OSCAR L. GARZA & ASSOCIATES P.C.

TAX ADVISORY SERVICES GROUP LLC

Federation of Tax Administrators

Motor Fuel Excise Tax Update

Chattanooga, Tennessee

September 23, 2015

New Mexico

- In the Matter of the Protest of ALON USA, L.P. No. 15-04, February 6, 2015.
- Section 7-1-69(A) states that:
  - in the case of failure due to negligence or disregard of department rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:
    - 2% per month or any fraction of a month from the date the return was required to be **filed multiplied by the tax liability established in** the late return, not to exceed twenty percent of the tax liability established in the late return; or
    - a minimum of $5.00, but the $5.00 minimum penalty shall not apply to taxes levied under the Income Tax Act…

New Mexico

- Section 7-1-69(A)(3) provides that a $5.00 penalty may apply when a taxpayer fails to file a return. Provision only applies when no tax is due or as Section 7-1-69(A)(3) provides, “regardless of whether a tax is due.”
- Section 7-1-69(A) **allows the Department to elect to impose the greater of** the amount of the 2% per month of the amount of the tax liability or the minimum of $5.00, whichever is greater. The minimum penalty of $5.00 is normally imposed if taxpayer has no taxable event. In Taxpayer's case, since the 2% of Taxpayer's tax liability was greater than $5.00, the Department elected to impose the greater amount.
- In conclusion, Taxpayer had a taxable event in January 2014 which created a tax liability of $927,776.01. The Department correctly used the tax liability amount to assess penalty calculated at 2%. The tax liability was established in the late return filed on May 5, 2014.

Ohio

- Mohmed v. Certified Oil Corp., Court of Appeals of Ohio, Eighth District, (Jun. 18, 2015)
- Under a plain language of the statute, and as explained by the Supreme Court of Ohio, R.C. 5751.02 does not allow a taxpayer to bill or invoice the CAT to another; however, the taxpayer is permitted to recoup its CAT liability by including it in the price charged for a good or service.

Ohio

- Before Certified delivered gasoline to Mohmed, it would send a price notification, and after the delivery, an invoice.
- The information in the price notifications included Certified's price, the specified contractual margin, freight cost, and the amount of the CAT tax. A subtotal for “price before taxes” including these four items was provided. The total price was then arrived at by adding an Ohio tax, federal tax, and oil spill tax to the “price before taxes.”

Ohio

- The invoice started with a subtotal, which carried the “price before taxes” from the price notification, and then separately listed the Ohio tax, federal tax, and oil spill tax, to arrive at an invoice total.
- The statute does not allow a vendor to bill or invoice the CAT as a tax to another, but it allows a vendor to recoup the tax by including it in the price charged.
- A review of Certified's invoices reflects it recovered the amount of the CAT imposed under the statute by including it in the price charged, a practice permitted under the statute.

New Jersey PPGRT

- Petroleum Products Gross Receipts Tax
- **Elective suppliers** are required to collect PPGRT on all NJ destined products.
- **Permissive suppliers** are **elective suppliers** and **suppliers can elect** to be **elective suppliers.**

New Jersey PPGRT

54:15B-3.a.

There is imposed on each company which is engaged in the refining or distribution, or both, of petroleum products and which distributes such products in this State a tax . . . of its gross receipts **derived from the first sale of petroleum products within this State;**

New Jersey PPGRT

54:39-118.a

A **licensed supplier or licensed permissive supplier may make a blanket election** with the director to treat all removals of fuel from all of its out-of-State terminals with a destination in this State as shown on the terminal-issued shipping paper as if the removals were removed across the rack by the supplier or permissive supplier from a terminal in this State for all purposes.

54:39-118.b

The election allowed by this section shall be made by filing a "notice of election" with the director, in the form and manner as the director by regulation may prescribe.

New Jersey PPGRT

54:39-118.c

The director shall publish a list of suppliers electing pursuant to this section.

54:39-118.d

The **absence of an election by a supplier** in accordance with this section shall in no way relieve the supplier of responsibility for remitting the tax imposed by the "Motor Fuel Tax Act," P.L.2010, c.22 (C.54:39-101 et seq.) upon the removal from an out-of-State terminal for import into this State by the supplier.

New Jersey PPGRT

54:39-118.e

A supplier that makes the election allowed by this section shall precollect the tax imposed by **P.L.2010, c.22 (C.54:39-101et seq.)** on all removals from a qualified terminal on its account as a position holder, or as a person receiving fuel from a position holder pursuant to a terminal bulk transfer, **without regard to the license status of the person acquiring the fuel from the supplier, the point or terms of sale, or the character of delivery.**

Delaware GRT

- Facts:
  - Sale of product at the rack outside Delaware.
  - Title transfer at the rack.
  - Customer arranges transportation from outside Delaware to Delaware.
  - BOL shows Delaware as destination
- 30 Del. Code 2901(8)b
  - “In the case of a wholesaler, "gross receipts" includes total consideration received from sales of tangible personal property physically delivered within this State to the purchaser or the purchaser's agent….”

Delaware GRT

Wagner, Kowalko, Walls, Sen. Adams

HOUSE OF REPRESENTATIVES
144th GENERAL ASSEMBLY

HOUSE BILL NO. 234

AN ACT TO AMEND CHAPTER 91, TITLE 7 OF THE DELAWARE CODE PERTAINING TO GROSS RECEIPTS INCLUDED IN THE TAX ASSESSMENT FOR THE HAZARDOUS SUBSTANCE CLEANUP FUND.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

- "For purposes of the additional tax imposed by this Section, gross receipts, as defined in Chapter 29, Title 30 of the Delaware Code, that are received after June 30, 2007, and before January 1, 2012, shall not include gross receipts from a sale of petroleum or petroleum products by a wholesaler, as defined in Chapter 29, Title 30 of the Delaware Code, if (i) the petroleum or petroleum products were sold to the wholesaler by a person who is licensed under Chapter 29, Title 30 of the Delaware Code, and (ii) the gross receipts from the sale described in paragraph (i) of this subsection were gross receipts defined in Chapter 29, Title 30 of the Delaware Code with respect to the seller.".
- Section 2. This Act shall become effective with respect to taxable periods beginning after June 30, 2007.

SYNOPSIS

- **This Bill ensures that the tax surcharge imposed for the Hazardous Substance Cleanup fund is paid only once, regardless of how many times petroleum products are resold.**

Delaware GRT

- Ford Motor Company v. Director of Revenue, 963 A.2d. 115 (December 8, 2008)
  - Merchandise may be considered to be physically delivered to the purchaser in Delaware when the seller arranges, pays for and controls the transportation of the merchandise from the seller to the purchaser in Delaware.
  - Seller maintaining risk of loss and carrying insurance on merchandise is a relevant consideration when determining delivery.
  - The Court determined that "[U]nder the statute, the determinative factor is the destination to which the seller delivers (or causes delivery by common carrier of) goods to the purchaser, either inside or outside Delaware, not the contractually agreed upon location of title passage."
  - In Ford, the Court determined that although Ford passed title to the merchandise (in this case motor vehicles) outside Delaware, it physically delivered the merchandise in to the purchaser in Delaware because it controlled ultimate delivery of the vehicles in Delaware, reimbursed dealers for damage, and carried insurance for the cost of repair of any damage prior to arrival at the final destination.

Delaware GRT

- So what is Delaware doing:
  - Ignoring Ford
    - If BOL has DE destination, then subject to GRT
  - Conveniently collecting Hazardous Substance Cleanup Act Tax more than once.
    - If DE assess HSCA tax on SELLER when sold outside DE but delivered DE, what about purchasers who imported and sold product in DE. Refund?

New York

- By SCOTT WALDMAN 4:59 a.m. | Jun. 24, 2014

- ALBANY—Two Fortune 500 companies that transport most of the crude oil through New York are contributing to the state's oil spill fund at a much lower rate than other energy companies, state records show.

- The fund is the first line of defense against the tremendous costs associated with an oil train derailment. However, it's so underfunded that it would do little to mitigate the actual cost of a major accident like those that have occurred in Canada, North Dakota and Virginia in the last year, some legislators say.

New York

New York State Office of the State Comptroller
Thomas P. DiNapoli
Division of State Government Accountability

Collection and Use of Oil Spill Funds

Department of Environmental Conservation

New York

OLG OSCAR L. GARZA & ASSOCIATES P.C.

TASG TAX ADVISORY SERVICES GROUP LLC

Key Findings

- **Our tests showed the Department generally collected all fees due the Fund for the facilities we tested. However, of 11 sampled MOSFs, we identified 8 that inaccurately reported the number of barrels of petroleum products received, subject to fees and surcharges, and/or transshipped. For the sampled facilities, these inaccuracies did not materially affect the revenue collected by the Department.**
- **We identified four facilities that may be incorrectly registered as PBS operations instead of larger MOSFs, thereby potentially avoiding appropriate oversight and reporting as well as higher amounts of fees and surcharges.**
- **The Department should be able to promptly detect and correct many of the discrepancies we identified by periodically analyzing the facility data that it already collects.**

New York

Oscar L. Garza & Associates P.C. | Tax Advisory Services Group LLC

Until April 13, 2015, Article 12 Section 174 of the Navigation Law imposed the following fees and surcharges on MOSFs:

- **An 8 cent per barrel license fee on any petroleum product used in the State, upon first transfer into the State;**
- **A 4.25 cent per barrel surcharge on petroleum used in the State; and**
- **A 1.5 cent per barrel surcharge on petroleum subsequently transferred out of the State.**

Facilities may claim a transshipment credit on barrels for which they are the first point of transfer into New York State but which are subsequently not used in the State. Between April 2012 and August 2014, licensees reported over 807 million barrels of petroleum transferred into MOSFs, of which about 600 million were reported as being subject to the full 12.25 cent per barrel fee and surcharge.

New York

Beginning September 1, 2015, based upon an amendment to Section 174 of the Navigation Law, the license fee for MOSFs increased from 8 to 9.5 cents per barrel and the surcharge on petroleum transferred out of State grew from 1.5 to 13.75 cents per barrel.

http://osc.state.ny.us/audits/allaudits/093015/14s59.pdf

Texas

- Pursuant to Texas Tax Code Section 162.201 (c), tax is imposed on the removal of diesel fuel from the bulk transfer/terminal system. The supplier is liable for and shall collect the tax imposed from the person who orders the removal from the bulk transfer/terminal system.
- However, Section 162.204 (a) states "the tax imposed under this subchapter does not apply to diesel fuel exported to a foreign country if the bill of lading indicates the foreign destination and fuel is actually exported to the foreign country." Section 162.201 is in the same subchapter as Section 162.204.

Texas

- Rule 3.441(c)(1) states that a supplier makes an export sale when it sells motor fuel in Texas to a licensed supplier who then, prior to any other sale or use in Texas, sends or transports the motor fuel outside the state. **The bill of lading or shipping document** must list the out of state destination.
- Rule 3.441(c)(2) states that a supplier who makes an export sale will not be liable for tax on motor fuel that the purchaser diverts provided that the seller issued a **bill of lading or shipping document** that shows that the motor fuel is to be delivered to a destination outside Texas.

Texas (Comptroller)

- Sec. 162.204. EXEMPTIONS
- (7) diesel fuel exported to a foreign country if the bill of lading indicates the foreign destination (emphasis added) and the fuel is actually exported to the foreign country;

- If SELLER issued a bill of loading showing the destination of the fuel then sec 162.204 (7) would be applicable. But since SELLER is not issuing a bill of lading showing the destination of the fuel, SELLER is required to collect the tax from BUYER and then if BUYER is exporting the diesel fuel outside the country they are required to pay the tax to SELLER and claim a refund on their tax return when the fuel is exported out of the country. Title for the goods was transferred to BUYER at the XXXXX Terminal and SELLER was responsible for collecting tax from BUYER. These sales are not export sales per the **"deal sheet".**

Texas (Comptroller)

Taxpayer is not in compliance with these rules as they are not issuing a bill of lading to show the destination of the fuel.

Lastly, per the tanker bill of lading issued by the shipping company shows BUYER as the consignee of the fuel. This proves the fuel belongs to BUYER and BUYER is further selling this fuel to their customer who is located out-of-country. Per the motor fuel statue BUYER is required to pay tax to SELLER and then file for a refund once the fuel is exported out-of-country.

Texas (Comptroller)

Per Rule 3.441 (c) (1) SELLER sold the fuel to BUYER and BUYER further sold the fuel to their ultimate customer out-of-the country. Section (c) (2) requires the seller (TP) to issue a bill of lading showing the destination of the fuel being delivered. The "deal Sheet" is the only document that shows the location of where the title of the fuel is being transferred, which is the at the refinery/terminal flange.

Conclusion

Per the motor fuels statue a supplier has to collect motor fuels tax from the person ordering the withdrawl of fuel from their terminal. Barge sales are below the rack sales and subject to Texas motor fuels. As a suppliers license holder taxpayer is required to issue a bill of lading clearly showing the destination of the fuel. Taxpayer is not in compliance to Rule 3.430, Rule 3.439 and Rule 3.441.

Oil Spill Tax

4611(a)GENERAL RULE.—

IRC History

There is hereby imposed a tax at the rate specified in subsection (c) on—

4611(a)(1)

crude oil received at a United States refinery, and

4611(a)(2)

petroleum products entered into the United States for consumption, use, or warehousing.

Oil Spill Tax

4612(a)DEFINITIONS.—

For purposes of this subchapter—

4612(a)(1)CRUDE OIL.—

The term "crude oil" includes crude oil condensates and natural gasoline.

4612(a)(2)DOMESTIC CRUDE OIL.—

The term "domestic crude oil" means any crude oil produced from a well located in the United States.

4612(a)(3)PETROLEUM PRODUCT.—

The term "petroleum product" includes crude oil.

List of Petroleum and Non-petroleum Oils

This list of oils is organized alphabetically into several subgroups. Crude oil and refined petroleum products are among the most familiar types of oils. Petroleum and fuel oil are specifically named in the Clean Water Act (CWA) definition of oil. Edible animal and vegetable oils and other oils of animal or vegetable origin have historically been considered CWA oils. Other non-petroleum oils are substances that have the properties and behavior of traditional oils and have historically been considered to be oils. Lube-oil additives are included in the list of oils because they may be shipped or stored in an oil medium. Some substances that have not been considered oils historically may be added to this list in the future if they are determined to have oil-like characteristics. If you have a question about whether a commodity that does not appear on this list is regulated as an oil, please call Mr. Patrick Keffler, CG-ENG-5, at (202) 372-1424.

www.homeport.uscg.mil

Go to Missions/Environmental/Hazardous Materials Standards

Federal Mixture Tax Credit

- 26 U.S.C §§6426, 6427 and §34
  - Biodiesel, ethanol, alternative fuel and renewable diesel mixture excise tax credits and related income tax credit are not includible in gross income and are therefore not subject to federal income tax.

History of the Tax Credit

- American Job Creation Act of 2004
  - Enacted §6426 and §6427
    - provides tax credit for biodiesel, alcohol, renewable diesel and alternative fuel blenders, users and retailers including:
    - a refundable income tax credit under §34 via §6427
    - an excise tax credit under §6426
    - A non-refundable biodiesel fuel income tax credit under §40A (Energy Policy Act of 2005)

History of the Tax Credit

- Many taxpayers claimed the mixture credit as an excise tax credit.
- The alcohol fuel mixture credit expired on December 31, 2011.
- The biodiesel, renewable diesel and alternative fuel credits expired on December 31, 2014.

Analysis of the Tax Credit

- The alcohol and biodiesel fuels tax credits in §§40 and 40A are includible in gross taxable income.
- §§6426, 6427 and related §34 tax credits are not includible in gross taxable income.

Analysis of the Tax Credit

- §87 was amended to include the §40A biodiesel income tax credits but not the excise tax credits.
- Congress has stated consistently the §§40 and 40A credits are includible in gross taxable income but has NEVER stated that §6426 credits are includible in income.
- IRS forms support the position that the §§6426 and 6427 credits are NOT includible in gross taxable income.

Analysis of the Tax Credit

- Congress has stated consistently that the §§40 and 40A credits are includible in income but has NEVER stated that §6426 credits are includible in income.
    - The legislative history of the Job Act states the §40 credit is includible in gross income, and adds a conforming amendment with the enactment of §40A, but is silent with respect to the §§6426 and 6427 credit.
        - Conference Report 110-627 to Public Law 110-234
        - Senate Report 112-208 to the Family and Business Tax Cut Certainty Act of 2012

Analysis of the Tax Credit

- IRS forms support the position that the §§6426 and 6427 credits are NOT includible in gross income.
  - The §§6426 and 6427 excise tax credits and the §34 income tax credits are not includible in gross income can be found in IRS forms used to claim the tax credits.
    - Form 4136
    - Form 720
    - Form 8849

Analysis of the Tax Credit

- Form 720
  - Statutory requirement that the credits be claimed first as an offset against §4081 excise tax liability, using Form 720, Schedule C,
  - Tax offset is not the same as a deduction which reduces income tax liability.
- Form 8849
  - A payment of a tax credit as required in §6427, not a refund of tax paid

Conclusion

- The §§6426 and 6427 excise tax credits and related §34 refundable income tax credit are NOT includible in gross income and are exempt from federal income tax.

Update

- Sunoco filed claim in Federal Court of Claims
- Growmark filed claim in Tax Court
- Ag Processing filed claim in Tax Court
- Others have filed amended returns, audit claims and filed protest to IRS Appeals
- Notice 2015-56
- Language from Senate Finance Committee on Extenders correctly states if you claim 40A credit, you must include in taxable income, silent if you claim 6426 and 6427 credit


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