

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

TSB-M-85 (5)M
Motor Fuel Tax
September 11, 1985

Subject: Motor Fuel Tax Law Changes
Article 12-A (Tax on Importation)

Chapter 44 of the New York State Tax Laws of 1985 made the following amendments to Article 12-A, Motor Fuel Tax Law effective June 1, 1985.

Definition of Distributor and Sale

Section 282, subdivision 1 includes within the definition of distributor a person or other entity which imports motor fuel into the state for storage within the state.

Section 282, subdivision 5 includes a reference to Article 28, Sales and Use Tax, for the definition of sale. Section 1101, subdivision (b) paragraph (5) of Article 28 defines sale as any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this Article, for a consideration or any agreement therefor.

Registration and Cancellation of Distributors

Section 283, subdivision 1 provides for registration of any person as a distributor upon application to the State Tax Commission.

Section 283, subdivision 2 lists those instances where the Tax Commission may refuse to register a person as a distributor; namely:

1. Failure to pay any tax finally determined to be due,
2. Failure to pay a penalty finally determined to be due under Section 289-b from an officer, director, shareholder, employee or partner of the applicant,
3. Conviction of the applicant for a crime under the Tax Law within the previous five years,
4. Conviction for a crime under the Tax Law within the previous five years, of an officer, director, shareholder, employee or partner of the applicant in his capacity as a person under a duty to file a return or pay taxes under Article 12-A,
5. Failure by a corporation to pay taxes finally determined to be due or conviction of such corporation for a crime under the Tax Law within the previous five years where a majority shareholder of such corporation at the time the taxes were finally determined to be due or at the time of such conviction is also a majority shareholder of the applicant, and

6. Cancellation of the applicant's registration within the preceding five years pursuant to Section 283 subdivision 4 (see discussion of Section 283, subdivision 4, below).

Section 283, subdivision 3 provides that the bond which is required to be filed by a distributor is to secure payment of sales and use taxes under Articles 28 and 29 in addition to the taxes due under Article 12-A and that the amount of the bond may be increased as the Tax Commission deems necessary.

Section 283, subdivision 4 now includes the sanction of suspension of a registration as well as the cancellation of a registration. A registration may be cancelled or suspended upon failure to file a bond when required, to file a revised bond when the amount of the required bond is increased or to comply with any of the provisions of this Article or any rule or regulation adopted pursuant to this Article by the Department of Taxation and Finance or by the Tax Commission. Also, a registration may be cancelled or suspended if the Tax Commission determines that the registrant or a responsible officer, director or partner of the registrant:

1. Commits fraud or deceit in his operations as a distributor or has committed fraud or deceit in procuring his registration,
2. Has been convicted for a felony bearing on the distributor's duties and obligations under the Tax Law,
3. Has knowingly aided and abetted a person who is not registered as a distributor in the importation, distribution, production, refining, manufacturing or compounding of motor fuel, or
4. Has impersonated a person represented to be a distributor but who was not in fact registered as a distributor.

Section 283, subdivision 5 provides for a hearing prior to cancellation, suspension or denial of an application. However, no hearing is required for denial of an application for failure to file a bond required by the Tax Commission in the amount fixed, or for cancellation or suspension of a registration for failure to file a return within 10 days of the date prescribed for filing a return under Article 12-A or Article 28 or for nonpayment of taxes due pursuant to Article 12-A or Article 28. Also, distributors which are partnerships must inform this department of any changes in partners or their addresses.

Section 283, subdivision 6 provides, in instances where a hearing is available under this Section for issuance of a notice of proposed cancellation or suspension of registration or refusal to register in the same manner as provided for the issuance of a notice of determination under Section 288. All such notices shall advise the person to whom it is issued of the hearing process and that the petition to challenge such notice must be filed within 90 days. In the case of a person applying to register, a notice of proposed refusal to register shall be issued promptly after an application for registration is received. Upon timely application for a hearing the Tax Commission shall then issue a notice of refusal to register or shall register the applicant within three months.

Section 283, new subdivision 8 provides that a registration cancelled or suspended because of a conviction for a felony shall be restored if the conviction is subsequently set aside or reversed upon appeal, and the accused acquitted or discharged. A conviction for a felony includes the conviction for a crime in a court of any State or of the United States provided that the conviction is for a crime that is a felony in New York. The Tax Commission may, on application of a person convicted for a felony, again register such person as a distributor if the person is pardoned by the Governor of the state where convicted or by the President of the United States, or receives a certificate of good conduct from the Board of Parole pursuant to the Executive Law.

Imposition of Motor Fuel Tax

Section 284 imposes the Article 12-A motor fuel tax on motor fuel imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state or on motor fuel which is produced, refined, manufactured or compounded by a distributor in the state. This section exempts from tax kero-jet fuel when sold to a distributor which is an airline and motor fuel sold to the United States, the State of New York or a charitable hospital.

Section 284, subdivisions 3 and 4 containing exemptions for certain sales were repealed. These exemptions were the tax on motor fuel sold by a distributor for immediate export and the tax on motor fuel sold by a distributor to a fire company or fire department as defined in Section 3 of the Volunteer Fireman's Benefit Law, to a volunteer rescue squad supported in whole or in part by tax money, or to a voluntary ambulance service as defined in Section 3001 of the Public Health Law.

Section 284, new subdivision 3 imposes personal liability for the Article 12-A taxes on a purchaser of motor fuel where the Article 12-A taxes have not been paid by him or passed through to him. A nondistributor - purchaser of motor fuel on which the Article 12-A taxes have not been paid must file a return and pay such taxes to the State Tax Commission within 24 hours of the day the motor fuel is received. A distributor-purchaser of such motor fuel may report and pay such taxes in accordance with the ordinary reporting requirements.

Presumption of Taxability

New Section 285-a establishes a presumption of taxability concerning motor fuel. It presumes that all motor fuel imported, manufactured or sold in the State is subject to the Article 12-A taxes and that all motor fuel imported, manufactured, received or possessed by any person has been imported, manufactured or sold for use, distribution, storage or sale in this state. The presumption does not apply to motor fuel in the fuel tank of a motor vehicle used to propel such vehicle or to motor fuel in small containers. The burden of proof that the motor fuel was not so imported, manufactured or sold shall be on such person. A maximum allowance of 2% of the fuel stored will be allowed for motor fuel lost due to shrinkage, evaporation and handling that a distributor establishes was lost therefrom.

Unless a purchaser has received a statement to the effect that the Article 12-A taxes have been paid to or by an identified distributor or other identified person required to pay the tax and that the taxes have been passed through to him, the purchaser shall pay the taxes directly to the Tax Commission.

Record Keeping and Returns

Section 286 adds persons who store motor fuel or diesel motor fuel for compensation to the persons required to keep records. Such records must identify the person for whom motor fuel is stored or to whom fuel is released and the type and quantity of fuel so stored or released. The Tax Commission is authorized to examine the equipment used for storage, sale or delivery of fuel and the fuel inventory of any person required to keep records.

Distributors are required to file monthly returns reflecting the information they are required to keep. Section 286, subdivision 2 provides that the Tax Commission may by regulation require nondistributors, who are required to keep records, to file monthly information returns (see 20 NYCRR 410.11, 420.11).

Section 286-b authorizes the Tax Commission by regulation to require the master or other person in charge of any vessel transporting motor fuel over the navigable waters of the State (who is presently required to keep records of the persons from whom he receives fuel, and to whom he delivers fuel as well as the amounts being delivered) to file monthly information returns. The criminal penalties in this section are repealed effective November 1, 1985. As of that date, the criminal penalties contained in the recently enacted Article 37 of the Tax Law apply.

Section 287 changes the filing date for the submission of the motor fuel tax returns from the 27th of each month to the 20th of each month.

Refunds and Credits

Section 289-c, subdivision 3, new paragraph (g) provides that the State of New York or its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions, a fire company or fire department as defined in Section 3 of the Volunteer Firefighter's Benefit Law, or a volunteer rescue squad supported in whole or in part by tax money shall be reimbursed for the amount of motor fuel taxes included in the price paid by such entity for motor fuel or diesel motor fuel if such fuel is used exclusively in vehicles owned and operated by such entity and used exclusively for its purposes.

Section 289-C, new subdivision 8 provides that a distributor or purchaser duly registered with, or licensed by, the taxing authority of another state as a distributor of, or a dealer in, motor fuel therein, shall be entitled to a refund or credit of the Article 12-A tax paid by, or included in, the price paid by such distributor or purchaser for motor fuel if such motor fuel was exported from the state for sale outside the state and, in connection with such exportation, the fuel was immediately shipped to an identified facility outside the state. An applicant for a refund or credit under this subdivision will have to comply with all requirements, including evidentiary requirements, imposed by the Tax Commission. Interest shall be allowed or paid at a rate set by the Tax Commission from the due date of the return to the date preceding the date of the refund check; however, no such interest will be allowed or paid if the return is processed within 30 days or if the amount of refund is less than one dollar.

Tax Enforcement Provisions

Section 288 authorizes the Tax Commission to determine liability for, and the amount of, the penalties stipulated in the amended subdivisions (1) and (2) of Section 289-b which are imposed respectively on owners of filling stations and responsible persons associated with corporations and responsible persons associated with corporations, partnerships, and individual proprietorships. The three-year statute of limitations will not apply to a distributor who fails to inform the Tax Department of a change in his address or, in the case of a corporation or a partnership, of a change in its officers, directors or partners or their resident addresses as required by Section 283 of the Tax Law. The Tax Commission may of its own motion redetermine a distributor's liability after a determination of such liability has been made.

Section 289 provides that warrants shall cover the interest owed by a distributor, as well as taxes and penalties. Also, if the warrant is filed with the Department of State, the lien created by the filing of such warrant shall apply to personal property as well as real property.

Section 289-b provides that the civil penalty for failure to file a tax return or pay tax within the time required by law shall be increased from five to ten percent for the first month of delay and that the aggregate penalty shall be limited to thirty percent of the tax due.

If a distributor or other person fails to file a return within sixty days of the required date, the minimum penalty shall be one hundred dollars or the tax required to be shown on the return, whichever is less.

Section 289-b, subdivision 1, paragraph (c) allows the Tax Commission to remit all or part of such penalty that it determines was due to "reasonable cause" and not due to willful neglect.

Section 289-b, subdivision 1, paragraph (b) provides that interest of one dollar or more for failure to pay tax on or before the last date prescribed by Article 12-A for payment shall be paid for the period from such last date to the date paid. Such interest, compounded daily, shall run from the prescribed date for payment of tax to the date on which the tax is actually paid at a rate set by the State Tax Commission.

Section 289-b, subdivision 1, paragraph (d) provides that the penalty for failure to timely pay tax due to fraud shall be fifty percent of the tax due. Interest shall be computed on the amount of tax due in the same manner as for non-fraud cases. In addition, there shall also be paid an amount equal to fifty percent of such interest for the period running from the last date prescribed by Article 12-A for the payment of the tax to either the date on which the amount of tax is finally determined or the date on which the tax is paid, whichever is earlier, and based on the amount of unpaid tax attributable to fraud.

Section 289-b, subdivision 1, paragraph (e) imposes a civil penalty on owners of filling stations who willfully and knowingly have in their custody, possession or control, motor fuel on which the required Article 12-A taxes have not been passed through in the purchase price. Such penalty shall be twice the amount of the tax not passed through and may be determined at any time within three years after the owner of the filling station acquires custody, possession or control of the motor fuel.

Section 289-b, subdivision 2 imposes a civil penalty on officers, directors, shareholders, or employees (who are responsible to comply with any requirement of this Article) of a corporation, a dissolved corporation, partnership or individual proprietorship and on members of a partnership where such corporation, partnership or individual proprietorship is a distributor who fails to pay the tax required by Article 12-A. Such penalty shall equal the taxes owed by the distributor plus penalties and interest pursuant to the above subdivision as if such person were a distributor.

The criminal penalties contained in Section 289-b are repealed effective November 1, 1985. As of that date, the criminal penalties contained in the recently enacted Article 37 of the tax law apply.