

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

TSB-A-11(1)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-11(8)S
Sales Tax
March 22, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110112A

Petitioner, [REDACTED] asks whether the petroleum product “Reformulated Gasoline Blendstock for Oxygenate Blending” (RBOB) is considered a motor fuel subject to the Article 12-A excise tax (including the petroleum testing fee), Article 13-A petroleum business tax, and the State and local sales taxes imposed by Article 28 and pursuant to the authority of Article 29 and required to be prepaid by section 1102 of the Tax Law. We conclude that RBOB is considered a motor fuel for purposes of these taxes.

Facts

Petitioner buys RBOB in bulk within the State. Petitioner also will be involved in the importation of RBOB into this State. Petitioner asserts that RBOB must be blended with another petroleum product before it could be sold or used with any intent of use in a motor vehicle. Petitioner further asserts that RBOB is not taxable until it has been splashed with ethanol.

Analysis

Section 282.2 of Article 12-A of the Tax Law defines motor fuel as gasoline, benzol or other product, except kerosene and crude oil, which is suitable for use in operation of a motor vehicle engine, but if kerosene or crude oil is compounded or mixed with any other product or products, and the resulting compound or mixture is suitable for use in the operation of any such motor vehicle engine, such resulting compound or mixture in its entirety shall be a "motor fuel." The Article 13-A petroleum business tax refers to Section 282.2 for the definition of motor fuel (see section 300(d)). The State and local sales taxes imposed by Article 28 and pursuant to the authority of Article 29 of the Tax Law also incorporate the definition of motor fuel in Section 282.2 (*see* section 1101(b)(4)(ii)(C)).

Section 410.2(a)(ii) of the motor fuel tax regulations specifically provides that:

[A]ny product that is not commonly or commercially known or sold as gasoline or a blend thereof, will not generally be considered to be suitable for use in the operation of a motor vehicle engine until one of the following, whichever is the earliest, takes place.

Subparagraph (b) of this regulation provides that one of the four events that would cause a product to be considered to be suitable for use in the operation of a motor vehicle engine is when the “product is destined for use in the operation of a motor vehicle engine as is reasonably concluded from facts and circumstances concerning such product.”

Because RBOB's only purpose is to be blended with motor fuel, it clearly is intended for the automotive market as motor fuel. Thus, it is considered a product destined for use in the operation of a motor vehicle and accordingly would be considered a motor fuel under 20 NYCRR § 410.2(a)(ii)(b).¹ As a motor fuel, the taxable incidence for purposes of the taxes imposed by Articles 12-A and 13-A of the Tax Law occurs when RBOB is imported into this State. If Petitioner is the importer of the RBOB, the applicable taxes are due from petitioner. For purposes of the sales tax required to be prepaid under section 1102 of the Tax Law, if Petitioner is a distributor of motor fuel, the tax is required to be prepaid when Petitioner imports RBOB or causes it to be imported into the state, or when it sells the RBOB if the tax has not previously been imposed. If Petitioner buys the RBOB within the State, the applicable taxes are due from the importer and must be passed through to the petitioner upon its purchase of the RBOB.

DATED: March 22, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and 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.

¹ It should be noted that the Governor's proposed budget legislation makes clarifications to the definitions of "motor fuel" and "diesel motor fuel." As part of the clarification, RBOB would be explicitly enumerated as a "motor fuel" for purposes of taxation under the three Tax Law articles in question. (See New York State Bill – S.2811-A/A.4011-A.)