

Ruling 2002-06

Vermont Department of Taxes

Dated: July 31, 2002

Written By: Timothy Collins, Attorney for the Department

Approved By: Janet Ancel, Commissioner of Taxes

You have requested the Department of Taxes to issue a letter ruling regarding the taxability of motor fuels imported into the State of Vermont in the tanks of motor vehicles transported by motor carriers. Your request includes both the gasoline tax, 23 V.S.A. § 3101 et seq. and the diesel fuel tax. 23 V.S.A. §3001 et seq.

The facts stated in your letter of April 19, 2002 are as follows:

1. The Taxpayer is a motor vehicle manufacturer who is located outside of the State of Vermont.
2. Vehicles manufactured by the Taxpayer are shipped to independently owned dealers located in the State of Vermont via common carrier and/or rail.
3. An unspecified amount of fuel is placed in the tanks of the motor vehicles at the manufacturing facility.
4. The stated purpose for the fuel is to "accommodate the loading and unloading of the motor vehicles in transit".
5. In some cases a motor fuel tax is paid to the state in which the manufacturing plant is located. In other cases, no motor fuels tax is paid on the fuel in the state where the manufacturing facility is located either because the fuel is exported from the state or because the state does not impose tax on such fuel.

DISCUSSION

Gasoline Tax

The Vermont gasoline tax states that "[e]xcept for sales of motor fuels between distributors licensed in this state, which sales shall be exempt from the tax, in all cases not exempt from the tax under the laws of the United States", each distributor shall pay a tax of 19 cents per gallon on each gallon of gasoline sold or used within the state by the distributor. 23 V.S.A. § 3106. The term distributor includes any person, firm or corporation who imports or causes to be imported gasoline or other motor fuel for use, distribution or sale within the state. 23 V.S.A. § 3101(a).

To apply this statutory scheme to your situation, it is necessary to address two issues. 1). Would your client be considered a distributor? According to the facts you related to the Department, your client is purchasing gasoline outside of Vermont and importing it into Vermont for use within Vermont. It is the Department's interpretation that these activities would make your client a distributor for purposes of the Vermont gasoline tax.

2. Are there any laws of the United States that would exempt this gasoline from the Vermont gasoline tax? In your letter of April 19, 2002, you suggest that this gasoline should be exempt from the Vermont tax because it is intended for off highway business use and such a usage is exempt from the Federal Motor Fuels tax. Without addressing the issue of whether this use constitutes an "off highway business use", the Department cannot accept this argument because it misconstrues the scope of the Vermont gasoline tax and confuses the Federal tax with the Vermont tax.

Section 3106 states "in all cases not exempt from the tax under the laws of the United States". The words "the tax" in this instance refers specifically to the Vermont gasoline tax. Another way of phrasing this statute would be whether there are any Federal laws that would prohibit the State of Vermont from taxing gasoline under a specific set of circumstances. An exemption from the Federal Motor Fuels tax is irrelevant to this analysis because an exemption from the federal tax does not necessitate a corresponding State exemption. Vermont is not "piggybacked" on the Federal motor fuels tax.

The Department has been unable to discover any Federal law that prohibits states from imposing a motor fuels or gasoline tax on gasoline that is used for off highway business use. Because of this, the use of the gasoline as described in your letter is subject to the Vermont gasoline tax imposed pursuant to 23 V.S.A. § 3101 et seq.

Diesel Fuel Tax

The Vermont Diesel Fuel tax imposes a tax on each gallon of diesel fuel that is sold or used within the State of Vermont with certain specified exceptions. 23 V.S.A. § 3003. For fuel that is purchased outside Vermont but used within Vermont, the tax is paid by the user and remitted to the state according to the procedures set forth in 23 V.S.A. § 3015. The tax attaches at the time of use. 23 V.S.A. § 3003 (b)(3). The Diesel fuel tax does contain a number of specific exemptions from tax including "uses by any vehicle off the highways of the state". 23 V.S.A. § 3003(d)(4). Thus, to determine whether the use set forth above is taxable, it is necessary to determine whether the use you described constitutes a use off the highways of the state.

The terms "highway," "road," "public highway" or "public road" are defined in the motor vehicle law to include "all parts of any bridge, culvert, roadway, street, square, fairground, or other place open temporarily or permanently to public or general circulation of vehicles, and shall include a way laid out under authority of law." 23 V.S.A. § 4(13)

Vermont case law has had a number of occasions to address what constitutes a highway or public highway under this definition with a key consideration being whether the location under consideration is open to the "general circulation of the public". *State v. Trucott*, 145 Vt. 274, 283 (1984). Some examples of locations that have been determined to be highways include a frozen lake, *Bourgon v. Farm Bureau Mut. Ins. Co.*, 128 Vt. 593, 595 (1970); privately owned roads maintained by a town, *State v. Pacquette*, 151 Vt. 631, 634 (1989); pull off areas by the side of a road, *Trucott*, 145 Vt. at 283-84; a parking lot, *State v. Jarvis*, 145 Vt. 8, 13 (1984); and a private residential driveway, *State v. Eckhardt*, 165 Vt. 606 (1996). On the other hand, a private parking lot

with limited access and whose characteristics sent an unequivocal message that it was closed to the general public was determined not to be a public highway. *State v. McNeil*, 164 Vt. 129, 131 (1995). In each of these occasions, the primary consideration was "whether the way is open temporarily or permanently to public or general circulation of vehicles." *Eckhardt*, 165 Vt. at 607.

Based on the above definition of public highway, the Tax Department is unable to agree with your argument that the diesel fuel is exempt from taxation because it is used for off highway use. Specifically, based on the facts presented in your letter, the Department notes that the fuel that is used in Vermont is potentially used in multiple locations each of which would need to be reviewed independently to determine whether it is open to public or general circulation of vehicles. However, the Department can conclude that, at the very least, a portion of the fuel would be considered to be used on the highways of Vermont.

Although your letter does not set forth a specific description of the locations where the fuel is used, you did state that it is intended to facilitate transit and that the motor vehicles in which the fuel is transported are sent by rail and/or by common carrier. Therefore, the uses in Vermont could potentially include the transfer of the vehicles from rail to a common carrier and would include the unloading of the vehicles at the dealer locations. Because the dealer locations are open to the public, any use of the fuel at the dealership would be considered to be use of fuel on the highways of Vermont. With respect to the possible use of the fuel in transferring the motor vehicles from rail to common carrier, there are insufficient facts from which the Department could make a determination as to whether the location was open to the public or general circulation of vehicles.

This ruling will be made public after deletion of the parties' names and any information which may identify the parties. A copy of the ruling showing the proposed deletion is attached, and you may request within thirty (30) days that the Commissioner delete any further information which might tend to identify the interested parties. The final discretion as to deletions, however, remains with the Commissioner.

This ruling is issued solely to your business and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statute or regulations.

3 V.S.A. Section 808 provides that this ruling will have the same status as an agency decision or order in a contested case. You have the right to appeal this ruling within (30) days.