

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

TSB-A-02(3)S
Sales Tax
April 3, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010301A

On February 27, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Greyhound Lines Inc., 15110 North Dallas Parkway, Dallas, Texas, 75248.

The issue raised by Petitioner, Greyhound Lines Inc., is whether it is eligible for a refund or credit of sales tax paid on the portion of the receipt for its purchases of diesel fuel attributable to the portion of the Federal excise tax on diesel fuel which is subsequently refunded to it by the Internal Revenue Service.

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

Petitioner is authorized by the Internal Revenue Service of the United States (IRS) to purchase dyed (federally untaxed) diesel fuel which is used to propel Petitioner's intercity buses. Petitioner is required to file a return and pay a reduced rate of federal excise tax (FET) of \$.074 per gallon to the IRS on these purchases. However, Petitioner also purchases clear (federally taxed) diesel fuel because some of Petitioner's suppliers cannot supply it with dyed diesel fuel. The amount paid by Petitioner to its suppliers for clear diesel fuel includes \$.244 per gallon FET. Petitioner is exempt from the FET to the extent of \$.17 per gallon (the difference between the \$.074 FET per gallon it would be required to pay if it had purchased and used untaxed fuel in its buses and the \$.244 per gallon included in the price of clear diesel fuel) and may file for a refund of the \$.17 per gallon with the IRS on Form 8849. Petitioner is currently paying New York sales tax to its suppliers on the entire receipt for the clear diesel motor fuel, including the \$.244 per gallon FET on all purchases in New York State. Since Petitioner is exempt from the FET to the extent of \$.17 per gallon, it contends that it should be entitled to a refund of sales tax paid on the portion of the FET on diesel fuel (\$.17 per gallon) for which it receives a refund from the Internal Revenue Service.

Applicable Law and Regulation

Section 1101(b)(3) of the Tax Law defines the term "receipt," in part, as:

The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such

shipping or delivery . . . is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. . . .

Section 1101(b)(8)(i)(A) of the Tax Law defines the term "vendor" as:

A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

Section 1132(a)(1) of the Tax Law provides:

Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

Section 1139 (a) of the Tax Law provides, in part:

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

Section 525.2(a)(2) of the Sales and Use Tax Regulations provides, in part:

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. . . .

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

Receipt. (a) Definition. The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. . . .

(b) Other taxes.

(1) Inclusions. (i) Generally, excise taxes which are imposed on manufacturers, importers, producers, distributors or distillers are included in the receipts on which sales tax is computed. Among these taxes, by way of example, and not by way of limitation, are:

* * *

(c) The Federal manufacturers excise taxes imposed pursuant to chapter 32 of title 26 of the U.S. Code, on the sale or lease of, for instance, certain automobiles (gas guzzlers); tires weighing more than 40 pounds; gasoline; coal; sporting goods, such as rods, reels, bows and arrows, etc.; firearms, shells and cartridges; and diesel fuel.

* * *

(iii) Excise taxes of the kind described in subparagraphs (i) and (ii) of this paragraph are included in the receipts on which sales tax is computed even though such excise taxes may be separately stated to the purchaser.

* * *

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Opinion

The federal excise tax of \$.244 per gallon imposed on clear diesel fuel is imposed pursuant to Chapter 32 of Title 26 of the U.S. Code, and is not imposed on Petitioner. Accordingly, the amount of such tax is included in the taxable receipts from the sale of such fuel. See Section 526.5(b)(1)(i)(c) of the Sales and Use Tax Regulations. The seller of the diesel fuel is a vendor as defined in Section 1101(b)(8)(i)(A) of the Tax Law and, as such, is required to collect sales tax on the receipt subject to tax at the time of sale, pursuant to Section 1132(a) of the Tax Law. A refund or credit of sales tax may be made under Section 1139(a) of the Tax Law only when the tax was erroneously, illegally or unconstitutionally collected or paid. Although any refund subsequently paid by the IRS to Petitioner ultimately effectuates a reduction in the cost of the diesel fuel to Petitioner, such refund does not reduce the receipt received by the vendor of the diesel fuel. The sales tax must be computed and collected upon the amount received by the vendor from the sale of

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the property. Accordingly, a refund of sales tax paid on diesel fuel is not allowed where the only basis for claiming such refund is a refund of a portion of the federal excise tax on the diesel fuel made by the IRS.

DATED: April 3, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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