

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

TSB-A-95
(3) Miscellaneous Tax
(40) Sales Tax
October 30, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z950328A

On March 28, 1995, a Petition for Advisory Opinion was received from Montauk Marine Basin, Box 610, Montauk, New York 11954.

The issue raised by Petitioner, Montauk Marine Basin, is whether a vessel with a license to fish and sell off a portion of its catch is entitled to a refund of the taxes imposed under Articles 12-A, 13-A, 28 and 29 of the Tax Law as they relate to fuel used in a vessel engaged in commercial fishing.

Petitioner alleges that a vast majority of the sport fishing fleet that uses the Montauk Harbor are licensed to catch and sell their fish, although most are simply pleasure boats and do not make their living on the water. Petitioner contends that many are affluent persons on million dollar sport fishing boats with crews. Petitioner claims that to receive a commercial fishing license in New York State one must pay \$100.00 if he or she is a resident or \$250.00 if he or she is a nonresident. There is no requirement that the licensee own a boat. Petitioner further alleges that a Federal tuna permit can be obtained by a boat owner by completing a short application and remitting a \$25.00 fee.

Subdivision 3(a) of Section 289-c of the Tax Law pertaining to the refund of taxes paid on gasoline and similar motor fuels imposed under Article 12-A provides as follows:

3.(a) Except as otherwise provided in paragraph (b) of this section, any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state, or in the operation of a pleasure or recreational motor boat upon or over the waterways of the state including waterways bordering on the state, shall be reimbursed the amount of such tax in the manner and subject to the conditions herein provided except that there shall be no reimbursement of tax paid on motor fuel or diesel motor fuel taken out of this state in a fuel tank connected with the engine of a motor vehicle and consumed outside of this state. (emphasis added)

Subdivision (g) of Section 301-c of the Tax Law pertaining to the reimbursement of petroleum business taxes imposed under Article 13-A provides as follows:

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(g) Diesel motor fuel and motor fuel used in the operation of commercial fishing vessels. Diesel motor fuel or motor fuel purchased in this state by a commercial fisherman at retail where (1) such diesel motor fuel or such motor fuel is delivered by a pump equipped with a hose directly into the fuel tank of a commercial fishing vessel to be used as fuel in the operation of such vessel for the purpose of engaging in the commercial harvesting of fish for sale; and (2) such vessel is operated by a commercial fisherman; but only where (i) the tax imposed pursuant to this article has been paid with respect to such diesel motor fuel or such motor fuel and the entire amount of such tax has been absorbed by such purchaser and, (ii) such purchaser possesses documentary proof satisfactory to the commissioner evidencing the absorption by it of the entire amount of the tax imposed pursuant to this article. Provided, however, that the commissioner shall require such documentary proof to qualify for any reimbursement of tax provided by this section as the commissioner deems appropriate.

Section 300 of the Tax Law provides, in part, as follows:

(i) "commercial fisherman" means a person licensed by an appropriate federal or state agency for the purpose of engaging in the commercial harvesting of fish and who is engaged in the business of harvesting fish for sale. In determining whether or not a business is being conducted consideration shall be given to the amount of time, capital and effort that is consumed by, as well as the percent of total gross income from all sources derived from the harvesting of fish for sale.

(j) "commercial fishing vessel" means a vessel which is used directly and predominantly in the harvesting of fish for sale and, if such vessel is required to be documented with the United States Coast Guard, it is currently documented with the United States Coast Guard and has a current fisheries endorsement on such documentation. (emphasis added)

Section 1105 of the Tax Law pertaining to the sales tax imposed by Articles 28 and 29 provides, in part, as follows:

Sec. 1105. Imposition of sales tax.- ... there is hereby imposed and there shall be paid a tax ... upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

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(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(vii) such services rendered with respect to fishing vessels and property used by or purchased for such vessels as such vessels are specified in paragraph twenty-four of subdivision (a) of section eleven hundred fifteen of this article.

Section 1115 of the Tax Law pertaining to the exemptions from sales and use taxes under Articles 28 and 29 provides, in part, as follows:

Sec. 1115. Exemptions from sales and use taxes.--(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(24) Fishing vessels used directly and predominantly in the harvesting of fish for sale, and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs. For the purpose of this paragraph the term fishing vessel shall not include any vessel used predominantly for sport fishing purposes. (emphasis added)

Technical Services Bureau Memorandum TSB-M-85(17)S dated October 7, 1985, entitled 1985 Legislation-Chapter 799, Sales Tax Exemption for Commercial Fishing Vessels provides that the term "fishing vessel" applies only to a vessel engaged directly and predominantly in the harvesting of fish for sale and not to a fishing vessel used predominantly for sport fishing purposes. The term "predominantly" means more than 50%.

A determination in the instant case as to whether a vessel with a license to fish and sell a portion of its catch is entitled to a refund of the taxes imposed under Articles 12-A, 13-A, 28 and 29 of the Tax Law is a factual question which cannot be determined in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions

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to a "specified set of facts." Tax Law, Section 171, subd. twenty-fourth; 20 NYCRR 2376.1(a).

In making its determination the Tax Department will consider collectively the provisions of Articles 12-A, 13-A, 28 and 29 as they apply to commercial fishermen and commercial fishing vessels, as well as, TSB-M-85(17)S, supra. The criteria to be met include, but are not limited to, the fact that the fisherman falls within the definition of a commercial fisherman as set forth in Section 300 of the Tax Law taking into consideration the amount of time, capital and effort that are consumed by the fisherman, as well as the percent of total gross income from all sources such fisherman has derived from the harvesting of fish for sale. In addition, the Tax Department will consider whether the commercial fishing vessel was used directly and predominantly (more than 50%) in the harvesting of fish for sale. Fishing vessels used directly and predominantly in the harvesting of fish for sale shall not include any vessel used predominantly (more than 50%) for sport fishing. If the fisherman and vessel do not fall within the provisions of Articles 12-A, 13-A, 28 and 29 as they apply to vessels engaged in commercial fishing, such fisherman will not be entitled to a reimbursement of the taxes paid on fuel used in such vessel.

DATED: October 30, 1995

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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