



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

KEITH G. MUNRO
Assistant Attorney General

GREGORY M. SMITH
Chief of Staff

April 25, 2013

OPINION NO. 2013-04

TAXATION; RED-DYED DIESEL FUEL; EXEMPTION; SALES / USE TAX. Opinion is another in a line of opinions since 1955 analyzing issues related to red-dyed diesel fuel. Fuel is exempt from sales and use tax pursuant to NRS 372.275 if it is a kind used in internal-combustion or diesel engines to propel a motor on the highway; and it is actually used in an internal-combustion or diesel engine. Red-dyed diesel burned in a diesel-powered generator to produce electricity for commercial use is exempt from sales and use tax; red-dyed diesel used in an open burner is not exempt from sales and use tax. The Department of Taxation can deny the exemption to retailers that do not provide sufficient documentation to prove the red-dyed diesel was sold for use in an internal-combustion or diesel engine.

Christopher G. Nielsen, Executive Director
State of Nevada, Department of Taxation
1550 College Parkway, Suite No. 115
Carson City, NV 89706

Dear Mr. Nielsen:

You have requested an opinion from this Office regarding the application of sales and use tax to red-dyed diesel fuel in Nevada. This Opinion will address the two different scenarios presented and the documentation necessary to support the exemption in NRS 372.275.

QUESTION ONE

Is red-dyed diesel fuel used to run a diesel-powered generator for commercial use exempt from sales and use tax pursuant to NRS 372.275?

ANALYSIS

Red-dyed diesel fuel refers to dyed special fuel defined in NRS Chapter 366, the special fuels chapter enforced by the Department of Motor Vehicles. The Department of Motor Vehicles collects taxes on special fuels. Dyed special fuel is defined as "special fuel which, in accordance with subsection 1 of NRS 366.203, must be dyed before it is removed for distribution from the rack." NRS 366.0255. The fuel is dyed so that it is easily identified as exempt from taxation by the Department of Motor Vehicles under NRS Chapter 366. NRS 366.203. There are exempt uses for dyed special fuel on and off the public highways. NRS 366.200.

The Department of Taxation is responsible for the collection and distribution of sales and use tax. NRS Chapters 372 and 374.¹ Generally, sales and use taxes do not apply to fuels that are subject to the fuel taxes enforced by the Department of Motor Vehicles. The statute exempting fuel from sales and use tax administered by the Department of Taxation does not make any specific reference to red-dyed diesel fuel or dyed special fuel. NRS 372.275 states:

There are exempted from the taxes imposed by this chapter the gross receipts from the sale and distribution of, and the storage, use or other consumption in this State of, any combustible gas, liquid or material of a kind used in an internal or combustion or diesel engine for the generation of power to propel a motor vehicle on the highways.

Red-dyed diesel fuel is fuel of a kind used in diesel engines to propel a motor vehicle on the highway. For purposes of the exemption in NRS 372.275, red-dyed diesel fuel and diesel fuel that has not been dyed are treated the same.

Questions regarding the application of the exemption for combustible gas, liquid, or material (hereafter "fuel") pursuant to NRS 372.275 have been previously addressed

¹ NRS Chapter 372 imposes a state-wide sales and use tax which goes into the state's general fund. NRS Chapter 374, which imposes a state-wide county sales and use tax to support local schools, is in all relevant respects identical to NRS Chapter 372. NRS 372.275 and NRS 374.280 which reference the fuel exemption are notable exceptions that will be more fully addressed below. Unless specifically noted, all further references to NRS Chapter 372 should be construed as references to corresponding provisions of NRS Chapter 374 as well.

by several Attorney General Opinions (“AGOs”) issued by this Office. Op. Nev. Att’y Gen. No. 1955-53 (April 29, 1955) concludes that the exemption applies more broadly than just to fuel “used in an internal or combustion or diesel engine for the generation of power to propel a motor vehicle on the highways.” Because the exemption uses the language “of a kind,” the exemption applies to any fuel of the same class, grade, or sort as that used to propel a motor vehicle on the highways, regardless of whether such fuel actually is used to propel a motor vehicle on the highway. *Id.*

Op. Nev. Att’y Gen. No. 1955-53 (April 29, 1955) is clarified in Op. Nev. Att’y Gen. No. 1955-61 (May 16, 1955) issued one month later. The Nevada Tax Commission requested further analysis regarding the uses of fuel that qualify for the exemption in NRS 372.275. The conclusion of the subsequent opinion is that the fuel must not only be “of a kind” used in an internal combustion or diesel engine, the fuel must also actually be used in an internal combustion or diesel engine.

Op. Nev. Att’y Gen. No. 1970-667 (May 22, 1970) revisits the fuel exemption in NRS 372.275. The opinion notes that there is a slight difference in wording between exemption for fuel in NRS 372.275 and the corresponding provision in NRS 374.280. NRS 372.275 refers to “an internal or combustion or diesel engine” whereas NRS 374.280 specifies “an internal-combustion or diesel engine.” The opinion sought to harmonize the different wording in the two statutes. Since the previous AGOs concluded that to be exempt the fuel had to be actually used in an engine, this opinion clarified that the language used in NRS 374.280 was the most recently added and that the legislature intended the exemption be applied to fuel used in an internal-combustion engine or diesel engine.

To summarize the previous AGOs that have been issued, fuel is exempt from sales and use tax pursuant to NRS 372.275 if:

1. It is of a kind used in internal-combustion or diesel engines to propel a motor vehicle on the highway; and
2. It is actually used in an internal-combustion or diesel engine.

Question One pertains to red-dyed diesel fuel used in a diesel-powered generator. The generator uses a diesel engine to produce electricity for commercial use. The red-dyed diesel fuel is fuel of a kind that is used to propel a motor vehicle on the highway and it is actually used in a diesel engine. Thus, both criteria are satisfied. The red-dyed diesel fuel, in this instance, is exempt from sales and use tax pursuant to NRS 372.275 even though the diesel engine is used to power a generator and not to propel a motor vehicle on the highway.

CONCLUSION TO QUESTION ONE

Red-dyed diesel fuel that is used in a diesel-powered generator to produce electricity for commercial use is exempt from sales and use tax pursuant to NRS 372.275.

QUESTION TWO

Is red-dyed diesel fuel purchased for use in an open burner exempt from sales and use tax pursuant to NRS 372.275?

ANALYSIS

The same analysis from Question One applies to Question Two, but with a different result. The red-dyed diesel fuel in this example is burned in an open burner and not in an internal-combustion or diesel engine. So even though the red-dyed diesel fuel in this scenario is also fuel of a kind used in internal-combustion or diesel engines to propel a motor vehicle on the highway, it is not actually used in an internal-combustion or diesel engine.

CONCLUSION TO QUESTION TWO

Red-dyed diesel fuel that is used in an open burner is not exempt from sales and use tax because it is not actually used in an internal-combustion or diesel engine.

QUESTION THREE

Can the Department deny the exemption on retail sales of red-dyed diesel fuel to retailers who do not possess the necessary documentation to verify the exemption?

ANALYSIS

Exemptions from taxation are narrowly construed in favor of taxation. *Sierra Pac. Power Co. v. Dep't of Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980). "Exemptions, no matter how meritorious, are of grace and must be strictly construed . . . [and] embrace only what is strictly within their terms." *Dep't of Taxation v. DaimlerChrysler Serv. North America, LLC*, 121 Nev. 541, 545, 119 P.3d 135, 137 (2005). A taxpayer has the burden to prove that he or she qualifies for a statutory exemption from taxation. Based on the analysis above, a taxpayer wishing to be exempt from taxation pursuant to NRS 372.275 must prove that the red-dyed diesel fuel was sold for use in an internal-combustion or diesel engine.

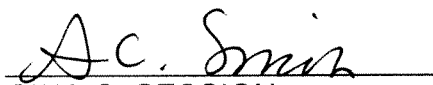
Christopher G. Nielsen
April 25, 2013
Page 5

NRS 366.733(2) requires a purchaser of dyed special fuel to provide to the retailer a written statement of acknowledgment and intended use of the fuel on a form provided by the Department of Motor Vehicles. The retailer is required to keep the written statement on file. NRS 366.733(3). Although this documentation is required for the administration of Chapter 366, it may also provide support for a claim for exemption pursuant to NRS Chapter 372. A retailer that is not able to produce the documentation required by NRS 366.733 may nevertheless qualify for the exemption in NRS 372.275 if he or she produces some other form of documentation proving that the dyed diesel fuel was sold for use in an internal-combustion or diesel engine.

CONCLUSION TO QUESTION THREE

The Department of Taxation can deny the exemption on retail sales of red-dyed diesel fuel to retailers who do not provide documentation proving that the red-dyed diesel fuel was sold for use in an internal-combustion or diesel engine.

CATHERINE CORTEZ MASTO
Attorney General

By: 
GINA C. SESSION
Chief Deputy Attorney General
Bureau of Government Affairs
Business and Taxation Division

GCS/AKG