwise sold and/or used under any circumstances not exempt from tax under such articles.

DATED: July 1, 1998

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

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