

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

TSB-M-85 (8.1)M  
Miscellaneous Tax  
December 1, 1986

Subject: Motor Fuel Tax and Highway Use Tax Law Changes (Criminal Penalties and Other Offenses)

Chapter 276 of the New York State Laws of 1986 made amendments to Article 37 of the Tax Law, effective December 1, 1986. This memorandum., TSB-M-85(8.1)M, together with

TSB-M-86(9)M (Registrations and Licenses),  
TSB-M-86(10)M (Tax Imposition) and  
TSB-M-86(11)M (Manifest Requirements),

reflects the Chapter 276 Motor Fuel Tax Law changes of 1986.

This memorandum also contains the changes enacted by Chapter 411 of the New York State Laws of 1986, effective November 1, 1986.

These memoranda should be associated with

TSB-M-85(5)M (Registrations and Tax Imposition) and  
TSB-M-85(8)M (Criminal Penalties),

which respectively reflect the Chapter 44 and Chapter 65 Motor Fuel Tax Law changes of 1985.

Violation of Article 12-A, Motor Fuel Tax

Felonies

The following felonies, which are effective December 1, 1986, were added:

Section 1812(d) Any owner of a filling station who willfully and knowingly has in his custody, possession or control any motor fuel on which the taxes imposed by or pursuant to the authority of Article 12-A of the Tax Law have not been

- (i) assumed or paid by a distributor registered under such article or
- (ii) included in the cost to him of such fuel where such taxes were required to have been passed through to him and included in his cost,

shall in either case be guilty of a Class E felony. Such owner shall willfully and knowingly have in his custody, possession or control any motor fuel on which such taxes have not been assumed or paid by a registered distributor where such owner has knowledge of the requirement that such taxes be paid and where, to his knowledge, such taxes have not been assumed or paid by a registered distributor on such motor fuel. Such owner shall willfully and knowingly have in his custody, possession or control any motor fuel on which such taxes are required to have been passed through to him and have not been included in his cost where such owner has knowledge of the requirement that such taxes be passed through and where, to his knowledge, such taxes have not been so included.

Section 1812(h) Any person who willfully makes a manifest required by Section 286-b of the Tax Law which he does not believe to be true and correct as to every material matter or who willfully produces any manifest for inspection as required under Section 286-b of such law which is known to be fraudulent or to be false as to any material matter, shall be guilty of a Class E felony.

Section 1812-b Any person who, within any 90 day period, imports or causes to be imported 2,900 gallons or more of motor fuel into the State for use, distribution, storage or sale within the State or produces, refines, manufactures or compounds 2,900 gallons or more of motor fuel within the State, while not registered as a distributor of motor fuel, shall be guilty of a Class E felony. Moreover, any person who has previously been convicted twice under Section 1812-b of the Tax Law and who, while not registered as a distributor, imports or causes motor fuel to be imported into the State for use, distributor, storage or sale in the State or produces, refines, manufactures or compounds motor fuel within the State, regardless of the amount of motor fuel involved, shall be guilty of a Class E felony.

Section 1812-c Any person, while not licensed as a terminal operator pursuant to Section 283-b of the Tax Law, who operates as a terminal operator as defined in Section 282.13 of such law, except where all of the motor fuel stored in the storage facility is solely for such person's own use and consumption, shall be guilty of a Class E felony.

Section 1812-d(b) Any person, while not licensed as an importing transporter pursuant to Section 283-a of the Tax Law, who offloads 2,900 gallons or more of motor fuel in a 30 day period into a facility (or facilities) located within the State where such motor fuel is being imported into the State for use, distribution, storage or sale in the State, shall be guilty of a Class E felony.

### Misdemeanors

The following misdemeanors, which are effective December 1, 1986, were added:

Section 1812(g) Any person who, being subpoenaed pursuant to Section 174 of the Tax Law or the provisions of the Civil Practice Law and Rules in connection with a matter arising under Article 12-A to attend as a witness or to produce books, accounts, records, memoranda, documents or other papers,

- (i) fails or refuses to attend without lawful excuse,
- (ii) refuses to be sworn,
- (iii) refuses to answer any material and proper questions, or
- (iv) refuses, after reasonable notice, to produce books, accounts, records, memoranda, documents or other papers in his possession or under his control which constitute material and proper evidence,

shall be guilty of a misdemeanor.

Section 1812-b Any person, while not registered as a distributor of motor fuel pursuant to Section 283 of the Tax Law, who imports, or causes to be imported any motor fuel into the State for use, distribution, storage or sale within the State (except motor fuel delivered into the ordinary fuel tank,

connected to the engine of a means of conveyance in order to propel it, or in a small drum or similar container) or who produces, refines, manufactures or compounds motor fuel within the State, shall be guilty of a misdemeanor.

Section 1812-d Any person, while not licensed as an importing transporter pursuant to Section 283-a of the Tax Law, who

- (i) transports motor fuel in the State which is being imported into the State for use, distribution, storage or sale in the State, or
- (ii) offloads motor fuel into a facility located within the State where such motor fuel is being imported into the State for use, distribution, storage or sale in the State,

shall be guilty of a misdemeanor.

Seizures and Forfeitures  
Effective July 14, 1986

Seizures

Section 1848(a) Whenever a police officer or a peace officer discovers any motor fuel which is being imported for use, distribution, storage or sale in the State where the person importing or causing such motor fuel to be imported is not registered as a distributor under Section 283 of the Tax Law, the police or peace officer is authorized to seize and take possession of the motor fuel, together with the vehicle or other means used to transport such motor fuel.

Section 1848(b) The Department of Taxation and Finance shall hold and safely keep such motor fuel, vehicle or other means of transportation seized pursuant to Section 1848(a) of the Tax Law. Seized motor fuel may be deposited to the credit of the Department of Taxation and Finance at a terminal or other storage facility within the State or may be sold by the Department on the open market.

Section 1848(c) Within five business days after the seizure of the motor fuel, vehicle or other means of transportation pursuant to Section 1848(a) of the Tax Law, the Department of Taxation and Finance shall move in Supreme Court in any county to confirm the seizure on such notice as the court shall direct to the owners of the property. If the Department fails to make such motion within the required period, the seized property shall be restored to its owners as provided in Section 1848(e) of the Tax Law. On a motion for an order confirming the seizure, the Department shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action for forfeiture and that there are grounds for confirmation of the seizure. The court shall grant an application for an order confirming the seizure when it determines that there is a substantial probability that the Department of Taxation and Finance will prevail on the issue of forfeiture.

## Forfeitures

Section 1848(d)(1) A forfeiture action shall be commenced within 45 days from the date of the seizure. The court may extend the time, not exceeding 30 days, within which the summons must be served, provided that the application for extension is made before the expiration of the time fixed. If the Department fails to commence the forfeiture action within the required period, such seized property shall be restored to its owners as provided in Section 1848(e) of the Tax Law.

Section 1848(d)(2) A forfeiture action shall be commenced in Supreme Court. The proper venue for trial of an action for forfeiture is the county in which the seizure occurred.

Section 1848(d)(3) Forfeiture of motor fuel together with the vehicle or other means used to transport such motor fuel shall be adjudged where the Department of Taxation and Finance proves, by clear and convincing evidence, that the person importing or causing such motor fuel to be imported was not registered as a distributor under Section 283 of the Tax Law. Ail defendants in a forfeiture action shall have the right to trial by jury on any issue of fact.

Section 1848(d)(4) The court in which a forfeiture action is pending may dismiss the action in the interests of justice upon an application as provided for as follows:

(A) At any time during the pendency of a forfeiture action, the Department of Taxation and Finance or a defendant may apply for an order dismissing the complaint and terminating the forfeiture action in the interest of justice.

(B) Such application for the relief must be made in writing and upon notice to all parties. The court may, in its discretion, direct that notice be given to any other person having an interest in the property.

(C) An application for relief must be brought exclusively in the Supreme Court in the county in which the forfeiture action is pending.

(D) The court may grant the relief if it finds that such relief is warranted by the existence of some compelling factor, consideration or circumstance demonstrating that forfeiture of the property or any part thereof would not serve the ends of justice. The court must issue a written decision, stating the basis for dismissal.

Section 1848(d)(5) A forfeiture action shall be stayed during the pendency of a criminal action which is related to it; provided, that upon motion of the Department of Taxation and Finance or a defendant in the forfeiture action, a court may, in the interest of justice and for good cause and with the consent of all parties, order that the forfeiture action proceed despite the pending criminal action; and provided that such stay shall not prevent the granting or continuance of an order confirming the seizure.

Section 1848(d)(6) The total that may be recovered by the Department shall not exceed the value of the motor fuel seized and, in addition, either the value of the vehicle or other means used to transport such fuel or three times the amount of the tax and penalty under Article 12-A and Article 28 and pursuant to the authority of Article 29 of the Tax Law with respect to the motor fuel, whichever is less.

#### Disposition of property

Section 1848(e) If (i) the Department of Taxation and Finance fails to move for confirmation of the seizure, (ii) a court denies an application for an order confirming the seizure, or (iii) judgment is entered against the department in the forfeiture action and that judgment is affirmed after all appeals are exhausted, then the Department shall restore such seized motor fuel, or motor fuel of a like quantity and type, or such seized vehicle or other means of transportation to the owners thereof. Alternatively, if such seized motor fuel has been sold as provided in Section 1848(b) of the Tax Law, the Department shall pay to the owners of such motor fuel the proceeds of such sale or, if greater, an amount of money representing the fair market value of the motor fuel at the time of the seizure.

Section 1848(f) A person whose property has been seized may move, upon notice to the Department of Taxation and Finance, in the Supreme Court in any county for an order releasing all or part of the property seized. However, if the Department has moved to confirm the seizure of such property, the motion to release such property must be made in the Supreme Court of the county in which the motion to confirm the seizure was made. On such a motion, the defendant shall give an undertaking in accordance with Article 25 of the Civil Practice Law and Rules in an amount equal to the value of the property sought to be released that he will pay the department the value of such property which may be adjudged forfeited. In the case of the owner of a vehicle or other means of transportation, the amount of the undertaking required shall not exceed three times the amount of all taxes and penalties due under Articles 12-A, 28 and pursuant to the authority of Article 29 of the Tax Law.

Section 1848(g) The Department of Taxation and Finance, after a judicial determination of forfeiture, shall, in its discretion, either retain seized property for its official use or sell such forfeited property at public sale. The net proceeds of any such sale, or of any sale of seized motor fuel as provided in Section 1848(b) of the Tax Law, after deduction of the lawful expenses incurred, shall be deposited and disposed of pursuant to the provisions of Section 171-a of such law with respect to deposits and dispositions of revenue.

#### Wrongful seizure

Section 1848(h) If the defendant recovers judgment in the forfeiture action or if it is finally decided that there was no justification for the seizure, a defendant may recover in an action for wrongful seizure all costs and damages, including reasonable attorneys' fees, which may be sustained by reason of the seizure. In order to establish a claim for wrongful seizure, the defendant must

establish by a preponderance of the evidence that the seizure was made without reasonable cause and not in good faith. Such an action for wrongful seizure shall be the defendant's exclusive remedy in connection with seizures made. No suit or action for wrongful seizure shall be instituted unless such suit or action is commenced within two years after the time when the property was seized.

Violation of Article 21, Highway Use Tax

The following provision was deleted from Section 512-a with respect to criminal proceedings and, effective November 1, 1986, was added to section 1815:

Section 1815(c) provides that an official weigh slip or ticket issued and certified by any truck weigher employed with the Department of Transportation or by any licensed weigh master will be admissible evidence before any court in any violation proceeding or criminal proceeding.

The renumbering of the following subdivisions is effective November 1, 1986:

Section 1815(a)(1)(A) Any person who uses or causes or permits the operation of a motor vehicle subject to Article 21 on any public highway without a proper permit and sticker, or to so use a permit or sticker which was suspended or revoked or which was issued for another vehicle, shall be subject to the fines or imprisonment prescribed in Section 1815(a)(2) of the Tax Law and for purposes of enforcement of this section, by the courts, police officers and peace officers such violation shall be deemed a traffic infraction.

Section 1815(a)(1)(B) Any person who operates, or causes or permits to be operated, on any public highway a motor vehicle having an actual gross or unloaded weight in excess of the gross or unloaded weight set forth on its permit, shall be subject to the fines or imprisonment prescribed in Section 1815(a)(2) of the Tax Law and for purposes of enforcement of this section, by the courts, police officers and peace officers such violation shall be deemed a traffic infraction.

Section 1815(a)(1)(C) Any person who fails to deliver or surrender, pursuant to the provisions of Article 21 or any rule or regulation promulgated by the Tax Commission, a permit or sticker to such Commission, or any person directed by the Tax Commission to take possession thereof, shall be subject to the fines or imprisonment prescribed in Section 1815(a)(2) of the Tax Law and for purposes of enforcement of this section, by the courts, police officers and peace officers such violation shall be deemed a traffic infraction.

Section 1815(a)(1)(D) Any person who fails to make any return under Article 21 or to keep records of the operations of motor vehicles as the Tax Commission prescribes, shall be subject to the fines or imprisonment prescribed in Section 1815(a)(2) of the Tax Law and for purposes of enforcement of this section, by the courts, police officers and peace officers such violation shall be deemed a traffic infraction.

Section 1815(a)(1)(E) Any person who makes any false return shall be subject to the fines or imprisonment prescribed in Section 1815(a)(2) of the Tax Law and for purposes of enforcement of this section, by the courts, police officers and peace officers such violation shall be deemed a traffic infraction.

Section 1815(a)(1)(F) Any person who violates any other provision of Article 21 or any rule or regulation promulgated thereunder shall be subject to the fines or imprisonment prescribed in Section 1815(a)(2) of the Tax Law and for purposes of enforcement of this section, by the courts, police officers and peace officers such violation shall be deemed a traffic infraction.

The following felony was added, effective November 1, 1986:

Felony

Section 1815(b) Any person who files or causes to be filed any return, affidavit or statement required or permitted by Article 21 of the Tax Law which is willfully false or fraudulent, or who willfully fails to file a return with intent to evade the highway use tax, shall be guilty of a Class E felony.