

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

TSB-A-09(4)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-09(63)S
Sales Tax
December 30, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z090129A

Petitioner ██████████ requests an Advisory Opinion explaining which category of exemption on form FT-1012, *Manufacturing Certification for Diesel Motor Fuel and Residual Petroleum Product*, applies to its use of unenhanced diesel motor fuel under the circumstances described below. We conclude that the correct category of exemption is box “Part I-Unenhanced diesel motor fuel,” which pertains to fuel used in the production of tangible personal property for sale.

Facts

Petitioner submitted the following facts as the basis for this Advisory Opinion. Petitioner manufactures industrial gases such as oxygen and nitrogen. It purchases unenhanced diesel motor fuel from a New York State Registered Distributor of Diesel Motor Fuel (Distributor) for a heating process used directly in the production of industrial gas products at its plant in ██████████, New York. The unenhanced diesel motor fuel is delivered into a tank with a dedicated delivery pipe going directly to the manufacturing equipment, where 100% of the purchased fuel is used in the production process.

Analysis

The question Petitioner asks can be resolved by determining whether the industrial gases produced by Petitioner are tangible personal property, such that Petitioner’s purchase of unenhanced diesel motor fuel to produce these gases qualifies for exemption from the taxes imposed by Articles 12-A (Tax on Gasoline and Similar Motor Fuels), 13-A (Tax on Petroleum Businesses), 28, and 29 (State and Local Sales and Compensating Use Taxes) of the Tax Law.

In Petitioner’s view, these gases are tangible personal property. Petitioner states that it provided its Distributor with a form FT-1012 on which Petitioner checked off box Part I, claiming an exemption from the diesel motor fuel tax, the petroleum business tax, and New York State and local sales tax on the basis that 100% of the unenhanced diesel motor fuel it was purchasing would be used directly and exclusively in the production of tangible personal property for sale, by manufacturing, processing, or assembly, and not on the highways of this State. Petitioner maintains that Part I is the appropriate box, inasmuch as the gases that it produces are industrial gases, not fuel gases.

Tax Law §282-a.3(b)(i) exempts from the Diesel motor fuel tax “[t]he 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 the purpose of use or consumption directly and exclusively in the production of tangible personal property, ... for sale, but only if all of such fuel is consumed other than on the highways of this state; provided, however, this exemption shall in no event apply to a sale of Diesel motor fuel which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle”

Tax Law §301-a(f)(4) exempts from the petroleum business tax “manufacturing gallonage,” which is defined as “residual petroleum product or diesel motor fuel (which is not enhanced diesel motor fuel) used and consumed directly and exclusively in the production of tangible personal property for sale by manufacturing, processing or assembly, but only if all of such fuel or product is delivered on the manufacturing site and is consumed other than on the highways of this state. ‘Manufacturing gallonage’ shall in no event include diesel motor fuel delivered at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle...” (Tax Law §300(m)).

Tax Law §1115(c)(1) exempts from sales and use tax the “[f]uel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining or extracting...” This exemption applies to the sale and use of unenhanced diesel motor fuel only if all of such fuel is consumed other than on the highways of this state, and does not involve a sale of diesel motor fuel delivered at a filling station or into a repository that is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle (*See* Tax Law § 1115(j)).

According to Petitioner, 100% of the unenhanced diesel motor fuel it purchases is delivered into a tank with a dedicated delivery pipe going directly into the manufacturing equipment, and is consumed in a heating process used to produce industrial gases. Therefore, in order for Petitioner to qualify for the exemptions noted above, the industrial gases it produces must be tangible personal property as that term is defined by the Tax Law. Tax Law §1101(b)(6) provides that tangible personal property is corporeal personal property of any nature and, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. Thus the question is whether the industrial gases produced by Petitioner are gases excluded by this provision from the definition of tangible personal property.

We conclude that they are not excluded, and are tangible personal property for the purposes of the exemptions in question. The petroleum business tax imposed by Article 13-A is jointly administered with the sales and compensating use tax imposed by Article 28 of the Tax Law and with the excise tax on gasoline and similar motor fuel imposed by Article 12-A of the Tax Law (*See* Tax Law §§ 315 and 289(f)). Therefore, it is appropriate to look at the Sales and Use Tax Regulations to resolve questions as to the definition of tangible personal property. Section 527.2(b)(3) of the Sales and Use Tax Regulations provides that “[s]ales of gas in containers or cylinders having a capacity of less than 100 pounds of gas are considered to be sales of tangible personal property subject to tax under subdivision (a) of section 1105 of the Tax Law and not the sale of gas service or gas for the purposes of this section.” However, industrial gases sold in containers or in bulk for purposes other than heating, cooking or lighting are considered tangible personal property, regardless of whether the container has a capacity of 100 pounds or more. *See Example 5* of section 527.2(b)(3): “A welding shop purchases a tank of oxygen and a tank of acetylene. The transaction is not the purchase of a gas service but is the purchase of tangible personal property.” *See also Airgas East, Inc.*, Adv Op Comm T & F, April 4, 2003, TSB-A-03(16)S and 20 NYCRR 526.8(b).

Based upon the foregoing, we conclude, assuming that the industrial gases produced by Petitioner are not used for the purpose of heating, cooking, or lighting, that these gases constitute tangible personal property. Therefore, the use of unenhanced diesel motor fuel as described by Petitioner to produce these

industrial gases would entitle Petitioner to claim an exemption from the diesel motor fuel tax, the petroleum business tax, and the New York State and local sales taxes. Accordingly, Petitioner may claim these exemptions by providing its Distributor with a Form FT-1012, *Manufacturing Certification for Diesel Motor Fuel and Residual Petroleum Product*, on which it checks off box Part I.

DATED: December 30, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.