

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

TSB-A-89 (1) M
Motor Fuel
September 29, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M890512B

On May 12, 1989 a Petition for Advisory Opinion was received from Fleet Supplies, Inc., 250 Mahoning Avenue, Cleveland, Ohio 44101.

The issue raised is whether Petitioner, Fleet Supplies, Inc. ("Fleet") is responsible for the payment of motor fuel tax and the New York State prepaid sales tax on motor fuel or in the alternative for obtaining and providing appropriate exemption documents.

Petitioner, Fleet Supplies, Inc., is an Ohio corporation with its principal office located at 250 Mahoning Avenue, Cleveland, Ohio 44113. The business operations of Fleet include the purchase and sale of diesel fuel, gasoline, and other petroleum products. Fleet is duly registered with the State of New York as an Article 12-A Distributor. (No. M-2524). Golden State Products & Petroleum ("Golden State") is apparently a sole proprietorship of whom the principal is Frank Yantorn. The principal place of business of Golden State is 1836 Euclid Avenue, Suite 811, Cleveland, Ohio 44115. International Petroleum Trades, Inc. dba P.A.L. Oil ("P.A.L. Oil") is a distributor with facilities located at Tonawanda, New York.

Commencing on or about May 29, 1988 and continuing through on or about November 30, 1988 Golden State contracted with Fleet to have Fleet supply to Golden State #2 fuel, gasoline, and other products ("Fuel") to be used in the business operations of Golden State. Golden State agreed to pay the then-prevailing purchase price for the Fuel, together with all applicable taxes. On numerous occasions after May 29, 1988, Fleet provided Fuel to Golden State. Fleet sold the Fuel to Golden State F.O.B. origin. Title to the Fuel was transferred to Golden State without Fleet taking physical possession of the Fuel. Golden State then used the Fuel in its business operations.

In connection with the supply and delivery of Fuel, Fleet sent invoices to Golden State for the amount due for the Fuel for which payments were made by Golden State to Fleet. All such invoices include the applicable purchase price for the Fuel. Initially, the invoices also include all applicable taxes due on such sales as more fully indicated below. Each invoice provided for a specific discount of the purchase price of the Fuel if payment was received by the indicated date.

Fleet purchased the Fuel used for resale to Golden State from P.A.L. Oil. At the time Fleet purchased the Fuel from P.A.L. Oil, Fleet was invoiced and Fleet paid the purchase price and all applicable taxes due on the purchases. Thereafter, Fleet would transfer title to the Fuel to Golden State in Tonawanda, New York. The invoices from May 29, 1988 through June 6, 1988, include charges for New York State Motor Fuel Tax and New York State Prepaid Sales Tax (sometimes hereinafter collectively referred to as "New York State Taxes") as well as the New York State

Gross Receipts Tax. In addition, the invoices include charges for federal tax on diesel or gasoline, as appropriate.

Thereafter, Golden State advised Fleet that Golden State was exempt from New York State Taxes. With regard to federal taxes, Golden State indicated that it was also exempt from federal diesel fuel taxes. Golden State paid the federal tax on gasoline purchases (except for the purchases for which no payment has been received). Fleet subsequently provided Golden State credits for the amount of the New York State Taxes and federal diesel taxes previously invoiced through June 8, 1988. Such credits were provided even though Fleet had paid P.A.L. Oil the New York State Taxes and federal taxes on its purchases prior to that date and continued to pay P.A.L. Oil the New York State Taxes and federal taxes thereafter.

Fuel was purchased by Golden State from Fleet during the period from May 29, 1988 through September 26, 1988. For purposes of this Petition, however, the only New York State Taxes at issue pertain to purchases of a total of 119,004 gallons of gasoline made during June, 1988. The total amount of New York State Taxes paid by Fleet to P.A.L. Oil and which Golden State should have paid to Fleet on the sale of 119,004 gallons of gasoline is as follows:

New York State Motor Fuel Tax (119,004 gallons at 8C/gallon)	-	\$ 9,520.32
New York State Prepaid Sales Tax (119,004 gallon at 5.2C/gallon)	-	<u>\$ 6,188.21</u>
TOTAL		\$15,708.52

Fleet received Golden State's Out of State Retailer Number (017044) and its Certificate for Exemption from Certain Taxes Imposed on Diesel Motor Fuel and Propane (Form FT-1005) indicating that Golden State was exempt from New York State taxes on diesel fuel. With regard to the New York State Gross Receipts Tax due on the sale of Fuel, Fleet has a direct pay license for Gross Receipts Tax. This amount was not paid by Fleet because Golden State has provided an Export Certificate from the New York State Gross Receipts Tax (Form CT-13-AX). The amount which would be due if the purchase of the Fuel were not exempt would have been \$1,870.08.

Fleet requested Golden State to provide documentation so that Fleet could obtain a refund of the New York State Taxes which it had paid to P.A.L. Oil. Golden State provided Fleet with a Form FT-936 - Statement of Exportation of Motor Fuel by Purchaser ("Statement of Exportation"), dated September 27, 1988. The Statement of Exportation was submitted to the New York State Tax Department of Taxation and Finance ("Department"), which stated that Golden State was a registered distributor in the State of Pennsylvania and that the product was being exported to Ontario, Canada.

Fleet filed its Return of Tax on Motor Fuel for the month of June 1988 requesting a refund of Motor Fuel Tax in the amount of \$25,187.84. On or about October 24, 1988, the State of New

York refunded only \$15,667.52. The balance of \$9,520.32 was not refunded.

Fleet also filed its Report of Sales Tax Prepayment on Motor Fuel for the month of June, 1988 indicating a credit due in the amount of \$10,183.88. The Prepaid Sales Tax for sales to exempt purchasers other than to Golden State was refunded. The amount of \$6,188.21 was not refunded because Fleet did not submit an Application for Refund for sales to Golden State because Fleet did not receive the necessary properly completed documentation from Golden State with regard to such sales. The Department had advised Fleet that the Form FT-936 - Statement of Exportation of Motor Fuel by Purchaser delivered by Golden State to Fleet was not properly completed.

After Fleet received notice from the Department that it would not refund the New York State Taxes to Fleet, Fleet requested Golden State to provide additional appropriate documentation so that Fleet could obtain a refund of the New York State Taxes. Thereafter, Golden State submitted to Fleet a second Statement of Exportation, dated November 7, 1988. The second Statement of Exportation was submitted to the Department but the Department has not issued a refund of the applicable New York State Taxes previously paid by Fleet. Neither Statement of Exportation indicated that Golden State was a collector pursuant to Section 6 of the Ontario Gasoline Tax Act. The statements did indicate that Golden State was a licensed distributor in the State of Pennsylvania.

Payments of the purchase price without the New York State Taxes were paid by Golden State to Fleet through August 8, 1988, at which time, Golden State had a \$450.00 credit toward the purchase price of Fuel without taxes. Thereafter, additional fuel was delivered by Fleet to Golden State, the purchase price for which without taxes if payment were made within the time to obtain the discount was \$29,835.15. This amount less the credit of \$450.00 results in a net discounted balance due without taxes in the amount of \$29,385.36. As of September 9, 1988, the balance due for the purchase price of the Fuel without taxes and without the discount was \$30,584.36

On or about September 26, 1988, Fleet submitted an invoice to Golden State for the total amount of New York State Taxes due for the sales by Fleet to Golden State. As the tax rate for the New York State Prepaid Sales Tax was different than originally invoiced, on or about November 30, 1988, Fleet submitted to Golden State revised invoices for the total amount of New York State Taxes.

On or about September 27, 1988, Golden State submitted a check in the amount of \$29,385.15 with a restrictive endorsement indicating that such payment would be payment in full in an effort to avoid payment of the New York State Taxes due on the purchases made by Golden State. Fleet refused to accept partial payment as payment in full and returned the check to Golden State. Golden State responded by letter dated October 4, 1988.

The Motor Fuel Tax due upon importation for use, distribution, storage or sale, though payable by the distributor, is borne by the purchaser and when paid by the distributor, is deemed to

have been paid for the account of the purchaser in accordance with Section 289-c(1) of the Tax Law and Section 415.1 of the Motor Fuel Tax Regulations. It is the intention of the law to place the ultimate burden resulting from such tax, so far as possible, on the persons who use the public highways of New York State in accordance with Section 289-c(2) of the Tax Law and Section 415.1(b) of the Motor Fuel Tax Regulations.

In order to obtain an exemption from tax in the present situation, the purchaser must furnish to the seller a properly completed certificate (Form FT-936 - Statement of Exportation of Motor Fuel by Purchaser) to the effect that the purchaser is entitled to acquire motor fuel upon which the tax has not passed through in accordance with Section 414.1(c)(2)(i)(a) of the Motor Fuel Tax Regulations. The Department reviews the documents to determine whether the documents are properly completed. The purchaser must be a duly registered or licensed distributor of, or dealer in, motor fuel in a state of the United States or province of a foreign country and must immediately export such motor fuel to an identified facility in that same state or province in which the purchaser is registered or licensed in accordance with Section 414.1(a)(3) of the Motor Fuel Tax Regulations.

It is presumed that all motor fuel in New York State is subject to tax unless the contrary is established in accordance with Section 414.1(c)(1) of the Motor Fuel Tax Regulations. The burden of proving that any sale of motor fuel is not subject to tax is upon the purchaser of the motor fuel and, unless otherwise provided, is also on the person required to pass through the tax in accordance with Section 414.1(d)(1) of the Motor Fuel Tax Regulations. If, however, a seller of motor fuel, within 90 days after delivery of such fuel, in good faith accepts from the purchaser a properly completed exemption certificate or other document evidencing exemption from tax, the seller is relieved of liability for failure to have passed through the tax with respect to that transaction and the burden of proving that such sale of motor fuel is not subject to tax is solely on the purchaser in accordance with Section 414.1(d)(2) of the Motor Fuel Tax Regulations. Provided, however, a seller of motor fuel shall be relieved of liability for failure to have passed through the tax on sales for export under paragraph (a)(3) of this section only if such seller receives, and accepts in good faith, the properly completed certificate prescribed by the Department of Taxation and Finance at or prior to the time of delivery of such motor fuel.

As with the New York State Motor Fuel Tax, there is a presumption that all sales of fuel are subject to the New York State prepaid sales tax until the contrary is established in accordance with Section 414.1(d) of the Motor Fuel Tax Regulations as prescribed by Section 414.1(e) of said regulations.

The Laws of the State of New York and the Regulations of the Commissioner of Taxation and Finance and their application in particular instances are presumed to be constitutional at the administrative level.

While there is no specific provision of the Tax Law allowing tax free purchases by distributors licensed by the provinces of Canada, Section 414.1(a)(3) of the Motor Fuel Regulations

extends the same privileges to distributors duly registered or licensed by the taxing authorities of the provinces of Canada.

It is noted that the Province of Ontario does not issue licenses to motor fuel distributors in a manner similar to that employed by the State of New York pursuant to the Tax Law. However, the Ontario Ministry of Revenue is authorized to appoint any person who is selling gasoline for resale in Ontario to be a collector under section 6 of the Gasoline Tax Act. The State of New York will recognize a Province of Ontario gasoline distributor appointed as a collector under section 6 of the Gasoline Tax Act by the Ministry of Revenue, as a duly licensed distributor for purposes of purchasing gasoline tax free in New York State for immediate export to an identified location in Ontario for the purposes of selling such gasoline. Inasmuch as the Ministry of Revenue does not issue licenses to such collectors, a letter issued by the Ontario Ministry of Revenue, Motor Fuels and Tobacco Tax Branch appointing a Province of Ontario distributor as a collector under section 6 of the Gasoline Tax Act will be acceptable as proof of such appointment.

A distributor's right to purchase tax free in New York State will terminate if the distributor's appointment by the Province of Ontario as a collector is suspended or revoked.

Accordingly, as long as the Province of Ontario distributor to whom Fleet sells the gasoline is authorized by the Ministry of Revenue to be a collector under section 6 of the Gasoline Tax Act, it will be recognized by the State of New York as a distributor of or a dealer of motor fuel in the Province of Ontario and will be authorized to purchase gasoline tax free for immediate export to an identified facility in Ontario for the purposes of selling such gasoline.

To effectuate a tax free purchase, Golden State must furnish to Fleet a copy of the letter of the Ministry of Revenue appointing it as a collector under section 6 of the Gasoline Tax Act. Additionally, it must furnish to Fleet a properly completed Statement of Exportation of Motor Fuel By Purchaser (Form FT-936) for each purchase of gasoline. In the absence of such documentation,

Fleet will be responsible for the payment of Motor Fuel Tax and the New York State Prepaid Sales Tax on Motor Fuel and may not take a credit for, or obtain a refund of said taxes.

DATED: September 29, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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