

Georgia Letter Ruling Number: LR SUT-2018-01
Topic: Dyed Diesel Fuel
Dated: March 7, 2018

This letter is in response to your letter ruling request dated June 14, 2017, regarding the application of Georgia sales and use tax to sales of dyed diesel fuel.

Facts Presented By Taxpayer

[Redacted], (“Taxpayer”) is a motor fuel distributor licensed to use and resell dyed diesel fuel.¹ Taxpayer buys dyed diesel fuel from other licensed motor fuel distributors free from motor fuel excise tax and sales tax and sells the dyed diesel fuel to end-users.

Issue

What is the appropriate tax treatment of a duly licensed distributor’s sales of dyed diesel to end-users?

Analysis

Motor Fuel Excise Tax

O.C.G.A. § 48-9-3 imposes excise tax on distributors who sell or use motor fuel.² “‘Motor fuel’ means any source of energy that can be used for propulsion of motor vehicles on the public highways including, but not limited to: (A) Gasoline; (B) Fuel oils; (C) Compressed petroleum gas; and (D) Special fuel.”^{3,4} No excise tax, however, is imposed on bulk sales⁵ of motor fuel by duly licensed distributors to duly licensed distributors.⁶ Because Taxpayer in this case is a duly licensed distributor, it may purchase dyed diesel from duly licensed distributors free from excise tax.

Taxpayer, as a duly licensed distributor, may sell dyed diesel free from excise tax to a consumer for a purpose other than highway use.⁷ Note that highway use includes the “use of motor fuel other than gasoline in the construction, reconstruction, maintenance, or repair of public highways.”⁸ As such, if Taxpayer sells dyed diesel to an end-user for highway use,⁹ including the construction, reconstruction, maintenance, or repair of public highways, then Taxpayer must remit excise tax on the transaction.

Sales and Use Tax

State sales and use tax is imposed on retail sales of tangible personal property, including fuels.¹⁰ “Retail sale” or a “sale at retail” means any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.¹¹

¹ License No. [Redacted]. The license states that Taxpayer is licensed to use and resell all fuels except compressed and special fuels. Dyed diesel is fuel oil. Ga. Comp. R. & Regs. r. 40-20-1-.01(e). Dyed diesel is not a compressed fuel or a special fuel. O.C.G.A. § 48-9-2.

² O.C.G.A. §§ 48-9-3(a)(1).

³ O.C.G.A. § 48-9-2(9).

⁴ Dyed diesel is a fuel oil. Ga. Comp. R. & Regs. r. 40-20-1-.01(e).

⁵ Chapter 9 of Title 48 does not define “bulk sale.”

⁶ O.C.G.A. § 48-9-3(b)(1).

⁷ O.C.G.A. § 48-9-3(b)(9)(“No tax is imposed by this article upon or with respect to the following sales by duly licensed distributors: . . . Sales of dyed fuel oils to a consumer for other than highway use as defined in paragraph (8) of Code Section 48-9-2 . . .”).

⁸ “Highway use” means: (A) The consumption or use of motor fuel other than gasoline in or upon a motor vehicle which is operated on the public highways; (B) The placing of motor fuel other than gasoline in the running tank or power cells of a motor vehicle designed for use and used on the public highways; or (C) The use of motor fuel other than gasoline in the construction, reconstruction, maintenance, or repair of public highways. O.C.G.A. § 48-9-2(8).

⁹ This ruling makes no assertions on the legality of the sale or consumption of dyed diesel for highway use. The sale or consumption of dyed diesel for highway use may result in penalties under O.C.G.A. § 48-9-16 and other laws.

¹⁰ O.C.G.A. §§ 48-8-30(b)(1), 48-8-2(37).

¹¹ O.C.G.A. § 48-8-2(31).

Accordingly, Taxpayer may purchase dyed diesel tax free for resale by presenting a resale certificate of exemption, such as a completed Form ST-5, to the seller.¹²

Retail sales of motor fuel, other than gasoline, purchased for purposes other than propelling motor vehicles on public highways as defined in Article 1 of Chapter 9 of Title 48 are fully subject to state sales and use tax, unless otherwise specifically exempted.¹³ Except as expressly provided, local sales and use taxes correspond to state sales and use tax, except as to rate.¹⁴ Thus, in addition to state sales and use tax, local sales and use taxes are generally imposed on retail sales of non-gasoline motor fuel for purposes other than propelling motor vehicles on public highways.¹⁵ Therefore, Taxpayer must remit state and local sales and use taxes on the sale to the end-user of dyed diesel for non-highway uses. The measure of tax is the “sales price,” as defined in O.C.G.A. § 48-8-2, of dyed diesel to the end-user.¹⁶

If Taxpayer sells dyed diesel for highway use, a different analysis applies. O.C.G.A. § 48-8-3.1 states that, except for sales of non-gasoline motor fuel purchased for purposes other than “propelling motor vehicles on public highways as defined in Article 1 of Chapter 9 of Title 48,” sales of motor fuels are exempt from state sales and use tax.¹⁷ In other words, sales of gasoline for any purpose and sales of motor fuel for purposes of propelling vehicles on public highways are exempt from state sales and use tax.

Because Chapters 8 and 9 of Title 48 are inextricably intertwined, containing multiple cross-references to each other, there is no significant difference between the meaning of “highway use” and “propelling motor vehicles on public highways.” To construe the terms as having different meanings would lead to incongruent results. Thus, “propelling motor vehicles on public highways” in Chapter 8, in addition to its obvious meaning, must include the construction, reconstruction, maintenance, or repair of public highways, just as “highway use” in Chapter 9 (as discussed above) includes the construction, reconstruction, maintenance, or repair of public highways. Thus, to the extent Taxpayer sells motor fuel for highway use, including the construction, reconstruction, maintenance, or repair of public highways, state sales and use tax does not apply.

As for local sales and use tax, the local sales and use tax imposition statutes state that no item or transaction that is not subject to state sales and use tax is subject to local sales and use taxes, except that local sales and use taxes are applicable to sales of motor fuels as prepaid local tax.¹⁸ Note, however, that prepaid local tax does *not* apply to *all* sales of motor fuel. Rather, prepaid local tax applies to motor fuel only when non-prepaid state and local sales and use taxes do *not* apply to motor fuel and when motor fuel excise tax applies to motor fuel. That is, prepaid local tax applies only to motor fuel sold for highway use. This conclusion is supported by O.C.G.A. § 48-8-30, which states, “The prepaid local tax shall be imposed at the time tax is imposed under Code Section 48-9-3.”¹⁹

Thus, to the extent Taxpayer makes sales of dyed diesel for highway use, such as for the construction, reconstruction, maintenance, or repair of public highways, Taxpayer should remit motor fuel excise tax and prepaid local tax on those sales and should not remit any non-prepaid state or local sales or use tax. The measure of tax for prepaid local tax is “the average retail sales price.”²⁰ The Department publishes the average retail sales price at least twice annually by bulletin.

¹² O.C.G.A. § 48-8-38.

¹³ O.C.G.A. § 48-8-3.1.

¹⁴ O.C.G.A. §§ 48-8-82(a) (LOST), 48-8-102(b) (HOST), 48-8-109.5(a) (EHOST), 48-8-110.1(c) and (d) (SPLOST), 48-8-141(a) (ESPLOST), 48-8-201(c)(1)(A) and (e) (MOST), 48-8-241, 48-8-269, 48-8-269.15, 48-8-269.30 (TSPLOSTs), 32-9-13 (Atlanta MARTA); MARTA Act, § 25(a).

¹⁵ Not all local sales and use taxes are imposed on all uses of motor fuel. For example, the TSPLOST taxes imposed under Articles 5 and 5A of Title 48, Chapter 8 of the Georgia Code do not apply to motor fuel used for propulsion of motor vehicles on the public highways and to various non-highway uses of motor fuel.

¹⁶ O.C.G.A. § 48-8-30.

¹⁷ O.C.G.A. § 48-8-3.1(a) and (b).

¹⁸ O.C.G.A. §§ 48-8-82(a) (LOST), 48-8-102(b) (HOST), 48-8-109.5(a) (EHOST), 48-8-110.1(c) and (d) (SPLOST), 48-8-141(a) (ESPLOST), 48-8-201(c)(1)(A) and (e) (MOST), 32-9-13 (Atlanta MARTA), 48-8-2(23) (definition of prepaid tax), and MARTA Act, § 25(a).

¹⁹ O.C.G.A. § 48-8-30(k).

²⁰ O.C.G.A. § 48-8-2(23).

Ruling

Taxpayer may purchase dyed diesel for resale free from sales and use tax by presenting a resale certificate, such as a completed Form ST-5, to the seller. Taxpayer must then remit non-prepaid state and local sales and use taxes on the sale to the end-user of dyed diesel for non-highway uses. The measure of tax is the “sales price” of dyed diesel to the end-user as that term is defined in O.C.G.A. § 48-8-2.

If Taxpayer sells dyed diesel for highway use, such as for the construction, reconstruction, maintenance, or repair of public highways, Taxpayer should remit motor fuel excise tax and prepaid local tax on those sales and should not remit any non-prepaid state or local tax. The measure of tax for prepaid local tax is the average retail sales price. The Department publishes the average retail sales price at least twice annually by bulletin.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. Should the circumstances regarding the transactions change or differ materially from those represented, this ruling may become invalid. In addition, subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different tax treatment than that expressed in this ruling.