

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(1)M
Petroleum Business Tax
TSB-A-02(40)S
Sales Tax
July 26, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M010810B

On June 19, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Petro, Inc., c/o Michael A. Shichman, Esq., 19 Barstow Road, Suite F, Great Neck, New York 11021-2231.

The issues raised by Petitioner, Petro, Inc., are:

- (1) Whether Petitioner or its customers are responsible for payment of the taxes imposed by Articles 13-A, 28 and 29 of the Tax Law on the sales of fuel oil described below.
- (2) Whether it is Petitioner's responsibility to ascertain whether a customer's property is residential, nonresidential or a combination thereof.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a distributor who sold fuel oil used for the heating of multiple dwelling structures occupied by residential and/or commercial occupants. Petitioner had never been advised by either the property owner or managing agent that the property was used for commercial purposes and had not been paying and passing through the Article 13-A tax or collecting and remitting the 4% State and ¼% Metropolitan Commuter Transportation District (MCTD) taxes imposed under Article 28 on such sales.¹ Petitioner subsequently paid the additional taxes due on such sales and commenced litigation against its customers to recoup the taxes it has paid.

Applicable Law and Regulations

Section 282-a of the Tax Law provides, in part:

1. There is hereby levied and imposed with respect to Diesel motor fuel an excise tax of four cents per gallon upon the sale or use of Diesel motor fuel in this state. (Note: Sections 282-b and 282-c of the Tax Law impose additional excise

¹ Commercial heating fuel is subject to the full State and local sales taxes. Residential heating fuel is not subject to the State 4% or the MCTD ¼% sales tax, but may be subject to local sales tax.

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taxes on diesel motor fuel of three cents and one cent, respectively, for a total tax of eight cents per gallon.)

* * *

3. (b) The tax on the incident of sale or use imposed by subdivision one of this section shall not apply to: (i) the sale to or use by the consumer of previously untaxed Diesel motor fuel which is not enhanced Diesel motor fuel and which is used exclusively for heating purposes . . . provided, however, this exemption shall in no event apply to a sale of Diesel motor fuel which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle (Emphasis added)

* * *

5. All the provisions of this article relating to the administration and collection of the taxes on motor fuel, except sections two hundred eighty-three-a and two hundred eighty-three-b of this article, shall be applicable to the tax imposed by this section with such limitation as specifically provided for in this article with respect to Diesel motor fuel and with such modification as may be necessary to adapt the language of such provisions to the tax imposed by this section. . . . (Emphasis added)

Section 285-a of the Tax Law provides, in part:

Presumption of taxability—

1. No person shall purchase motor fuel in this state, excluding a purchase at retail, unless the taxes imposed by this article have been assumed by a distributor registered under this article in accordance with a certification under subdivision three of this section or paid by such distributor, and, in each of such instances, are passed through to such purchaser. In addition to any other civil and criminal penalties which may apply, any person who purchases motor fuel without having received a certification from the seller in accordance with subdivision three of this section shall be jointly and severally liable to pay the taxes imposed by this article with respect to such motor fuel. (Emphasis added)

Section 285-b of the Tax Law provides, in part:

Presumption of taxability - Diesel motor fuel

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* * *

2. For purposes of the proper administration of this article and to prevent evasion of the taxes imposed on Diesel motor fuel by this article, it shall be presumed that all Diesel motor fuel sold, received or possessed in the state is subject to the taxes imposed by this article until the contrary is established. It shall be further presumed that any person so selling, receiving or possessing such Diesel motor fuel is responsible for payment of the excise taxes on such fuel. (Emphasis added)

3. (a) The claim for or exemption from tax provided for in subparagraphs (i), (iii), (iv), (v), (vi), (vii) and (ix) of paragraph (b) of subdivision three of section two hundred eighty-two-a of this article shall be established by means of an exempt transaction certificate. If any such exemption is applicable, such certificate shall be provided by the purchaser to the seller at the time of or prior to delivery of the Diesel motor fuel. Such exempt transaction certificate shall set forth the name and address of the purchaser and the basis of the exemption and shall be signed by such purchaser and by the seller. Such certificate shall be in such form and contain such other information as the commissioner of taxation and finance shall require. Where a proper and complete exempt transaction certificate has been furnished and accepted by the seller in good faith, such certificate under such circumstance shall relieve the seller of the burden of proving that the Diesel motor fuel covered by such certificate is exempt from tax by reason of subparagraph (i), (iii), (iv), (v), (vi), (vii) or (ix) of paragraph (b) of subdivision three of such section two hundred eighty-two-a. Any purchaser who furnishes to his seller a false or fraudulent exempt transaction certificate for the purpose of establishing an exemption from the tax imposed by section two hundred eighty-two-a of this article shall be jointly and severally liable for the tax imposed by such section. In lieu of an exempt transaction certificate, the commissioner of taxation and finance may provide for the establishment of such exemption by means of a procedure or other document which he deems appropriate so as to secure the revenues from the excise tax on Diesel motor fuel. Provided, further, in the case of the exemption provided by subparagraph (i) of paragraph (b) of subdivision three of section two hundred eighty-two-a of this article, the commissioner shall provide for an alternative procedure or other document signed only by the seller, such as a metered delivery ticket, for the establishment of such exemption in those cases where such commissioner is satisfied that the use of such alternative procedure or other document will not jeopardize the revenues from the excise tax on Diesel motor fuel. (Emphasis added)

Section 289-c(1) of the Tax Law provides:

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The tax imposed by this article though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser. No person shall sell, advertise, or offer for sale motor fuel, separate from the tax herein imposed; and the price paid by the purchaser for motor fuel on which the tax has been paid, if such price be not less than the amount of the tax thereon, shall be presumed for the purposes of this section to have included the tax. (Emphasis added)

Section 289-c(1-a)(c)(i) of the Tax Law provides:

Any person making a sale of motor fuel under the circumstances described in paragraph (a), or subparagraph (i) of paragraph (b) of this subdivision or making a sale of Diesel motor fuel under the circumstances described in subdivision four of section two hundred eighty-two-a of this article whereby the tax or taxes imposed by this article have not been passed through to the purchaser, shall be allowed a refund or credit of the tax or taxes imposed by this article in the amount of such tax or taxes paid by such person on such motor fuel or Diesel motor fuel being sold or included in the price paid by such person for such fuel. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the commissioner under such rules and regulations as he may prescribe.

Section 289-c(3)(a) of the Tax Law provides:

Except as otherwise provided in paragraph (b) of this section, any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state, or in the operation of a pleasure or recreational motor boat upon or over the waterways of the state including waterways bordering on the state, shall be reimbursed the amount of such tax in the manner and subject to the conditions herein provided except that there shall be no reimbursement of tax paid on motor fuel or diesel motor fuel taken out of this state in a fuel tank connected with the engine of a motor vehicle and consumed outside of this state.

Section 300(b) of the Tax Law provides, in part:

The term "petroleum business" means:

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(2) With respect to diesel motor fuel, every corporation and unincorporated business (i) importing diesel motor fuel or causing diesel motor fuel to be imported into the state for use, distribution, storage or sale in the state, (ii) producing, refining, manufacturing or compounding diesel motor fuel within the state, (iii) engaging in the enhancement of diesel motor fuel within the state, (iv) making a sale or use of diesel motor fuel in the state, other than a retail sale not in bulk or self-use of diesel motor fuel which has been the subject of a retail sale to such corporation or unincorporated business. . . .

Section 301-a of the Tax Law provides, in part:

(a) General. Notwithstanding any other provision of this chapter, or of any other law, for taxable months commencing on or after the first day of September, nineteen hundred ninety, there is hereby imposed upon every petroleum business for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state, a monthly tax for each or any part of a taxable month equal to the sum of the motor fuel component determined pursuant to subdivision (b) of this section, the automotive-type diesel motor fuel component determined pursuant to paragraph one of subdivision (c) of this section, the nonautomotive-type diesel motor fuel component determined pursuant to paragraph two of subdivision (c) of this section and the residual petroleum product component determined pursuant to subdivision (d) of this section.

* * *

(c)(2) Nonautomotive-type diesel motor fuel component. The nonautomotive-type diesel fuel component shall be determined by multiplying the nonautomotive-type diesel motor fuel rate times the number of gallons of nonautomotive-type diesel motor fuel sold or used by a petroleum business in this state during the month covered by the return under this section. Provided, however, that no diesel motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution, nor shall any nonautomotive-type diesel motor fuel be included in the measure of the tax imposed by this article more than once. (Emphasis added)

Section 301-b of the Tax Law provides, in part:

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The following gallonage otherwise includable in the measure of the tax imposed by section three hundred one-a of this article on a petroleum business shall be exempt from the measure of tax on such petroleum business:

* * *

(d) Sales to consumers for heating purposes.

(1) Total residential heating exemption. (A) Unenhanced diesel motor fuel sold by a petroleum business registered under article twelve-A of this chapter as a distributor of diesel motor fuel or residual petroleum product sold by a petroleum business registered under this article as a residual petroleum product business to the consumer exclusively for residential heating purposes.

(B) Enhanced diesel motor fuel sold by a petroleum business registered under article twelve-A of this chapter as a distributor of diesel motor fuel to the consumer exclusively for residential heating purposes but only if such enhanced diesel motor fuel is delivered into a storage tank which is not equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and such storage tank is attached to the heating unit burning such fuel, provided, that with respect to each delivery of such fuel over four thousand five hundred gallons, to obtain this exemption there shall be required a certificate signed by the purchaser stating that the product will be used exclusively for residential heating purposes.

Section 308(b) of the Tax Law provides, in part:

Payment of tax. Each petroleum business shall pay to the commissioner of taxation and finance with the filing of the return or returns the tax imposed by this article during the period covered by the return.

Section 315(b) of the Tax Law provides, in part:

Joint administration of taxes. In addition to the powers granted to the commissioner in this chapter, the commissioner is hereby authorized to make provisions for the joint administration, in whole or in part, of the taxes imposed by articles twelve-A and twenty-eight and pursuant to the authority of article twenty-nine of this chapter upon automotive fuel and the taxes imposed by this article,

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including the joint reporting, assessment, collection, determination and refund of such taxes, and for that purpose to prescribe that any of the commissioner's functions under such articles, and any returns, forms, statements, documents or information to be submitted to the commissioner under such articles, any books and records to be kept for purposes of the taxes imposed or authorized to be imposed by such articles, any schedules of amounts to be collected under such articles, any registration required under such articles, and the payment of taxes under such articles, shall be on a joint basis with respect to the taxes imposed by or pursuant to such articles. Provided, notwithstanding any provision of this article to the contrary, in the furtherance of joint administration, the provisions of subdivision one of section two hundred eighty-five-a and subdivision one of section two hundred eighty-nine-c of this chapter shall apply to the taxes imposed under this article with the same force and effect as if those provisions specifically referred to the taxes imposed hereunder and all the products with respect to which the taxes are imposed under this article . . . (emphasis added)

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105-A of the Tax Law provides, in part:

(a) Notwithstanding any other provisions of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) or (b) of section eleven hundred five on the receipts from the retail sale of fuel oil and coal used for residential purposes; the receipts from the retail sale of wood used for residential heating purposes; and the receipts from every sale, other than for resale, of propane (except when sold in containers of less than one hundred pounds), natural gas, electricity, steam and gas, electric and steam services used for residential purposes shall be paid at the rate of three percent for the period commencing January first, nineteen hundred seventy-nine and ending December thirty-first, nineteen hundred seventy-nine; at the rate of two and one-half percent for the period commencing January first, nineteen hundred eighty and ending September thirtieth, nineteen hundred eighty, and at the rate of zero percent on and after October first, nineteen hundred eighty. The provisions of this subsection shall

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not apply to a sale of (i) diesel motor fuel which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and (ii) enhanced diesel motor fuel except in the case of a sale of such enhanced diesel motor fuel used exclusively for residential purposes which is delivered into a storage tank which is not equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and such storage tank is attached to the heating unit burning such fuel, provided that each delivery of such fuel of over four thousand five hundred gallons shall be evidenced by a certificate signed by the purchaser stating that the product will be used exclusively for residential purposes.

* * *

(d) Where a residence is a part of a multiple dwelling or other premises consisting of residential and non-residential units, or where a portion of a residence is used for non-dwelling purposes including the conduct of a trade or business, the commissioner may establish such rules and regulations as may be necessary in order to allocate to such residence the portion of the sale or use of energy sources or services attributable to the residential portion.

(e) The tax commission may prescribe a certificate to be taken by the vendor of the energy sources or services specified in subsection (a) of this section from the purchaser of such energy sources or services. Where a certificate is required, unless such vendor shall have received such certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address, together with such other information as such commission may require, stating that the premises, for which such energy sources or services are purchased, is used solely as a residence or identifying the residential portion of premises, for which such energy sources or services are purchased including instances where a multiple dwelling unit or other premises consists of residential and nonresidential units or where a portion of a residence is used for non-dwelling purposes, such as the conduct of a trade or business, the provisions of this section shall not apply and the tax shall be imposed at the rate provided for in sections eleven hundred five and eleven hundred ten. No further certificate need be furnished for any subsequent purchase for such premises if the information set forth in the certificate last furnished the vendor has not materially changed.

Section 1132 of the Tax Law provides, in part:

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(a) (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. . . . The tax shall be paid to the person required to collect it as trustee for and on account of the state. (Emphasis added)

* * *

(c) (1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type . . . are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer (Emphasis added)

* * *

(h)(3)(i) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all retail sales of motor fuel or diesel motor fuel are subject to the tax required to be collected by subdivision (a) of section eleven hundred five of this article or paid by the provisions of section eleven hundred ten of this article until the contrary is established, and it shall be presumed that all motor fuel or diesel motor fuel imported, manufactured, subjected to enhancement, sold, received or possessed by any person in this state, which such person cannot otherwise account for as having been sold subject to the tax required to be collected by subdivision (a) of section eleven hundred five or paid by the provisions of section eleven hundred ten of this article, has been sold subject to the tax required to be collected by subdivision (a) of section eleven hundred five or paid by the provisions of section eleven hundred ten except that no such presumption shall apply with respect to motor fuel or diesel motor fuel in the fuel tank of a motor vehicle used to propel such vehicle or to motor fuel in small drums or similar containers. The burden of proving that any sale is not so subject shall be upon the person required to collect such tax and the purchaser of such fuel. (Emphasis added)

(ii) Unless the vendor has received from the purchaser a statement or certificate in such form as the commissioner may require, that the purchaser pursuant to the provisions of subdivision (a) of section eleven hundred five-A, subdivision (j) of section eleven hundred fifteen or subdivision (b) of section eleven hundred sixteen of this article is not subject to the provisions of this paragraph, such sale shall be deemed a sale subject to the provisions of sections eleven hundred five and eleven

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hundred ten of this article notwithstanding any provision of subdivision (c) of this section. (Emphasis added)

(iii) Where any certificate or statement required under this paragraph has been furnished to the vendor and accepted in good faith, the burden of proving that the receipt is not taxable hereunder shall be solely upon the purchaser. The vendor shall not be required to collect such taxes from purchasers who furnish such certificates or statements in proper form.

Section 1133 of the Tax Law provides, in part:

(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax. (Emphasis added)

(b) Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid.

Section 1139(a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant

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to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor. Such application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. Notwithstanding any other provision of this article, if the time to file an application for refund or credit of any tax, penalty or interest would otherwise have expired on or before December nineteenth, nineteen hundred sixty-nine, the time for filing such application is hereby extended to and including December twentieth, nineteen hundred sixty-nine, except that it shall be further extended, as provided in subdivision (c) of section eleven hundred forty-seven, where a taxpayer has consented in writing to the extension of the period for assessment of additional tax. (Emphasis added)

Section 528.1(c) of the Sales and Use Tax Regulations provides:

Exemptions from the sales and compensating use tax are strictly construed. For an exemption to be allowed, it must clearly appear that a transaction is eligible for the exemption. The burden of proving nontaxability is on the person claiming the exemption.

Section 561.1(f) of the Sales and Use Tax Regulations provides, in part:

Sales of diesel motor fuel shall be treated in the same manner as sales of any other kind of tangible personal property and shall be subject to any applicable State and local sales and compensating use taxes and the provisions of this Subchapter relating to sales and uses of tangible personal property.

Technical Services Bureau Memorandum, TSB-M-95(4)M, dated June 15, 1995, entitled *Residential Heating Defined for Purposes of Article 13-A*, states, in part:

Article 13-A of the Tax Law, the Petroleum Business Tax, imposes a tax on petroleum businesses based on the quantity of taxable products sold or used by the petroleum business during the reporting period. The tax is a cents-per-gallon tax that varies by product. The measure of the tax does not include sales of the following products when made to customers exclusively for residential heating purposes:

--diesel motor fuel (No. 2 heating oil, kerosene, etc.), and

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--residual petroleum products (No. 5 fuel oil, No. 6 fuel oil, etc.).

“Residential purposes” means any use of a structure or part of a structure as a place of abode maintained by or for a person (whether or not owned by the occupant) on other than a temporary or transient basis. . . . Examples of structures that would normally be considered used for residential purposes include, single- and multiple-family housing units, college and boarding school dormitories, long-term care nursing homes, prisons, orphanages, parsonages and convents.

“Nonresidential purposes” means any use other than for residential purposes, as defined above, including any use in the conduct of a trade, business or profession, by the owner of the structure or by another person.

If a customer has both residential and nonresidential areas heated by the same heating system, the supplier may allocate the fuel on a percentage basis. The percentage of fuel used for residential purposes is determined by dividing the square footage of the structure or structures used entirely for residential purposes by the total square footage. Common areas used for both residential and nonresidential purposes are not used in the determination.

* * *

The fuel determined to be used for residential purposes is exempt from the petroleum business tax, while the fuel used for nonresidential purposes is subject to tax.

If the premise to which the supplier is delivering the fuel oil is a one- or two-family house that is not used to conduct a business, trade or profession, a notation to that effect in the accounting records of the fuel supplier or on a document such as a metered delivery ticket is sufficient to evidence tax exemption. However, for multiple-dwelling and/or multiple-use structures, the customer should complete a Form TP-385, Certification of Residential Use, Sales Tax Reduction on Energy Purchases, certifying the percentage of residential use. The customer must give a new certification to the fuel supplier whenever the percentage of residential use changes. (Emphasis added)

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Opinion

Petitioner specifically asks who is responsible (the fuel oil distributor or the user of the respective fuel oil delivered) for payment of the taxes imposed by Articles 13-A, 28 and 29 of the Tax Law on fuel oil, and whose responsibility is it to ascertain whether a property is residential, commercial or a combination thereof.

Although Petitioner's questions relate specifically to petroleum business tax and sales and compensating use tax, it is necessary to include in this discussion the Article 12-A diesel motor fuel excise tax because Article 13-A incorporates portions of Article 12-A by reference. (See Section 315(b) of the Tax Law.) While each of these taxes is imposed by a separate article of the Tax Law, these taxes are all jointly administered. Thus, it is necessary to look at the provisions of each of these taxes, particularly those of the Article 13-A tax, to understand the application of the Tax Law to the circumstances at issue.

Effective September 1, 1990, Article 13-A was amended to change the computation of tax from a percentage of gross receipts to a cents-per-gallon basis. (See Section 301-a(c) of the Tax Law.) Section 315(b) of the Tax Law provides for the joint administration of the Article 13-A tax with the taxes imposed by Articles 12-A, 28 and 29 and incorporates by reference Section 289-c(1) of Article 12-A which states that the tax imposed “though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser.”

The seller and its customer are jointly and severally liable for the taxes imposed under Article 12-A and Articles 28 and 29. (See Sections 282-a(5), 285-a(1), 285-b(3), 289-c(1), and 1133 of the Tax Law.) Thus, the seller of fuel oil is required to either pay the tax and pass it through to, or collect the tax from, the purchaser who ultimately bears the burden of the tax. Therefore, the Petitioner and its customer both may be held liable for these taxes. The Department of Taxation and Finance has the authority to assess the seller or purchaser where there is a failure to pay or an underpayment of tax. (See Sections 288 and 1138 of the Tax Law.) Conversely, where there is an overpayment of tax, the purchaser may apply for a refund directly from the Department, or the seller may apply for a refund or credit of the overpayment where the tax which was passed through or collected by the seller has been repaid to the purchaser. (See Sections 289-c and 1139 of the Tax Law.) Furthermore, Section 1133(a) of the Tax Law provides that the seller has the “same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service. . . .” These provisions make clear that the seller and purchaser are jointly liable for the Article 12-A excise tax and sales tax due on sales of fuel oil. Since the Article 13-A tax is administered jointly with these taxes and incorporates by reference Sections 285-a(1) and 289-c(1) of Article 12-A, as discussed above, the seller and purchaser of fuel oil are jointly liable for the Article 13-A tax as well.

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Under Articles 12-A, 13-A, 28 and 29, sales of fuel oil are presumed to be taxable. (See Sections 285-b, 315, and 1132(h) of the Tax Law.) With respect to these taxes, the seller is required to pass the Articles 12-A and 13-A taxes through to the purchaser and collect and remit the Articles 28 and 29 taxes from the purchaser unless some exemption is documented. With respect to the Article 13-A tax on heating fuel, Technical Services Bureau Memorandum, TSB-M-95(4)M, *Residential Heating Defined for Purposes of Article 13-A*, specifically instructs distributors that for multiple-dwelling and/or multiple-use structures, the customer should complete a Form TP-385, *Certification of Residential Use, Sales Tax Reduction on Energy Purchases*, certifying the percentage of residential use. For sales to multiple-dwelling or multiple-use structures, the distributor should impose all applicable taxes unless the customer certifies that the diesel fuel qualifies for exemption as residential heating fuel. Only when an exemption certificate has been furnished to the distributor and accepted in good faith will the purchaser bear the sole burden of proving that the fuel is not taxable.

Thus, in the present case the responsibility to ascertain whether the property heated by the fuel is residential, nonresidential or a combination thereof, is on both Petitioner and its customers. Since Petitioner did not obtain the appropriate exemption document establishing the exemption for residential heating fuel, the burden of proving the exempt nature of Petitioner's sales of fuel oil cannot rest solely with the purchaser.

Section 1133(a) of the Tax Law provides that a vendor has the same right to collect sales tax from a customer as if the tax were a part of the purchase price. It is clear that Petitioner may recoup sales tax from its customers. In accordance with the preceding discussion, based on the joint administration of the Article 12-A, 13-A, 28 and 29 taxes on fuel oil, it appears that a distributor may also be entitled to recoup from its customer the amount of Article 13-A tax that was due on a sale of fuel oil. However, the mere fact that Petitioner was assessed additional taxes on its sales of fuel oil and paid these taxes directly to the Department of Taxation and Finance is not proof that Petitioner failed to collect or pass through such tax and is entitled to recoup these taxes from its customer. Petitioner may only recoup tax from its customer if Petitioner did not pass through the Article 13-A tax to, or collect the Articles 28 and 29 taxes from, the customer on the sale of the fuel oil. Assessments may be issued by the Department to distributors for Article 13-A tax passed through to, or Articles 28 and 29 taxes collected from, the customer but not remitted by the distributor to the Department as well as for taxes not passed through to or collected from the customer. The amount of tax which Petitioner may recoup from its customers, if any, can only be determined through evidentiary documents such as invoices, delivery tickets or contracts. Such documents must establish that these taxes were not passed through to or collected from the customer. Therefore, whether Petitioner is permitted in the present case to recoup from its customers the taxes assessed by and paid to the Department is a question of fact which cannot be answered in this Advisory Opinion, as the Opinion's scope is limited to the applicability of pertinent statutory and regulatory provisions to the specific set of facts presented.

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Please note that when a vendor elects to pursue its rights against the purchaser, Section 1133 requires that the Department of Taxation and Finance shall be joined as a party in any action or proceeding brought to collect the tax.

DATED: July 26, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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