



COLORADO
Department of Revenue

Taxation Division

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GIL-14-023

September 18, 2014

XXXXXXXXXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXX

Re: Fuel Taxation and Reporting of Propane

Dear XXXXXXXXXXXXX,

You submitted a request for guidance regarding the appropriate treatment of propane for fuel tax and reporting purposes.

The Colorado Department of Revenue ("Department") issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issues and is not binding on the Department. A private letter ruling provides a specific determination for a specific set of facts, is binding on the Department but not on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department Rule 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department initially treats your request as one of a general information letter. If you would like the Department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with Department Rule 24-35-103.5. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not a determination of the tax consequence of any particular action or inaction.

Issues

1. Must propane dealers be licensed under Article 27 of Title 39 now that propane is taxed in the same manner as other "special fuels", as defined by section 39-27-101(27) CRS?
2. If a propane dealer is licensed, is it required to post the bond required by section 39-27-104(2)?
3. Are all propane dealers (licensed or unlicensed) required to report sales of fuel in the Colorado Fuel Tracking System ("COFTS")?
4. If a propane dealer is required to report on COFTS, may it aggregate sales and report

them on a “net gallons” basis?

5. Must a propane dealer that sells no taxable propane pay tax on all of the dealer's carryover inventory at the end of every month?

Background

Representatives of the propane industry have approached the Department with these questions because the Department's fuel tracking system (“COFTS”) presents difficulties when applied to fuels that are not generally sold as motor fuels. In particular, COFTS' calculation of tax imposes tax on substantial quantities of fuel that will ultimately not be subject to fuel tax. In addition, COFTS requires reporting of fuel sales on a customer by customer basis, even though many propane customers are individual end users who will not resell the fuel.

The Department issued GIL 13-025 on December 9, 2013 to answer the question whether propane sold for uses other than propelling a motor vehicle is subject to fuel tax. As noted in that GIL, “special fuel” is only fuel that will or may be used to propel a motor vehicle. If a dealer is certain that propane will not be used for purposes of propelling a motor vehicle, the dealer may avoid paying fuel tax on such fuel pursuant to Section 39-27-102, C.R.S and thereby avoid the need for the ultimate consumer of the fuel to apply for a refund of the tax.

The application of the fuel tax reporting regime to propane raises questions because propane is a fuel that is transitioning into being used as motor fuels. It is still not in wide use as a motor vehicle fuel. Therefore, there are many propane dealers whose sales distribution networks are designed to sell only non-motor vehicle fuel. Two such examples would be 1) a propane distributor who sells exclusively for home-heating purposes and 2) a dealer who sells propane to a retailer exclusively for barbeque grills.

Propane industry representatives argue that the COFTS system presents unique and undue burdens on propane industry participants and ask that the Department review the fuel tax reporting and taxation requirements with respect to propane specifically.

Discussion

1. Licensure - Must propane dealers be licensed under Article 27 of Title 39 now that propane is taxed in the same manner as other special fuels?

Although “special fuels” are defined as fuels used in a motor vehicle, and although most propane sales are, at present, not ultimately destined for motor vehicle use, as noted in GIL 13-025, only propane dealers that are *certain* the propane will not be used in motor vehicle use may avoid the designation of “special fuel licensee” under the statutes. Thus, although the Department understands the problem that propane dealers face in knowing that much of their fuel is not destined to be motor fuel, nevertheless, as further explained below, propane dealers that deal in fuel that may be used in a motor vehicle are dealing in special fuel under the statutes.

All propane dealers who sell propane that may be destined for motor vehicle use must be licensed under section 39-27-104, C.R.S. Although a dealer exclusively selling propane

that the dealer is certain will not be used in a motor vehicle is not a distributor pursuant to the definition in section 39-27-101(7), C.R.S., the definition of special fuel encompasses all fuel that is or may be destined for use in motor vehicles. The definition speaks in the present or past tense (“used to propel”). However, the statute must be enforced with respect to the future use of fuel because the tax is imposed when the fuel is “acquired, sold, offered for sale, or used.”¹ Thus, only fuel that a dealer is certain will not be used as a motor fuel is not a “special fuel” governed by the fuel tax statutes and regulations.

Because propane is fungible, if a dealer has propane that is or may be destined for motor vehicle use and also has propane that is not destined for motor vehicle use, all propane in the dealer’s inventory is “special fuel” within the meaning of the statute. The Department would allow two separate subsidiaries that maintain separate inventories to treat fuel owned by one subsidiary as “special fuel” and fuel owned by the other subsidiary as non “special fuel” so long as the two inventories are kept strictly segregated. However, in the absence of separate corporate form, the Department cannot be assured that the inventories are not commingled.

The Department recognizes that the term “certain” is a difficult standard to meet. However, given the structure of the statutes, we believe it to be the appropriate standard. The Department offers the following “safe-harbors” in determining whether sales are “certain” not to be used in motor vehicle use.

First, propane sold exclusively to residential and commercial end users in tanks not equipped to dispense the propane into motor vehicles (e.g., for home or commercial heating) is not destined for motor vehicle use.

Second, propane sold exclusively to retailers in containers that are intended for end users and cannot reasonably be used to dispense the propane into a motor vehicle (e.g., barbeque tanks) is not propane destined for motor vehicle use if distributor is certain that the retailer does not sell or use propane as a motor fuel.

In contrast, a propane dealer that sells to another propane dealer cannot be certain of the end-use of the fuel. Therefore, a propane dealer who sells to another dealer that is not licensed may not sell propane without accruing the fuel tax. As a consequence, although a propane dealer that sells fuel exclusively for non-motor vehicle purposes need not be licensed, such a dealer may choose to license in order to be able to purchase tax free fuel if they buy from an in-state distributor.

Thus, although the Department recognizes that there may be circumstances in which a propane dealer need not be licensed, the Department anticipates that this will be a truly rare circumstance. The statutory scheme of motor fuel taxation is dependent on full reporting by all participants in the fuel distribution system and the Department must enforce the statutes accordingly.

2. If a propane dealer is licensed, is it required to post the bond required by section 39-27-104(2), C.R.S.?

Any licensed propane dealer who makes no motor fuel (or potentially motor fuel) sales

¹ Section 39-27-102(1)(a), C.R.S.

need not post the bond required by section 39-27-104(2)(b), C.R.S. If a propane dealer that makes no taxable sales wishes to license in order to facilitate the purchase of tax-free propane, it need not post a bond until it plans to start making taxable or potentially taxable sales.

3. Are all propane dealers required to report sales of fuel in the Colorado Fuel Tracking System ("COFTS")?

Any licensed propane dealer must also report all sales of propane in COFTS. The requirements of section 39-27-105(1), C.R.S. apply to all licensees. The Department is sympathetic to the concerns expressed by propane dealers with regards to the COFTS reporting requirements.

As noted below, the Department will make a number of concessions to the circumstances of propane dealers. However, some problems raised by representatives of the propane industry are a function of the statutory scheme and cannot be altered within the Department's administrative powers.

4. If a propane dealer is required to report on COFTS, may it aggregate sales?

Section 39-27-105(1.3)(d), C.R.S. allows propane dealers to aggregate sales based on a particular type or class of user. COFTS currently requires sales to be reported on a transaction by transaction basis. With appropriate funding, COFTS can be reprogrammed to allow aggregated reporting.

However, in the interim, the Department will allow propane dealers to aggregate in-state sales by category by treating categories as artificial purchasers and by treating the aggregated sales as a single sale.

Propane dealers may report under the following categories:

1. "Residential use" (use artificial EIN 11-1111111);
2. "Commercial heating use" (use artificial EIN 22-2222222);
3. "Other commercial use" (use artificial EIN 33-3333333); or
4. "Retail sales unsuitable for motor fuels" (such as barbeque tanks - use artificial EIN 44-4444444).

Dealers have also raised concerns that the system limits their reporting to 12,000 gallon increments. The COFTS system does limit the total gallons for a single truckload to 12,000. However, there are a number of other delivery methods that do not have a gallons limitation. For propane dealers who are aggregating sales and need to report sales of more than 12,000 in a category, the Department directs the dealer to report these sales as other than by truckload.

If the Department is funded to do so, the Department will modify the COFTS system to allow propane dealers to report aggregated sales by their specific delivery method without a gallowage limitation.

4.1 May propane dealers report gallons on a "net gallons" basis rather than a gross basis?

With respect to "net" gallowage reporting, section 39-27-101(11), C.R.S. defines "gallons"

as “gross gallons”. Although the statute does contain an exception for compressed natural gas (CNG), we cannot extend that exception to liquefied petroleum gas because of the very specific nature of the statute. Moreover, that exception for CNG still requires “gross” reporting.

5. Must a propane dealer pay tax on its carryover inventory every month?

While the Department is sympathetic to the concerns raised by the propane dealers, the statutes are very specific about the point of taxation and its imposition. It is the nature of the excise tax that tax is imposed on the purchase of the taxable or potentially taxable fuel. The tax is imposed on the first in-state occurrence of the fuel being “acquired, sold, offered for sale, or used”.²

Thus, the COFTS system imposes tax on the fuel as it is purchased by the dealer. If a dealer sells some of that fuel during the month in a non-taxable transaction, the system offsets the non-taxable fuel sold against the total tax due on fuel purchases made during the month. This approach has the effect of essentially imposing tax on the sum of taxable sales made during the month plus any carryover inventory that the dealer has on hand.

As noted above, the COFTS system was designed to deal with fuels that are principally motor fuels. The addition of propane to the reporting system presents the COFTS system with certain challenges. In particular, the system does not have a mechanism for accepting the reporting of a propane dealer who makes exclusively non-motor fuel sales.

The COFTS system will require programming to allow it to accept reporting without imposing tax from propane dealers who exclusively make non-taxable sales. Such dealers should contact the Department to deal with bills that may be generated by the COFTS system that are not due.

With respect, however, to propane dealers who do make some taxable sales, but the bulk of whose sales are non-taxable, the COFTS system is appropriately calculating the tax at the time of the filing of the return. As noted above, the statutory scheme imposes the tax as an excise tax on the first acquisition, sale, offer for sale, or use of taxable or potentially taxable fuel.³ The dealer will be refunded any tax paid on fuel that is ultimately sold for non-taxable purposes.

We hope these responses address some of the concerns raised by the industry. We recognize that a number of issues remain that the Department has not been able to accommodate. However, we see those issues as arising from statutory requirements over which the department has no discretion.

Miscellaneous

This letter represents the good faith opinion of Department personnel who are knowledgeable on state taxes issues. However, the Department does not make a

² section 39-27-102(1)(a), C.R.S

³ “The tax imposed shall be computed upon the total amount of gasoline or special fuel... acquired by each distributor in this state....” section 39-27-102 (1)(a), C.R.S.

specific determination here on any of the issues raised and the Department is not bound by this general information letter.

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by home-rule cities and home-rule counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

Enclosed is a redacted version of this letter. Pursuant to statute and regulation, this redacted letter will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted letter.

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue