DEPARTMENT OF THE TREASURY
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OFFICE OF
CHIEF COUNSEL

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[redacted]

Attn: [redacted]

Dear [redacted]

I am responding to your June 18, 2001, letter on behalf of your constituent, [redacted] the president of [redacted]. [redacted] wrote that his company operates several ready mixed concrete facilities in [redacted] and [redacted], and his industry has a problem claiming a federal fuel tax credit.

[redacted] said that the Internal Revenue Code (the Code) imposes a tax on certain fuels, including diesel fuel, but allows a fuel tax credit for fuels used in an off-highway business use. Under an IRS regulation, when a vehicle has two engines, one to propel the vehicle on the highway and one for a non-propulsion function (such as turning a concrete mixer drum), the fuel used in the non-propulsion engine qualifies for the off-highway tax credit. However, when the vehicle has only a single engine to both propel the vehicle and to power a non-propulsion activity, the entire amount of fuel in the vehicle is taxable. [redacted] said we established the regulation when vehicles commonly used a separate engine to perform non-propulsion functions. Since modern "power take-off units" now used in concrete mixer vehicles allow the engine that propels the vehicle to also power non-propulsion equipment, he believes the IRS is penalizing his industry's efficiency by taxing the entire amount of fuel in the vehicle and not allowing a tax credit for the fuel used to mix the concrete.

The Code imposes tax on certain removals, entries, or sales of taxable fuels (gasoline, diesel fuel, and kerosene) [Section 4081(a)(1)(A) of the Code]. When that tax is not imposed, a backup tax is imposed on diesel fuel sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle or used by any person as a fuel in a diesel-powered highway vehicle [Section 4041(a)(1)]. The IRS does not

impose tax on diesel fuel if sold for use or used in an off-highway business use [Section 4041(b)(1)(A)]. An off-highway business use is defined as any use by a person in a trade or business other than as fuel in a highway vehicle which (at the time of such use) is registered, or required to be registered, for highway use under the laws of any state or foreign country [Section 6421(e)(2)].

When we impose tax under sections 4041 or 4081 on the sale of diesel fuel and the fuel is used in a nontaxable use (which includes an off-highway business use), a credit or refund is available to the ultimate purchaser of the fuel [Section 6427(l)(1)(A)]. Under such circumstances, alternatively, the taxpayer may claim a credit against income tax for the tax imposed [Section 34(a)]. We allow the claim for the income tax credit or payment for the nontaxable use of the fuel only when the fuel is used other than as a fuel in a propulsion engine of a diesel-powered highway vehicle [Section 48.6427-8(b)(1)(vii)(C) of the Manufacturers and Retailers Excise Tax Regulations].

Previously, the IRS established rules to determine liability at the time of sale of fuel used both for the propulsion and the nonpropulsion of the vehicle [Section 48.4041-7]. The principles we established in that regulation for the dual use of fuel are applicable in determining whether to allow a credit or payment [Section 48.6427-1(d)].

Section 48.4041-7, which we established in 1986, provides, in part:

> Tax applies to all taxable liquid fuel sold for use or used as a fuel in the motor which is used to propel a diesel-powered vehicle, . . . even though the motor is also used for a purpose other than the propulsion of the vehicle . . . . Thus, if the motor of a diesel-powered highway vehicle . . . operates special equipment by means of a *power take-off or power transfer*, tax applies to all taxable liquid fuel sold for this use or so used, whether or not the special equipment is mounted on the vehicle . . . . For example, tax applies to diesel fuel sold to operate the mixing unit on a concrete mixer truck if the mixing unit is operated by means of a power take-off from the motor of the vehicle . . . . However, tax does not apply to liquid fuel sold for use or used in a separate motor to operate special equipment (whether or not the equipment is mounted on the vehicle). If the taxable liquid fuel used in a separate motor is drawn from the same tank as the one which supplies fuel for the propulsion of the vehicle, a reasonable determination of the quantity of taxable liquid fuel used in the separate motor during the period is acceptable for purposes of application of the tax. (emphasis added).

Thus, when we established the regulation 15 years ago, we recognized and fully considered the use of power take-off units. Federal courts have upheld the regulation in several decisions, including *Western Waste Industries v. Commissioner*, 104 T.C. 472 (1995).

I hope this information is helpful. [redacted]

Sincerely,

Richard A. Kocak
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Passthroughs and Special Industries