Fuel Tax Restructuring Under HB21-1322

COLORADO
Department of Revenue
Taxation Division

This special guidance publication highlights certain changes to the gasoline and special fuel taxes that will take effect January 1, 2022 as a result of House Bill 21-1322. Most notably, the bill eliminates the option to defer tax for up to three transactions, affecting both distributors and importers. Bonding requirements for fuel tax licensees were also eliminated. Additionally, beginning with the returns and reports for January 2022, all returns and reports must be filed through the Department's *Revenue Online* website.

Nothing in this publication modifies or is intended to modify the requirements of Colorado's statutes and regulations. Taxpayers are encouraged to consult their tax advisors for guidance regarding specific situations.

Background

Article 27 of Title 39 of the Colorado Revised Statutes imposes an excise tax upon gasoline and special fuel. The tax is generally imposed upon and paid by distributors when gasoline or special fuel is removed from a terminal or imported into the state for distribution.

Under the law as it existed prior to House Bill 21-1322, the fuel tax was generally imposed upon one of the first three transactions among distributors to take place after the fuel had left its terminal of origin. Position holders removing fuel from a terminal could elect pay the tax and report the subsequent disbursement (to another distributor or otherwise) as tax-paid on their fuel tax return. Alternatively, if the position holder sold the fuel to a licensed distributor, they could elect to defer the tax and report the disbursement as tax-unpaid on their return. That sale would be the first of the three allowable tax-deferred sales even if it was occurring as the fuel entered the tank truck or railcar as it was removed from the terminal by the position holder. Regardless of the position holder's election to defer or pay the tax, they would report the disbursement on the Colorado Fuel Distributor Report (DR 7056).

Changes made by House Bill 21-1322

House Bill 21-1322 eliminated the election to defer the tax for up to three transactions. Instead, in the case of gasoline or special fuel removed from a terminal, the tax is imposed upon, and must be reported and paid by, the distributor first receiving the gasoline or special fuel at the terminal. The Department has received questions about the proper tax treatment in situations not explicitly addressed by House Bill 21-1322. This publication is intended to provide general guidance regarding those situations.

When fuel is sold by a supplier (position holder) to a licensed distributor or exporter as it is being withdrawn from a terminal and loaded into a cargo tank or railcar, the purchaser is the distributor who is first receiving the fuel. In that case, the purchaser is liable for, and must report and pay, the tax. In the case of multiparty "flash sales" occurring at the rack, the Department will regard the position holder listed by the terminal operator on disbursement schedule 15B of the Terminal Operator Report as the "supplier," and the supplier's customer as the "purchaser." If the purchaser is not a licensed distributor, a user who is deemed to be a distributor and licensed under section 39-27-102(2)(a), C.R.S., or a licensed exporter, the supplier is the distributor and first recipient of the fuel and must report and pay the tax upon removal.

The implementation of House Bill 21-1322 coincides with the decommission of the Colorado Fuel Tracking System (COFTS). Fuel tax returns and reports for tax periods beginning January 2022 must be filed through *Revenue Online*. Spreadsheet returns and reports will still be accepted; however, the EDI format used in COFTS will be replaced by an XML filing. Filing instructions, sample spreadsheets, and sample XML schema are available online at *Tax.Colorado.gov/fuel-tax-forms*. The Department will continue to largely use the model terminal report, distributor report, and carrier report prescribed by the Federation of Tax Administrators with minor adjustments necessary to accommodate the new tax structure.

Imports and exports

The repeal of the tax deferral will also apply to imported gasoline and special fuel. In general, gasoline and special fuel imported by tank truck and railcar will be subject to tax when entering the state and the importer is the distributor required to report and pay the tax. In particular, gasoline and special fuel imported by tank truck or railcar and unloaded into a bulk plant is subject to tax upon import.

However, that tax will not apply when imported fuel is destined for and actually unloaded into a Colorado terminal operated by a licensed terminal operator. Importers will report such imports as schedule 6 disbursements on their Colorado Fuel Distributor Report (DR 7056), and must list a licensed Colorado terminal as the destination and a licensed terminal operator or supplier as the recipient or "buyer." Gasoline and special fuel imported by bulk transfer (i.e., by pipeline) into a terminal will also continue to be untaxed until removal.

Gasoline and special fuel removed from a terminal by a licensed exporter exclusively for delivery into another state is exempt from tax.

Reporting and penalties

The Department will generally continue to use the model terminal report, distributor report, and carrier report prescribed by the Federation of Tax Administrators. Terminal operators will continue to report fuel received into and disbursed from their terminals, and will start reporting inventory positions on schedule 15C of the Colorado Fuel Terminal Operator Report. A new schedule 6K will be added to the distributor report to track disbursements by a position holder or other supplier to the licensed, tax-liable distributor or exporter. Distributors will continue to report all receipts and disbursements even if all receipts are tax-paid. Carriers must also continue reporting fuel removed from a terminal and fuel imported into the state on the Colorado Fuel Carrier Report. Collectively, these reports will help the Department prevent evasion and maintain a fair marketplace.

Reports and returns will continue to be due on the 26th of every month. House Bill 21-1322 reduced the penalty for late reporting to a flat $100 per occurrence unless the delay resulted in an estimated return under section 39-27-105(3), C.R.S. A penalty of 10% of the tax due, plus 0.5% per month, not to exceed 18%, will continue to apply to late payment. However, in order to ensure an orderly transition, penalties for 2022 tax periods will be waived if a distributor demonstrates a good-faith effort to comply with the changes made by House Bill 21-1322, amends incorrect returns, and pays any resulting deficiency no later than March 31, 2023.

Reports, returns, and payments will continue to be required electronically. The Department is, however, decommissioning the Colorado Fuel Tracking System. Starting with the January 2022 period, reports and returns will be filed using the *Revenue Online* system used for a variety of other tax and fee types. Revenue Online will offer similar filing options, including web entry and spreadsheet upload. Filings currently made in COFTS by EDI will be replaced by XML filing in Revenue Online. Distributors will be able to pay by debit or credit card, e-check, ACH Debit, and ACH Credit. Please visit *Tax.Colorado.gov/fuel-tax-forms* for information on electronic filing and *Tax.Colorado.gov/electronic-funds-transfer* for additional information on electronic payment.

Allowances

The tax-liable distributor (i.e., the distributor who first receives fuel removed from a terminal or first imports fuel into Colorado by tank truck or railcar) is allowed the 2% loss allowance. As a result of House Bill 21-1322, the statute no longer requires that half of the loss allowance be allocated to retailers. The tax-liable distributor is also allowed to retain 0.5% of the tax due to cover the expenses of reporting and paying the tax, and any bad debt losses.

Exemptions

Dyed diesel engine fuel and dyed kerosene continue to be exempt from tax, and may be sold without the payment of tax, subject to certain conditions. Distributors may also sell fuel to the United States, the state of Colorado, and Colorado local governments without the payment of tax regardless of whether it is dyed, provided the distributor has verified the purchaser holds an exemption permit issued by the Department. They may also sell gasoline and other qualifying products to certain air carriers without the payment of tax. A distributor who acquires tax-paid fuel from another licensed distributor, and sells the fuel to these exempt users tax-free, may claim credit for the taxes paid. These exempt users may also apply for a refund permit and make refund claims on a quarterly basis. However, the user may not claim a refund for the same fuel for which the distributor claimed a credit.

Additional exemptions apply to certain uses of clear gasoline and special fuel. Distributors may not, however, sell fuel tax-free to exempt purchasers other than those holding an exemption permit as discussed above. Non-exempt purchasers using taxed fuel in an exempt manner must obtain a refund permit and apply for refunds on a quarterly basis.

Blenders and blend components

Blending generally refers to the process of mixing gasoline or special fuel with any other liquid upon which the fuel tax has not been imposed (excluding the indelible dye used to create dyed special fuel). A blender is anyone who blends fuel outside of the bulk transfer and terminal system and are required to be licensed as such.

Blend components are those non-taxable liquids that are mixed with gasoline and special fuel to create blended fuels. Ethanol is a common example of a blend component. Blend components generally are not subject to tax until they are blended with taxable fuel. Biodiesel, which is commonly blended with petroleum diesel, is not a blend component because it meets the definition of a special fuel even as B100 (i.e., pure, unblended biodiesel). As such, it is taxed like other special fuel upon removal from a terminal, acquisition, or import by a distributor, subject to the exceptions discussed above (i.e., the exception for import to a licensed terminal).

Blenders and others engaged in blending must track and report their inventory of blend components. Shipments of blend components will continue to be reported in line with previous requirements.

Distributors acquiring blended gasoline or blended special fuel at a terminal rack will continue to be liable for tax on the entire volume, including the blend components, which upon blending have become gasoline or special fuel. Blenders will similarly be liable for tax on gasoline or special fuel as it is removed or imported, but will not be liable for tax on blend components unless and until those components are blended with gasoline and special fuel and sold as blended fuel. Upon sale, a blender will report and pay tax on the entire volume, including the blend components, but may take credit for tax previously paid on the removal or import of gasoline or special fuel.

Licensing and bonding requirements

House Bill 21-1322 largely left fuel tax licensing requirements unchanged. All participants in the fuel distribution system must generally hold one or more licenses depending upon their roles and the number of locations from which they operate. This includes terminal operators, suppliers, distributors, importers, exporters, carriers, and blenders. House Bill 21-1322 explicitly added terminal operators to the list of persons required to be licensed in section 39-27-104, C.R.S., but the Department has long required such persons to be licensed. Users who acquire untaxed fuel are deemed to be distributors, and must obtain a license, file distributor reports, and pay taxes in the same manner as other distributors.

House Bill 21-1322 eliminated the requirement that certain licensees—namely distributors, refiners, and terminal operators—post a bond or provide evidence of a savings account, deposit, or certificate of deposit generally equal to three times their monthly tax liability. Previously posted bonds and CDs will be surrendered during the first quarter of 2022 as long as the licensee has no outstanding tax liability.