



TAX BULLETIN 10-9

Virginia Department of Taxation

August 24, 2010

IMPORTANT INFORMATION REGARDING **THE RETAIL SALES AND USE TAX TREATMENT** **OF CERTAIN FUELS**

TAX has recently discovered that clarification is needed regarding the Retail Sales and Use Tax treatment of certain motor fuels. This Tax Bulletin is intended to provide guidance to affected taxpayers to ensure the proper collection of the Retail Sales and Use Tax.

Imposition of the Tax

The Retail Sales and Use Tax is imposed on every retail sale of fuel unless the fuel is subject to the Virginia Fuels Tax, or another tax exemption applies. Generally, motor fuel used in highway vehicles is subject to the Virginia Fuels Tax, which is administered by the Department of Motor Vehicles ("DMV"), and is not subject to the Retail Sales and Use Tax, which is administered by TAX. Dyed diesel fuel and other fuel that is not used in a highway vehicle is exempt from the Virginia Fuels Tax, and thus is subject to the Retail Sales and Use Tax. The Retail Sales and Use Tax must be paid on these fuels unless an exemption from the Retail Sales and Use Tax applies to the sale.

Registration of Dealers

Any person selling fuel at retail that is not subject to the Virginia Fuels Tax is considered a dealer for the purposes of the Retail Sales and Use Tax. If a dealer is not registered for the Retail Sales and Use Tax, he must apply to TAX for a certificate of registration for the Retail Sales and Use Tax using Form R-1, Business Registration Application.

Sales Price

For purposes of the Retail Sales and Use Tax, the sales price does not include the following amounts:

- Separately stated federal diesel fuel excise taxes may be excluded from the sales price, however, any dealer who fails to exclude the federal diesel excise tax when collecting any sales tax may not deduct the federal diesel excise tax from his taxable sales (Source: Public Document ("PD") 88-68 (April 26, 1988));

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- Any transportation and delivery charges if the charges are separately stated on the invoice; otherwise the tax must be computed on the total charge (Source: *23 Virginia Administrative Code (VAC) 10-210-6000*);
- Any finance charges, carrying charges, service charges or interest from credit extended under conditional sale contracts or conditional contracts providing for deferred payments;
- Any bad check and late payment charges; and
- Any charges for billing and collection services.

Exemptions

All sales of fuel that is not subject to the Virginia Fuels Tax are subject to the Retail Sales and Use Tax until the contrary is established. The burden of proving that the tax does not apply rests with the dealer unless he takes, in good faith from the purchaser, a certificate of exemption indicating that the fuel is exempt under the law. The certificate will remain in effect except upon notice from TAX that it is no longer acceptable. However, a certificate that is incomplete, invalid, infirm or inconsistent on its face is never acceptable, either before or after notice. (Source: *Code of Va. § 58.1-623*)

Certificates of exemption in the various categories are available on TAX's website, www.tax.virginia.gov. Each certificate explains its use, and may be reproduced by the dealer for use on purchase orders, sales slips or other documents relating to the transaction. Reasonable care and judgment must be exercised by all concerned to prevent the giving or receiving of false, fraudulent or bad faith exemption certificates. An exemption certificate cannot be used to make a tax free purchase of fuel not covered by the exact wording of the certificate.

In the event that a dealer fails to collect the Retail Sales and Use Tax due on the sale of taxable motor vehicle fuel from his customer, the dealer is liable for the payment of the tax.

Exemptions from the Retail Sales and Use Tax include, but are not limited to, the following exemptions:

- Fuel sold for resale. (Source: *Va. Code § 58.1-603*)
- Fuel sold to the United States, the Commonwealth or political subdivisions of the Commonwealth if the purchases are pursuant to required official purchase orders to be paid for out of public funds; the United States Government National credit card and the Commonwealth of Virginia credit card may be used in lieu of a Certificate of Exemption

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when purchasing fuel from any retailer or distributor in localities subject to the motor vehicle fuel sales tax. (Source: *Va. Code* § 58.1-609.1(4))

- Fuel sold for use in a commercial watercraft, even if the Virginia Fuels Tax has been refunded to the purchaser. (Source: *Va. Code* § 58.1-609.1(6))
- Fuel sold to farmers for use in farm machinery or motor vehicles, licensed or nonlicensed, used in agricultural production for market if it is to be so used at the time of purchase. (Source: *Va. Code* § 58.1-609.2(1))
- Fuel sold to a commercial waterman to operate machinery used in extracting fish, bivalves or crustaceans from water for commercial purposes. (Source: *Va. Code* § 58.1-609.2(4))
- Fuel sold to harvesters of forest products who use the motor vehicle fuel in commercial tree farming. (Source: *Va. Code* § 58.1-609.2(6))
- Fuel purchased for use that would qualify for the manufacturing exemption. (Source: *Va. Code* § 58.1-609.3(2))
- Fuel for use or consumption aboard ships or vessels engaged in intercoastal trade between ports in this state and ports in other states of the United States; or in foreign commerce between ports in this state and ports in foreign countries when delivered directly to such ships or vessels. Fuel used directly in the building, conversion or repair of such ships and vessels is also exempt. (Source: *Va. Code* § 58.1-609.3(4))
- Fuel sold to an airline and used directly in the rendition of its common carrier service in interstate, intrastate or foreign commerce operations providing "scheduled air service." "Scheduled air service" as defined in *Va. Code* § 58.1-1501, means service provided by a single air carrier consisting of regularly scheduled flights to one or more Virginia airports at least five days per week. (Source: *Va. Code* § 58.1-609.3(6))
- Fuel purchased for the use or consumption of any nonprofit organization that holds a valid certificate of exemption from TAX, or any nonprofit church that holds a valid self-executing certificate of exemption, that is exempt from paying the Retail Sales and Use Tax. (Source: *Va. Code* § 58.1-609.11)

Collection of Tax

The Retail Sales and Use Tax on fuel may either be included in the unit measure of fuel using the bracket system set forth in 23 VAC 10-210-220 to determine the proper amount of tax to be added to the sales price of each unit, or the tax may be computed at a straight five percent

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of the sales price and separately stated from the selling price. The bracket system does not relieve the dealer from the liability of paying an amount equal to five percent of his gross taxable sales. If the tax is computed at a straight five percent of the sales price, one-half cent or more is treated as one cent.

The taxes collected must be remitted to TAX in the same manner as with all other retail sales when the dealer files his Retail Sales and Use Tax return.

Example 1:

Retailer purchases gasoline for resale, upon which the Virginia Fuels Tax has been paid. Retailer sells the gasoline to a customer for use in a pleasure watercraft. Retailer does not collect the Retail Sales and Use Tax from the customer, as the Virginia Fuels Tax has already been paid. The owner of the pleasure watercraft may apply to the DMV for a refund of the Virginia Fuels Tax. The owner of the pleasure watercraft would then be liable for the Retail Sales and Use Tax on the purchase of the fuel.

Example 2:

Retailer purchases dyed diesel fuel from a fuel wholesaler for resale upon which the Virginia Fuels Tax has not been paid. Retailer is exempt from the Retail Sales and Use Tax as the fuel is purchased for resale and must provide a resale certificate of exemption (ST-10). Retailer sells the dyed diesel fuel to a customer for use in a pleasure watercraft. Retailer must collect the Retail Sales and Use Tax from the customer, as the Virginia Fuels Tax was not paid.

Example 3:

Retailer purchases dyed diesel fuel from a fuel wholesaler for resale upon which the Virginia Fuels Tax has not been paid. Retailer is exempt from the Retail Sales and Use Tax as the fuel is purchased for resale and must provide a resale certificate of exemption (ST-10). Retailer sells the dyed diesel fuel to a commercial waterman for commercial purposes. Retailer receives a valid certificate of exemption from the commercial waterman (ST-16). Retailer does not collect the Retail Sales and Use Tax.

Refunds

When any person pays the Retail Sales and Use Tax to a dealer and the use of the fuel is specifically exempt, such person may file a claim for refund with the dealer to whom the tax was paid. The dealer may then file a claim for refund with TAX. The dealer must show that the tax was collected from his customer, paid to TAX, and subsequently refunded by the dealer to his customer. Refunds authorized will be for the amount of tax remitted to TAX by

the dealer, less any applicable dealer discount. Refunds cannot be authorized on exempt transactions unless the dealer files a claim within three years from the last day prescribed by law for the timely filing of the return on which the tax was paid to TAX.

Use Tax

A customer who purchases fuel upon which the Virginia Fuels Tax was paid and subsequently receives a refund of the Virginia Fuels Tax from the DMV is liable for the use tax component of the Retail Sales and Use Tax on the purchase of the fuel. If the customer is a registered dealer for the purposes of the Retail Sales and Use Tax, the customer may file and remit the use tax on the purchase of the fuel on its regular Retail Sales and Use Tax return. If the customer is a business, but not a registered dealer, the business should file and remit the use tax on the purchase of the fuel on the Business Consumer's Use Tax Return, Form ST-7. If the customer is an individual who is not a registered dealer, he should remit the use tax on the purchase of the fuel either on the Consumer's Use Tax Return for Individuals, Form CU-7, or on the Individual Income Tax Return, Form 760 Schedule ADJ.

Example 4:

Retailer purchases gasoline for resale upon which the Virginia Fuels Tax has been paid. Retailer sells the gasoline to a customer for use in a pleasure watercraft. Retailer does not collect the Retail Sales and Use Tax from the customer, as the Virginia Fuels Tax has already been paid. The customer subsequently requests and receives a refund of the Virginia Fuels Tax from the DMV. The customer must file and remit the Retail Sales and Use Tax on the purchase of the fuel to TAX.

Example 5:

Retailer purchases gasoline for resale upon which the Virginia Fuels Tax has been paid. Retailer sells the gasoline to a commercial waterman for commercial purposes. Retailer does not collect the Retail Sales and Use Tax from the customer, as the Virginia Fuels Tax has already been paid. The customer subsequently requests and receives a refund of the Virginia Fuels Tax from the DMV. The customer does not remit the Retail Sales and Use Tax on the purchase of the fuel as he qualifies for an exemption from the tax.

Prior Noncompliance

For sales and use tax purposes, *Va. Code* § 58.1-634 states, in part, "taxes imposed by this chapter shall be assessed within three years from the date on which such taxes became due and payable." The statute also states that in cases where returns have not been filed, TAX may make an assessment at any time within six years from the date the taxes became due and payable.

Instead of assessing dealers who did not properly collect the Retail Sales and Use Tax on retail sales of fuel that were not subject to the Virginia Fuels Tax for the full three years of Retail Sales and Use Tax due on such sales, TAX will allow such dealers who come forward prior to September 20, 2010 to resolve the liability.

Self-Assessment

Dealers who did not properly collect the Retail Sales and Use Tax on retail sales of fuel with no willful intent to defraud the Commonwealth may elect to self-assess the Retail Sales and Use Tax on such sales occurring on and after August 1, 2009. TAX will waive the remaining tax, penalties and interest on such sales for the full three years for these dealers. Willful intent to defraud the Commonwealth exists where a person commits a voluntary, conscious, and intentional act to defraud the Commonwealth. The dealer must contact TAX at (804) 786-1879 prior to September 20, 2010 to be included in the self-assessment program. Dealers will be allowed to establish a payment plan for any outstanding liabilities for retail sales of fuel that were not subject to the Virginia Fuels Tax if necessary.

Offers in Compromise

Any dealer who did not properly collect the Retail Sales and Use Tax may also choose to make an offer in compromise to settle for less than the full amount. Under *Va. Code* § 58.1-105, TAX may accept an offer in compromise if the taxpayer can show that there is reasonable cause for reducing or waiving the penalty or can show doubtful liability or collectibility for reducing or waiving the tax and interest. While penalties may be reduced or waived entirely with good cause, taxes and interest may not be waived unless it can be shown that the tax liability is doubtful, or that it is doubtful that the bill can be collected.

To request an offer in compromise, the dealer should write to the Tax Commissioner describing the type of tax involved, taxable period, date and amount due, and include a detailed explanation, along with supporting documentation, of the reasons why the tax, penalty or interest should be reduced or waived. A check for the amount of the offer should be included with the letter. The check will be applied to the account. The deposit of the check does not indicate the acceptance or denial of the offer. An explanation of when and how payment will be made should be provided if no payment is made with the offer submission. If the offer is made because the person assessed is unable to pay, a signed Financial Information Statement must be included. This form can be found with the Taxpayer Bill of Rights, which is available on TAX's website at <http://www.tax.virginia.gov>. The proposal will be considered based on the available information. If the Tax Commissioner accepts the offer, the remaining tax due will not be assessed. If the offer is not accepted, the balance must be paid. Unless it is doubtful that the tax can be collected, TAX is unlikely to accept an offer in compromise that requests the waiver of more than the amount of tax that would be waived under the self-assessment option listed above.

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For additional information, please visit TAX's website, www.tax.virginia.gov. If you have any questions regarding this Tax Bulletin, you may also contact TAX at (804) 367-8037 or through the "Live Chat" service on TAX's website, www.tax.virginia.gov.