

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

TSB-A-96 (1)M
Miscellaneous Tax
TSB-A-96 (46)S
Sales Tax
July 15, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z951113A

On November 13, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Castle Oil Corporation, 290 Locust Avenue, Bronx, New York 10454.

The issue raised by Petitioner, Castle Oil Corporation, is whether the blends resulting from combining marine diesel fuel or substandard No. 2 heating oil with low-sulfur enhanced diesel motor fuel will be deemed to be enhanced diesel motor fuel for purposes of Articles 12-A, 13-A and 28 of the Tax Law.

Petitioner presents the following facts. Castle Oil Corporation and its wholly-owned subsidiary Castle Supply & Marketing, Inc. (collectively, "Castle") are distributors of diesel motor fuel, selling primarily No. 2 heating oil (unenhanced diesel fuel). Castle also sells limited quantities of enhanced diesel motor fuel, as well as other products not relevant to the instant matter.

Castle has identified a supplier who can provide Castle with marine diesel fuel at a favorable price. Marine diesel fuel is an unenhanced, high-sulfur product that does not meet the specifications of No. 2 heating oil and is not suitable for the operation of a motor vehicle engine of the diesel type. In order for marine diesel fuel to meet the specifications of No. 2 heating oil, it would be necessary to blend the marine diesel fuel with either low-sulfur enhanced diesel motor fuel or No. 2 heating oil.

Castle is also able to obtain, from time to time, substandard No. 2 heating oil that does not meet the industry specifications for No. 2 heating oil. In order for the substandard heating oil to meet the specifications of No. 2 heating oil, it is necessary to blend it with either low-sulfur enhanced diesel motor fuel or No. 2 heating oil. The blending process results in the creation of industry standard No. 2 heating oil.

Castle does not currently engage in blending enhanced diesel motor fuel with either marine diesel fuel or substandard heating oil. However, if the blends would not be taxable upon their sale, it would be economically advantageous for Castle to engage in producing these blends.

Subdivision (16) of section 282 of Article 12-A of the Tax Law provides in part:

"Enhancement" when used in this article with respect to Diesel motor fuel shall mean the addition or blending of kerosene or any other substance or additive, such as a cetane improver, to or with fuel oil or other middle distillate which improves or enhances such middle distillate's performance in the operation of a motor vehicle engine of the diesel type, provided, enhancement shall not include the production of fuel oil by the addition of a substance to number two fuel oil for the purpose of lowering the cloud point or pour point of such product to that of generally accepted

industry standards for number two fuel oil and such resulting product is invoiced and sold, in good faith, by the producer thereof as number two fuel oil. "Enhanced Diesel motor fuel" shall mean the combined or blended product which has resulted from the act of enhancement (not the purchase of the ingredients to make the blend) and any product specifically designated "Diesel fuel" or "No. 1 Diesel fuel" or "No. 2 Diesel fuel" or any like industry designation commonly used to refer to a fuel used in the operation of a motor vehicle engine of the Diesel type which meets standard industry specifications for such fuel.

Subdivision (1) of section 282-a of Article 12-A of the Tax Law provides in part:

The excise tax is imposed on the first sale or use of Diesel motor fuel to occur which is not exempt from tax under this article. Provided, however, if the tax has not been imposed prior thereto, it shall be imposed on the delivery of Diesel motor fuel to a filling station or into the fuel tank connecting with the engine of a motor vehicle for use in the operation thereof whichever event shall be first to occur.

Section 301-a of Article 13-A of the Tax Law imposes a petroleum business tax on diesel motor fuel. Section 1102 of Article 28 of the Tax Law imposes a prepaid sales tax on diesel motor fuel. Pursuant to statutory provisions, the excise tax, the petroleum business tax and the prepaid sales tax on diesel motor fuel are, to the extent possible, administered on a joint basis. A determination of whether diesel motor fuel is enhanced or unenhanced that is made in accordance with the provisions of the excise tax will also apply for purposes of the petroleum business tax and the prepaid sales tax.

Section 282-a(3)(b)(ii) of Article 12-A provides that a sale of previously untaxed unenhanced diesel motor fuel by one registered distributor to another registered distributor is exempt from the imposition of the excise tax (as long as the sale is not a retail sale or a sale involving delivery of the fuel at a filling station or into a repository which is equipped with a hose or other apparatus by which the fuel could be dispensed into the fuel tank of a motor vehicle). However, an inter-distributor sale of enhanced diesel motor fuel does not receive the benefit of this exemption.

Section 301-b of Article 13-A and section 1102 of Article 28 provide an exemption from the imposition of the petroleum business tax and the prepaid sales tax, respectively, for inter-distributor sales of previously untaxed unenhanced diesel motor fuel, similar to the exemption from the excise tax contained in section 282-a of Article 12-A.

Information contained in the bill jacket for Chapter 261 of the Laws of 1988, which, among other things, amended Article 12-A to add the definition of "enhancement," states as follows:

This . . . bill follows general industry practice by recognizing the difference between the various products that are included in the class defined as "Diesel motor fuel." Accordingly, Diesel product tailored to the automotive market is taxed on its first sale in the State. Undifferentiated product, such as No. 2 fuel oil (which is usually used as heating fuel), will pass tax-free between registered distributors and will also be sold tax-free to the consumer for heating or production purposes. Therefore, the sale of No. 2 fuel oil to a consumer for heating fuel will not be subject to tax. No. 2 fuel oil will, however, be subject to tax if it is identified for the automotive market; e.g., delivered into the storage tanks of filling station.

* * *

Enhanced product is product invoiced as automotive diesel fuel and also the blended product which results from the addition of kerosene or a cetane improver to No. 2 fuel oil so as to improve the operation of such fuel oil in a motor vehicle engine of the Diesel type. (Letter of Commissioner of Taxation and Finance, Governor's Bill Jacket, L. 1988, Ch. 261)

We reach the following conclusions regarding the issue raised by Petitioner.

The blend at issue resulting from combining marine diesel fuel with enhanced diesel motor fuel would not be deemed to be enhanced diesel motor fuel. Marine diesel fuel is not a middle distillate, but is instead a residual petroleum product formed by blending No. 2 diesel fuel oil and No. 6 residual fuel oil to produce a lower volatility fuel. This fuel is commonly used in medium speed marine engines, often for commercial fishing. Because marine diesel fuel is not a middle distillate, the process of blending it with enhanced diesel motor fuel does not meet the statutory definition of the term "enhancement." Additionally, the resulting product is not identified for use in the automotive market, but is a product that meets the specifications of No. 2 heating oil and which will be sold as No. 2 heating oil.

The blend at issue resulting from combining substandard No. 2 heating oil with enhanced diesel motor fuel would not be deemed to be enhanced diesel motor fuel as long as the enhanced diesel motor fuel does not contain kerosene or any other substance or additive (such as a cetane improver) which would improve the substandard heating oil's performance in a diesel automotive engine. If the automotive performance of the substandard heating oil were not improved, the blending process would not constitute "enhancement," as that term is defined in the Tax Law.

Additionally, the resulting product meets the industry specifications for No. 2 heating oil, will be invoiced and sold, in good faith, as No. 2 heating oil, and will not be identified for use in the automotive market.

Accordingly, the resulting heating oil is unenhanced diesel motor fuel for purposes of Articles 12-A, 13-A and 28 of the Tax Law. Sales of this heating oil by one registered distributor to another registered distributor may be made (if the product is previously untaxed) in accordance

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with the inter-distributor exemption, without imposition of the excise tax, the petroleum business tax or the prepaid sales tax on diesel motor fuel, as long as the sales are not retail sales or sales involving delivery of the fuel at a filling station or into a repository which is equipped with a hose or other apparatus by which the fuel could be dispensed into the fuel tank of a motor vehicle.

It should be noted that if the resulting heating oil were sold and delivered to a repository equipped with a hose or other apparatus by which the fuel could be dispensed into the fuel tank of a motor vehicle, or otherwise sold and/or used under any circumstances not exempt from tax under Articles 12-A, 13-A and/or 28 of the Tax Law, these taxes would be imposed, without regard to whether the heating oil is deemed to be unenhanced diesel motor fuel.

It should also be noted that Castle may accomplish its objective of producing an unenhanced diesel product meeting the specifications of No. 2 heating oil by blending either the marine diesel fuel or the substandard No. 2 heating oil with low-sulfur No. 2 heating oil, rather than low-sulfur enhanced diesel motor fuel. The No. 2 heating oil could be purchased by Castle in this State exempt from taxes under the inter-distributor sales exemption.

DATED: July 15, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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