

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

TSB-A-04(9)S
Sales Tax
April 7, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S021001B

On October 1, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Steven J. Rosenblatt, CPA, Rosenblatt, Kiman, Levittan, & Levine & Co. LLP, 1700 Jericho Tpke., New Hyde Park, NY 11040. Petitioner, Steven J. Rosenblatt, CPA, furnished additional information with respect to the Petition on August 22, 2003, and September 11, 2003.

The issue raised by Petitioner is whether an automobile dealership is entitled to a credit for the sales tax paid on gasoline used to provide a full tank of gas with the purchase of a new vehicle.

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

An automobile dealership (hereinafter “dealer”) selling a new motor vehicle to its customer provides the vehicle to the customer with a full tank of gasoline. Petitioner asserts that the dealer *must* sell the vehicle with a full tank of gas. Petitioner provided a sample vehicle manufacturer’s window sticker which lists a full tank of fuel as one of the items included in the manufacturer’s suggested retail price (MSRP) of the vehicle. The automobile manufacturers do not transport the motor vehicles to the dealers with full tanks of gas. The dealer does not have its own gas pumps and does not sell gasoline in its ordinary course of business. Therefore, gasoline must be purchased by the dealer. The dealer purchases the gasoline from a retail service station. The dealer pays sales tax on the gasoline when it is purchased.

Certain automobile manufacturers provide a credit to the dealer for filling up the tanks of new vehicles with gasoline. This credit is allowed to the dealers on the sale of new vehicles. The amount of the credit is a flat fee established by the manufacturer based on the car model sold. The credit is not a direct reimbursement of a dealer’s actual cost for the amount of gasoline necessary to fill the tank of any particular vehicle sold. Petitioner supplied sample statements which show that the credit is applied to the dealer’s account with the manufacturer. Petitioner further states that the credit is applied after the car has been sold.

Applicable law and regulations

Section 1101(b)(4) of the Tax Law provides, in part:

Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which

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the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel or diesel motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of section eleven hundred two of this article except where a provision of this article relating to motor fuel or diesel motor fuel specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred two of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. . . .

Section 1105(a) of the Tax Law imposes sales tax upon, "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

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 (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article. . . .

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(4)(i) Tangible personal property which is purchased and given away without charge, *for promotion or advertising purposes is not purchased for resale.* It is a retail sale to the purchaser thereof, and is not a sale to the recipient of the property. (Emphasis supplied)

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(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Opinion

An automobile dealer is in the business of selling motor vehicles to customers. Petitioner states that the motor vehicles are sold with a full tank of gas, which fuel the dealer has purchased from a retail service station. Petitioner states that pursuant to the dealer's agreement with various vehicle manufacturers, the vehicle must be delivered to the retail customer with a full tank of gas.

The fact that the manufacturer's window sticker which designates the items included in the MSRP of the vehicle indicates that along with listed standard equipment and installed optional equipment a full tank of gas is also included at sale is one factor indicating that the gasoline is a component part of the vehicle being sold. Similarly, though the contract of sale entered into between the dealer and the customer may or may not specify that the dealer is required to provide the customer with a full tank of gas as a condition of sale, the fact that the dealer's printed advertisements and other written representations, or the dealer's invoice or other documents signed and agreed to by the dealer and the customer, refer to the fact that a full tank of gas is provided the customer at sale likewise would indicate that the gasoline is sold as a component part of the vehicle being sold.

Where it appears that the gasoline is property provided to the customer by the dealer as part of the sale of the new vehicle to the retail customer, the gasoline is considered a constituent component part of the vehicle so sold. Were the property a commodity other than motor fuel, the dealer would be able to make a purchase of the property without payment of sales tax as a purchase for resale. However, in accordance with sections 1101(b)(4)(ii) and 1105(a) of the Tax Law, motor fuel, including gasoline, may not be purchased by persons at a retail service station without payment of the sales tax. Thus the dealer must, at the time of its purchase of the gasoline, pay to the retail service station vendor the sales tax imposed on the cost of the gasoline under section 1105(a).

In these described circumstances, where the gasoline has become a component part of the vehicle being sold and is transferred by the dealer to the customer as a constituent part of the customer's purchase of such vehicle, the dealer may claim a refund or credit for the tax that it paid to the retail service station on its purchase of the gasoline.

However, if the dealer cannot show that its agreements with, or representations to, the customer provide that the customer will receive a full tank of gas upon the purchase of the vehicle, it would appear that the dealer includes a full tank of gas with the sale of a vehicle not as a

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component part of the vehicle being purchased but rather as a promotional good will gesture on the dealer's part. In these circumstances, the dealer's purchase of gasoline provided to customers with the purchase of motor vehicles is a promotional purchase of tangible personal property as described in section 526.6(c)(4)(i) of the Sales and Use Tax Regulations. Such purchases do not qualify for the resale exclusion set forth in section 1101(b)(4)(i) of the Tax Law. See *The American Tobacco Company*, Adv Op Comm T&F, May 23, 1995, TSB-A-95(16)S. Therefore, the dealer's purchase of gasoline provided in vehicles, for which there is no agreement or representation to provide the gasoline, is subject to the sales tax imposed pursuant to section 1105(a) of the Tax Law, and the dealership is not entitled to a refund or credit of the tax paid on such purchase.

It should be noted that any purchases of gasoline which are otherwise consumed by the dealer are also subject to sales tax. Accordingly, since the dealer will be making purchases at retail of gasoline all of which are subject to sales tax at the time of its purchase, and only some of the gasoline purchased may be eligible for refund or credit upon a qualifying transfer and sale of such fuel to the customer as a component part of the sale of a new vehicle, the dealer must keep detailed records substantiating the actual uses of the gasoline it purchases.

The credit provided by certain manufacturers to the dealer for providing customers with a full tank of gas is similar in nature to a dealer incentive or dealer rebate. There is no sales tax imposed upon such transaction. Such sales tax as may be due is imposed on the sale of the vehicle by the dealer to the retail purchaser thereof, the gasoline being included as a component part of such sale. There being no transfer of title or possession of gasoline between the manufacturer and the dealer, the manufacturer does not purchase the gasoline from the dealer. Similarly, the manufacturer is not selling gasoline to the retail purchaser of the vehicle, either as such or as a physical component part of the new vehicle, or providing the gasoline to the retail purchaser of the vehicle as a gift or promotional gesture.

DATED: April 7, 2004

/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.