ID: CCA-717950-08

Number: **200848044**

Office:

Release Date: 11/28/2008

UILC: 45L.00-00

From:
Sent: Thursday, July 17,2008 9:50 AM
To:
Cc:
Subject: Section 45(H) Certifications

Here are my thoughts:

The certification is only a certification that the taxpayer's qualified costs with respect to the facility will result in compliance with the applicable EPA regulations. The certification is not a certification that

1. the taxpayer is allowed the credit for a particular year,
2. the taxpayer is a small business refiner,
3. the fuel produced by the taxpayer is low sulfur diesel fuel, or
4. any expenditure is a qualified cost for purposes of § 45H.

This taxpayer failed to receive the required certification within the 30-month period and, therefore, the taxpayer is not allowed the credit for . The taxpayer did not submit its application in time for the Service to act on it, in consultation with EPA, before the running of the 30-period. Because the Taxpayer did not request certification more than 60 days from the end of the 30-month period, nothing in the statute, or Rev. Proc. 2007-69, causes the suspension or delay of the 30-month period before the period has run.

Because issuance of the notice of certification is not a conclusion that the taxpayer will be allowed the credit, I have two additional thoughts.

Second (I have looked at this very closely but it is something that could be developed by looking at the concept of "credit determined" in other parts of the Code) , because § 45H bases the credit on the diesel fuel production "credit determined … during the taxable year," and the concept of "credit determined" is used in § 45H(a), § 45H(e)(1), and § 45H(g), I believe that an argument might be made that no diesel fuel production credit is determined for and thus, possibly, a subsequent tax year can be the first taxable year in which the low sulfur diesel fuel production credit is determined with respect to the taxpayer's facility. If this argument is viable, then the taxpayer could claim the credit for the or a following tax year. Note that the references to the subsections of § 45H above are to the provision after the amendments by the Tax Technical Corrections Act of 2007 and that § 45H(g), which was added by this act, provides: ELECTION TO NOT TAKE CREDIT.—No credit shall be determined under subsection (a) for the taxable year if the taxpayer elects not to have subsection (a) apply to such taxable year.