INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

January 12, 2011

Third Party Communication: None
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Index (UIL) No.: 6426.00-00, 4105.00-00
CASE-MIS No.: TAM-142651-10

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Year(s) Involved:
Date of Conference:

LEGEND:

Taxpayer =

ISSUE:

Where Taxpayer delivers a fuel mixture of gasoline and alcohol over the rack to a receiving person under a two-party exchange agreement within the meaning of § 4105 of the Internal Revenue Code, is the fuel mixture “sold” within the meaning of §§ 6426(b)(1) and (b)(3)(A)?

CONCLUSION:

Yes, a fuel mixture delivered over the rack under a two-party exchange agreement within the meaning of section § 4105 is “sold” by the delivering person within the meaning of §§ 6426(b)(1) and (b)(3)(A).

FACTS:

Taxpayer is a taxable fuel registrant and a position holder in gasoline at terminals that it operates. Taxpayer owns gasoline and alcohol as separate components in its terminals. Taxpayer has two-party exchange agreements with its Exchange Partners, which are other taxable fuel registrants. All agreements are detailed in written contracts between the parties. The two-party exchange agreements are explicitly for the exchange of fuel mixtures, not for the exchange of one or more components of the mixtures. Taxpayer produces the alcohol/gasoline mixture by combining gasoline and alcohol in its terminals before delivering the mixture over the rack to the receiving person. The resulting alcohol/gasoline mixture is gasoline, a taxable fuel, and it is ultimately used as a fuel. Taxpayer exchanges the fuel mixtures with its Exchange Partners in a manner that meets the requirements of § 4105 (b)(1) through (b)(4) and the Exchange Partners are liable for the tax imposed by § 4081 on their removal of the fuel mixtures at the terminal rack.

LAW AND ANALYSIS:

Under § 4105(a), the delivering person in a two-party exchange is not liable for the tax imposed under § 4081(a)(1)(A)(ii) (relating to tax on removal from a terminal). Section 4105(b) defines “two-party exchange” as a transaction, other than a sale, in which taxable fuel is transferred from a delivering person that is a taxable fuel registrant to a receiving person who is so registered where certain prescribed events occur (which are described in § 4105 (b)(1) through (b)(4)).

Sections 6426(a) and (b)(1) allow an alcohol mixture credit for alcohol used by the taxpayer in producing any alcohol fuel mixture for sale or use in a trade or business of the taxpayer.

Section 6426(b)(3) defines “alcohol fuel mixture” to mean a mixture of alcohol and a taxable fuel which

(A) is sold by the taxpayer producing such mixture to any person for use as a fuel, or

(B) is used as a fuel by the taxpayer producing such a mixture.

Taxpayer delivers the fuel to the receiving person under a two-party exchange contract within the meaning of § 4105. Section 4105 defines a two-party exchange, in part, as a transaction, other than a sale, in which taxable fuel is transferred from a delivering person who is a taxable fuel registrant to a receiving person who is a taxable fuel registrant.

The fuel mixture delivered by Taxpayer under the two-party exchange agreement to a receiving person is provided for a consideration, namely the provision of like fuel to Taxpayer in another geographic area. Thus, the fuel mixture is exchanged for other property, specifically, like property elsewhere. In the § 4105 definition of the term "two-party exchange," Congress intended to exclude "sales" in which fuel is exchanged for money or similar property from the definition. (There may be, however, a reconciliation involving monetary payments at the end of a period specified in the two-party exchange agreement.) By definition, however, Congress intended to include the transfer of ownership in taxable fuel for other consideration such as that provided by Taxpayer in the two-party exchange agreements.

Taxpayer's delivery of the fuel mixture to the receiving person under a two-party exchange agreement is a "sale" within the meaning of § 6426(b)(1) of the Code, and the fuel mixture is "sold" within the meaning of § 6426(b)(3)(A). Accordingly, under these facts, Taxpayer, a producer of an alcohol/gasoline mixture, sells an "alcohol fuel mixture" for use as a fuel within the meaning of § 6426(b)(3)(A), and may claim the alcohol fuel mixture credit under § 6426(b).

CAVEAT:

Temporary or final regulations pertaining to one or more of the issues addressed in this memorandum have not yet been adopted. This memorandum therefore will be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusion in the memorandum. See section 11.04 of Rev. Proc. 2011-1, 2011-1 I.R.B. 1.

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.