

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

TSB-M-92 (1) M
TSB-M-92 (6) S
Diesel Motor Fuel
February 12, 1993

Taxability of Diesel Motor Fuel For Use In Concrete Mixer Trucks

This memorandum supercedes TSB-M-92(1)M, undated.

In the New York State Tax Appeals Tribunal decision B.R. DeVitt, Inc., regarding the application of New York State sales tax to certain purchases, concrete mixer trucks as well as the components to build a mixer truck, were held to be eligible for the production exemption under section 1115(a)(12) of the Tax Law. In addition, the Tribunal found that the fuel consumed by the mixer trucks was exempt pursuant to section 1115(c) of the Tax Law as fuel consumed exclusively in production.

The period covered in the DeWitt decision (March 1, 1983 through November 30, 1985) was prior to the enactment of existing sections of law that address the taxation of automotive fuels.

Section 1115(c) of the Tax Law as applicable to the period under audit provided an "up front" exemption from tax for fuel used or consumed directly and exclusively in the production of tangible personal property for sale by manufacturing.

Subsequent to the period covered by the decision, section 1115(j) was added to the Tax Law. This section provides that the section 1115(c) production exemption is not applicable "up front" to purchases of diesel motor fuel (except sales and uses of diesel which is not enhanced and only if such fuel is consumed other than on highways) and in no event may the "up front" exemption be claimed on sales of diesel motor fuel delivered to a filling station or into a repository equipped to dispense fuel into motor vehicles.

When diesel motor fuel is delivered into the fuel tank of a mixer truck or into a storage tank used to fuel the mixer truck, the fuel is being purchased at retail and the purchase price must include the retail sales tax imposed under section 1105(a) of the Tax Law as well as both the Article 12-A Diesel Motor Fuel Tax and the Article 13-A Petroleum Business Tax at the automotive-type diesel motor fuel rate.

However, section 1120(d) of the Tax Law provides for a refund of sales tax paid on diesel motor fuel that would have been exempt under section 1115(c) if the provisions of section 1115(j) did not exist. Accordingly, for purposes of Articles 28 and 29, any New York State and local sales or use tax paid on purchases of diesel motor fuel used or consumed by concrete mixer trucks is refundable except for New York City's 4% local sales and use tax. Form FT-1009, Application for Refund of Sales Tax on Diesel Motor Fuel Purchased at Retail must be filed to obtain the refund. No refund will be made with respect to any portion of fuel that is consumed by a concrete mixer truck for activities that are not directly in production.

TSB-M-92 (1) M
TSB-M-92 (6) S
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Section 282-a(3)(b)(i) of Article 12-A of the Tax Law provides an exemption from the diesel motor fuel tax for diesel motor fuel used or consumed directly and exclusively in the production of tangible personal property for sale by manufacturing, but only to the extent that the fuel is not enhanced and is consumed other than on highways. In addition, the exemption will not apply to diesel motor fuel whether or not enhanced delivered to a filling station or repository equipped to dispense fuel into motor vehicles.

Although Article 12-A does not have a refund provision similar to section 1120(d), as a matter of policy, credit or refund of the Article 12-A tax not to exceed 26% of the total fuel consumed by the mixer trucks is allowed for off highway use based on Section 289-c(3)(a), which provides for a reimbursement of tax paid on diesel motor fuel which is not consumed in the operation of a motor vehicle on the highways of this state. Form FT-1046, Diesel Motor Fuel Tax Refund Application must be filed to obtain the refund.

Although sections 301-g(b)(2) and 301-j(b)(1) of Article 13-A provide for a reimbursement of the tax surcharge and supplemental tax imposed by such sections with respect to unenhanced diesel motor fuel purchased by a manufacturer where the fuel is used or consumed directly and exclusively in the production of tangible personal property for sale by manufacturing, processing or assembly, no similar credit or refund provisions for enhanced diesel motor fuel exist in Article 13-A.

Therefore, no reimbursement of any of the Article 13-A taxes is available with regard to enhanced diesel motor fuel purchased for use or consumption in concrete mixer trucks.