Office of Chief Counsel
Internal Revenue Service
memorandum

Number: **201047020**
Release Date: 11/26/2010

CC:PSI:7:CJLangley
PRENO-125773-10

UILC: 6427.01-00

date: September 20, 2010

to: Holly McCann
Chief, Excise Tax Program

from: Stephanie Bland,
Senior Technician Reviewer, CC:PSI:7

---

subject: Kerosene Sold Under the Low Income Home Energy Assistance Program

This memorandum responds to your request dated June 16, 2010, for advice on the treatment of undyed kerosene purchased using State vouchers or other forms of payment by a state under the Low Income Home Energy Assistance Program (LIHEAP) or an equivalent state funded program. This advice may not be used or cited as precedent.

LIHEAP is a federally-funded grant program managed by the U.S. Department of Health and Human Services that provides grants to all 50 States, the District of Columbia, U.S. territories and Indian tribes and tribal organizations (collectively "local LIHEAP programs"). The purpose of LIHEAP is to assist low income households, particularly those with the lowest incomes that pay a high proportion of household income for home energy, primarily in meeting their immediate home energy needs. The federal government does not provide energy assistance directly to the public. Rather, a person in need of assistance must apply to the local LIHEAP program, which will determine eligibility for assistance. Unlike some Federal programs, applications, eligibility rules, types of assistance, and benefit levels can vary greatly among the various local LIHEAP programs.

In one type of LIHEAP program, a state provides a voucher for a certain amount of money to its LIHEAP participants through an agency it establishes. The participant then uses the voucher to purchase undyed kerosene for use in home heating systems. Afterwards, the state agency reimburses the ultimate vendor for the dollar amount specified on the voucher.

You have asked us for our legal opinion on whether, in the situation described above, undyed kerosene purchased by LIHEAP participants using vouchers and used by LIHEAP participants for home heating purposes is for the "exclusive use of a state." If the use of the undyed kerosene by LIHEAP participants is deemed to be used for the exclusive use of a state, you have asked whether an ultimate vendor that is registered under § 4101 may use the voucher as a certificate (within the meaning of § 48.6427-9(e)(2)) for purposes of making an ultimate vendor claim. For purposes of this memorandum we assume tax has been imposed under § 4041 or 4081.

Section 4081 of the Internal Revenue Code generally imposes an excise tax on taxable fuels that are removed from a refinery, removed from a terminal, entered into the U.S. or sold to a person not registered under § 4101 unless there was a prior tax. Section 4041(a)(1) provides a backup tax for any liquid not taxed under § 4081 that is sold for use or used as a fuel in a diesel powered highway vehicle or diesel powered train. However, under § 4041(g)(2), states are exempt from such tax if the fuel is for the exclusive use of any state. The Code does not define the term "exclusive use."

Section 6427(l)(1) provides that except as otherwise provided in §§ 6427(k) and (l), if any diesel fuel or kerosene on which tax has been imposed by § 4041 or § 4081, is used by any person in a nontaxable use, the Secretary shall pay (without interest) to the ultimate purchaser of such fuel an amount equal to the aggregate amount of tax imposed on such fuel under § 4041 or 4081, as the case may be, reduced by any payment made to the ultimate vendor under § 6427(l)(4)(C)(i).

Section 6427(l)(2) provides that the term "nontaxable use" means any use that is exempt from tax imposed by § 4041(a)(1) other than by reason of a prior imposition of tax.

Section 6427(l)(5)(A) provides that § 6427(l)(1) shall not apply to diesel fuel or kerosene used by a State or local government. Section 6427(l)(5)(C) provides that, except for § 6427(l)(5)(D) (credit card issuers), the amount that would (but for § 6427(l)(5)(A)) have been paid under § 6427(l)(1) with respect to any fuel shall be paid to the ultimate vendor of such fuel, if such vendor (i) is registered under § 4101 and (ii) meets the requirements of § 6416(a)(1)(A), (B) or (D).

Section 48.6427-9 of the Manufacturers and Retailers Excise Tax Regulations provides rules under which certain registered ultimate vendors of taxed diesel fuel and kerosene may claim the credits or payments allowed by § 6427. Section 48.6427-9(e)(2)(i) provides generally that the buyer must provide the ultimate vendor a certificate that consists of a statement that is signed under penalties of perjury by a person with authority to bind the buyer, is in substantially the same form as the model certificate provided in § 48.6427-9(e)(2)(ii) of this section, and contains all information necessary to complete such model certificate. A new certificate must be given if any information in the current certificate changes. The certificate may be included as part of any business records normally used to document a sale.

Rev. Rul. 59-359, 1959-2 C.B. 312, holds that sales of gasoline to a state highway authority is for the exclusive use of the state when the gasoline is furnished without charge to motorists stranded on the highway.

Rev. Rul. 73-542, 1973-2 C.B. 341, holds that sales of diesel fuel to bus owner-operators under contract with a county school board to transport students to and from school are sales for the exclusive use of a political subdivision of a state when the school board reimburses the bus owner-operator for the actual cost of the fuel rather than on a per mile or per diem basis.

In Rev. Rul. 79-112, 1979-14 C.B. 356, a school district contracts with an independent school bus operator to transport students to and from school. Under the terms of the contract, the school bus operator agrees to bear all fuel expenses including the risk and burden of increases in the cost of fuel. The revenue ruling holds that the sale of gasoline for use by the bus operator is not for the exclusive use of the school district.

Rev. Rul. 70-214, 1970-1 C.B. 230, holds that in determining whether sales to an organization are sales for the exclusive use of a state, it must be established that the organization is either (a) controlled, directly or indirectly, by a state agency, or (b) is performing a traditional governmental function on a nonprofit basis.

The situation described above differs from Rev. Rul. 73-542 because, in this case, the state does not bear the burden of any price increases in the fuel. Instead, the state provides a voucher that the LIHEAP participant redeems for a dollar amount of undyed kerosene. Therefore, if prices increase, the LIHEAP participant incurs higher out-of-pocket fuel costs. Furthermore, this case is distinguishable from Rev. Rul. 59-359 because in this case, the state neither purchases nor takes title to the undyed kerosene. Finally, the LIHEAP participant in this case is neither controlled, directly or indirectly, by a state agency, nor does it perform a traditional government function (such as maintaining public safety on the highways). See Rev. Rul. 70-214. Based on the foregoing, we conclude that undyed kerosene purchased by LIHEAP participants for home heating use under the scenario described above is not used for the exclusive use of a state. Accordingly, the ultimate vendor is not the proper claimant under § 6427(l)(5)(C).

We note, however, that in the scenario described above, although the undyed kerosene is not being used for an exclusive state use, it is being used for a nontaxable use. Section 6427(l)(1) generally provides that if any kerosene on which tax has been imposed by § 4041 or 4081 is used by any person in a nontaxable use, the Secretary shall pay (without interest) to the ultimate purchaser of such fuel an amount equal to the aggregate amount of tax imposed on such fuel. In this case, the LIHEAP participant is the ultimate purchaser of the undyed kerosene it purchases using state vouchers. Therefore, to the extent tax was imposed under § 4041 or 4081, the LIHEAP participant

may make a claim under § 6427(l)(1) for an amount equal to the aggregate amount of the tax so imposed.

If you have any questions concerning this memorandum, please contact Charles J. Langley, Jr. at (202) 622-3130.