

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(39)S
Sales Tax
September 1, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090421B

Petitioner [REDACTED], asks whether it is allowed to take credits for prepaid sales tax on the number of gallons of motor fuel lost due to shrinkage, evaporation and handling (not to exceed 2% of the fuel stored) in the underground retail gasoline station tanks at its retail gasoline stations and convenience stores. We conclude that Petitioner, acting in its retail capacity, cannot take a credit for prepaid sales tax on the number of gallons of gasoline lost due to shrinkage, evaporation and handling at its retail stores.

Facts

Petitioner owns and operates neighborhood convenience stores throughout New York State. In addition to selling food and other assorted products, many of the stores are also gas stations, where motorists can purchase various grades of gasoline (motor fuel) and diesel fuel for their vehicles. Petitioner purchases motor fuel from both New York and non-New York-based suppliers to sell at retail. Since Petitioner purchases some of its motor fuel from a non-New York distributor, Petitioner is licensed as a distributor of motor fuel under the provisions of Article 12-A of the New York State Tax Law. Petitioner does not have any bulk storage facilities in New York. The motor fuel is imported and placed directly into the underground retail gasoline station tanks for Petitioner to sell at retail.

The Department of Taxation and Finance recently conducted an audit of Petitioner's Petroleum Business and Sales and Use Tax Returns. During the audit, a question was raised regarding whether credits for shrinkage, evaporation, and handling were taken into consideration for purposes of calculating sales tax credits.

Analysis

Distributors are responsible for the payment of the Article 12-A excise taxes, Article 13-A petroleum business tax, and prepaid sales taxes on motor fuel that is imported into or caused to be imported into New York by a distributor for use, distribution, storage, or sale in New York as well as on motor fuel that is produced, refined, manufactured, or compounded by a distributor in New York. (Tax Law sections 284[1], 1102[a][2] and 301-a[b]). There is an identical credit allowed by statute for both the motor fuel excise taxes and the prepaid sales tax for gallons lost due to shrinkage, evaporation and handling. (Tax Law sections 285-a[2] and 1132[h][1][ii]). Under the prepaid sales tax, a distributor is allowed an adjustment in the gallons subject to the taxes imposed if the distributor establishes that these gallons were lost due to shrinkage, evaporation and handling. That allowance cannot exceed two percent of the fuel stored. The burden of proving that any motor fuel is not subject to tax because of these allowances is on the person responsible for the prepaid tax with respect to such fuel. (Tax Law section 1132 [h][1][ii]).

Petitioner is asserting that it is entitled to a credit against the prepaid sales tax based on gallons imported but lost, allegedly due to shrinkage, evaporation, or handling when placed into, held, or dispensed from tanks located at Petitioner's retail stations. As Petitioner acknowledges, this issue has already been addressed with regard to Article 12-A. The Department has consistently interpreted the credit under Article 12-A to be applicable only to fuel held for bulk storage and not to fuel stored for sale at retail. This issue was addressed in the Division of Tax Appeals determination in *Uni-Marts, Inc.*, DTA No. 812177

