STATE OF NEW YORK

8843

2017-2018 Regular Sessions

IN ASSEMBLY

December 22, 2017

Introduced by M. of A. THIELE -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to certain sales of fuel to exempt commercial fishermen

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 3 of section 289-c of the tax law is amended by adding a new paragraph (i) to read as follows:

(i) Notwithstanding any provision of the law to the contrary, tax paid pursuant to this article in respect to motor fuel or diesel motor fuel purchased by a commercial fisherman and paid for by such commercial fisherman with a credit card shall be reimbursed or credited to the issuer of the credit card used for such purchase or the fuel distributor designated in accordance with and subject to the provisions of sections eleven hundred thirty-eight, eleven hundred thirty-nine, eleven hundred forty-two, and eleven hundred forty-five of this chapter concerning such credit card issuers, fuel distributors and commercial fishermen. Such provisions shall apply with respect to the administration of and procedure with respect to the taxes imposed under this article in the same manner and with the same force and effect as if the language of such provisions had been incorporated in full into this article and had expressly referred to the tax under this article, with such modifications as may be necessary in order to adapt the language of such provisions to the taxes imposed by this article, except to the extent that any such provision is not relevant to this article.

§ 2. The tax law is amended by adding a new section 301-n to read as follows:

§ 301-n. Credit or reimbursement for certain commercial fishermen by credit card. Notwithstanding any provision of the law to the contrary, tax paid pursuant to this article in respect to motor fuel or diesel motor fuel purchased by a commercial fisherman and paid for by such

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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commercial fisherman with a credit card shall be reimbursed or credited to the issuer of the credit card used for such purchase or the fuel distributor designated in accordance with and subject to the provisions of sections eleven hundred thirty-eight, eleven hundred thirty-nine, eleven hundred forty-two, and eleven hundred forty-five of this chapter concerning such credit card issuers, fuel distributors and commercial fishermen. Such provisions shall apply with respect to the administration of and procedure with respect to the taxes imposed under this article in the same manner and with the same force and effect as if the language of such provisions had been incorporated in full into this article and had expressly referred to the tax under this article, with such modifications as may be necessary in order to adapt the language of such provisions to the taxes imposed by this article, except to the extent that any such provision is not relevant to this article.

§ 3. Paragraph 3 of subdivision (a) of section 1138 of the tax law is amended by adding a new subparagraph (F) to read as follows:

(F) In addition to any other liability a credit card issuer or fuel distributor may have, the commissioner shall determine any or all of the following liabilities: (1) any tax, interest or penalty liability of a credit card issuer or fuel distributor for any credit allowed or refund paid under subdivision (i) of section eleven hundred thirty-nine of this part which was erroneously, illegally or unconstitutionally allowed or paid to such credit card issuer or fuel distributor, or (2) the penalty imposed by subparagraph (x) of paragraph one of subdivision (a) of section eleven hundred forty-five of this part. In any such instance, the commissioner shall give the credit card issuer or fuel distributor notice of such determination in the manner described in paragraph one and two of this subdivision. Such determination shall be an assessment of any such liability unless such credit card issuer or fuel distributor, within ninety days after the giving of such notice and determination, shall apply to the commissioner for a hearing. The commissioner may, nevertheless, of his or her own motion, redetermine such determination or liability for penalty. Furthermore, the commissioner may, of his or her own motion, abate any part of the penalty determined to be erroneous or excessive whether or not such penalty has become finally and irrevocably fixed with respect to such issuer or fuel distributor but no claim of abatement may be filed by such issuer or fuel distributor. The provisions of this paragraph shall not be construed to limit in any manner the powers of the attorney general under subdivision (a) of section eleven hundred forty-one of this part or the powers of the commissioner to issue a warrant under subdivision (b) of such section against any such issuer or fuel distributor whose liability has become finally and irrevocably fixed.

§ 4. Section 1139 of the tax law is amended by adding a new subdivision (i) to read as follows:

(i)(1) Notwithstanding any provision of the law to the contrary, pursuant to the provisions of this subdivision, the commissioner shall refund or credit to (i) a credit card issuer tax paid pursuant to this article in respect to motor fuel and diesel motor fuel purchased by a commercial fisherman and paid for by such commercial fisherman with a credit card issued by such credit card issuer or (ii) a fuel distributor tax paid pursuant to this article in respect to motor fuel and diesel motor fuel purchased by a commercial fisherman and paid for by such commercial fisherman with a credit card issued by a credit card issuer. Such credit card issuer or such fuel distributor, as designated by the parties in a written designation to the commissioner, shall be the only

person eligible to receive such refund or credit, provided that: (A) such taxes were actually paid to the commissioner; (B) the fuel so purchased by the commercial fisherman is for its own use or consumption such that the purchase qualifies as an exempt purchase pursuant to an exception in paragraph five of subdivision (b) of section eleven hundred sixteen of this article; (C) the credit card issuer or fuel distributor meets the requirements of paragraph two of this subdivision; and (D) the commissioner has not issued a notice pursuant to subdivision fifteen of section eleven hundred forty-two of this part indicating that the credit card issuer or fuel distributor is no longer allowed to claim a refund or credit under this subdivision for the fuel purchased by a particular commercial fisherman. Such application for credit or refund shall be submitted after the end of the quarter in which the vendor of the motor fuel or diesel motor fuel was required to report the tax liability it collected from the credit card issuer or fuel distributor pursuant to section eleven hundred thirty-six of this part, but within the applicable statute of limitations as required under this section.

(2) In order to be eligible to receive the refund or credit provided for in paragraph one of this subdivision, the credit card issuer or fuel distributor shall: (A) file with the commissioner a certificate of registration and receive a certificate of authority pursuant to section eleven hundred thirty-four of this part, if not already so registered, provided, however, the credit card issuer or fuel distributor shall provide such additional information as the commissioner may require; (B) establish it has (i) not charged or otherwise received any tax, or any amount purportedly as tax, from the commercial fisherman making the purchase; and (ii) filed a written consent signed by the chief fiscal officer of the commercial fisherman stating that no tax was charged to such commercial fisherman by the credit card issuer or fuel distributor, and therefore the commercial fisherman has no claim for a credit or refund relating to its purchases of motor fuel or diesel motor fuel effected with the credit card issuer's credit card and that no such claim has or will be made by the commercial fisherman; (C) establish either that (i) the retail station or other vendor has been repaid the amount of tax it charged to the commercial fisherman on the commercial fisherman's purchase of the motor fuel or diesel motor fuel, or (ii) obtained the written consent of the retail station or other vendor to the allowance of the credit or refund to the credit card issuer or fuel distributor; and (D) provide such detailed transactional and jurisdictional information to the commissioner as the commissioner may require, in the form requested by the commissioner.

(3)(A) The term "commercial fisherman" means a person described in subdivision (i) of section three hundred of this chapter.

(B) The term "credit card issuer" means a person which finances the exempt purchase of motor fuel or diesel motor fuel by a commercial fisherman by means of a credit or other access card issued to the commercial fisherman by such person.

(C) The term "fuel distributor" means any person who is a registered distributor under article twelve-A of this chapter and who is registered as a person required to collect tax pursuant to this article.

(4) If any requirement of paragraph two of this subdivision is not met, or if the credit card issuer and, where applicable, the fuel distributor, receive a notice pursuant to subdivision fifteen of section eleven hundred forty-two of this part, then an amount equal to the tax imposed by this article shall be collected from the commercial fisherman, notwithstanding such commercial fisherman's exempt status, and such

commercial fisherman shall be responsible for seeking any credit or refund which it may be allowed under this article.

(5) The provisions of subdivisions (a), (b) and (c) of this section shall also apply to an application for refund or credit pursuant to this subdivision, except to the extent that such subdivisions are inconsistent with this subdivision, and except that no interest shall be allowed or paid upon any refund made or credit allowed pursuant to this subdivision. Any document required pursuant to this subdivision shall be in such form and contain such information as the commissioner shall prescribe.

(6) A credit card issuer or fuel distributor designated pursuant to this subdivision to receive the refund or credit and its officers, directors, employees, managers and members under a duty to act for such credit card issuer or fuel distributor in complying with any requirement of this article and, where such credit card issuer or fuel distributor is a partnership or limited liability company, any member of such partnership or company shall be deemed to be persons required to collect tax and shall be personally liable in accordance with section eleven hundred thirty-three of this part with respect to the liabilities described in subparagraph (F) of paragraph three of subdivision (a) of section eleven hundred thirty-eight of this part. Nothing in this subdivision shall be construed to require a credit card issuer to file a return pursuant to section eleven hundred thirty-six of this part unless otherwise required to do so by another provision of this article or unless the commissioner, in his or her discretion, determines it is necessary for the proper enforcement of this article for credit card issuers or distinct classes of such issuers to file such returns and gives notice of such determination to such issuers.

(7) Nothing in this subdivision shall be construed to exempt (A) the purchase of motor fuel or diesel motor fuel by a government entity where it is not the ultimate user or consumer of such fuel, or (B) any sale by a commercial fisherman of motor fuel or diesel motor fuel.

§ 5. Section 1142 of the tax law is amended by adding a new subdivision 15 to read as follows:

15. To issue a notice to a credit card issuer and, where applicable, the fuel distributor, and any commercial fisherman, as such terms are defined in subdivision (i) of section eleven hundred thirty-nine of this part, that, as of the date specified by the commissioner in such notice, the credit card issuer or fuel distributor shall no longer be eligible to apply for refunds or credit with respect to purchases of motor fuel or diesel motor fuel by such commercial fisherman, the commercial fisherman shall no longer be eligible to employ any other credit card issuer or fuel distributor pursuant to such subdivision (i) and no such claim for credit or refund will be allowed or paid in accordance with such subdivision (i), where the commissioner has determined that (a) the motor fuel or diesel motor fuel purchased through the use of the credit card issuer's credit card was not for the commercial fisherman's own use or consumption or (b) it is necessary for the proper enforcement of this article to issue such notice. The commissioner, in his or her discretion, may cancel or suspend the operation of such notice where the credit card issuer, fuel distributor, where applicable, and the commercial fisherman establish, to the commissioner's satisfaction, that appropriate steps have been undertaken to rectify the circumstances leading to the issuance of such notice. In such case, the commissioner will notify the credit card issuer or fuel distributor, where applicable, that the designated person will be eligible to apply for refunds or

credits pursuant to subdivision (i) of section eleven hundred thirty-nine of this part in accordance with such terms as set forth by the commissioner. Nothing in this subdivision shall be deemed to affect the eligibility of the commercial fisherman to claim a refund or credit for tax paid on motor fuel or diesel motor fuel it purchased where such purchase qualifies for exemption pursuant to paragraph five of subdivision (b) of section eleven hundred sixteen of this article. Notwithstanding any other provision of law, if the credit card issuer, fuel distributor, where applicable, or commercial fisherman disputes any aspect of the notice issued pursuant to this subdivision:

(i) the credit card issuer, fuel distributor, where applicable, and the commercial fisherman who receive such a notice shall have the right to have the issuance of such notice reviewed by the commissioner or his or her designee by contacting the department at a telephone number or an address to be disclosed in the notice within ten days of the recipient's receipt of the notice. The recipient may present written evidence or arguments in support of its claim, or the recipient may appear at a scheduled conference with the commissioner or such designee to present oral arguments and written and oral evidence in support of such position. The commissioner or such designee is authorized to delay the effective date of the notice to enable the recipient to present further evidence or arguments in connection with the issuance of the notice. The commissioner or such designee shall cancel the notice if the commissioner or such designee is not satisfied by a preponderance of the evidence that the facts underlying such notice do not support the issuance of such notice.

(ii) except as provided for in paragraph (i) of this subdivision, the credit card issuer, fuel distributor or the commercial fisherman shall not have any right to a hearing under any other provision of this chapter to challenge the issuance of such notice. Rather, such determination shall be reviewable only by a proceeding under article seventy-eight of the civil practice law and rules, provided, however, that (A) such proceeding is commenced within four months of the date the commissioner issued such notice or, if such notice is disputed, within four months of the date the commissioner or such designee upholds such notice in whole or in part, (B) the credit card issuer, fuel distributor, where applicable, and any affected commercial fisherman are named as parties to the action, and (C) the only issue which may be considered by such review is whether such notice was within the discretion of the commissioner under this article. Such proceeding shall be instituted in Albany county. Upon the filing of such petition, the court shall have jurisdiction to set aside such notice or to dismiss the petition. The jurisdiction of the supreme court shall be exclusive and its order shall be final, subject to review by the appellate division of the supreme court and the court of appeals in the same manner and form and with the same effect as provided by law for appeal from a judgment in a special proceeding. All such proceedings for review shall be heard on the petition, transcript and other papers, and on appeal shall be heard on the record, without requirement of printing.

§ 6. Paragraph 1 of subdivision (a) of section 1145 of the tax law is amended by adding a new subparagraph (x) to read as follows:

(x) In addition to any other penalty or interest under this article or other law, any credit card issuer or fuel distributor, as defined in subdivision (i) of section eleven hundred thirty-nine of this part, who receives a refund or credit pursuant to such subdivision knowing, at the time the refund application is filed or the credit is taken, that the

motor fuel or diesel motor fuel purchased was not for the commercial fisherman's own use or consumption, shall be liable for a penalty in the amount of the tax refunded or credited, plus applicable interest due under this article.

§ 7. This act shall take effect on the first day of the sales tax quarterly period, as described in subdivision (b) of section 1136 of the tax law, that begins at least ninety days after the date on which it shall have become a law and shall apply to sales made and uses occurring on or after that date in accordance with the applicable transitional provisions of sections 1106 and 1217 of the tax law.