

INTERNAL REVENUE SERVICE  
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

February 23, 2005

Third Party Communication: None  
Date of Communication: Not Applicable

Index (UIL) No.: 6427.00-00, 6427.02-00  
CASE-MIS No.: TAM-151771-04  
Number: **200627026**  
Release Date: 7/7/2006

Taxpayer's Name:  
Taxpayer's Address:

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

LEGEND:

I =

STATE X =

CITY C =

A =

B =

ISSUE(S):

Whether, under the circumstances described below, a credit or payment is allowable to I on fuel used in I's buses?

Whether, under the circumstances described below, fuel used in I's buses is for the exclusive use of a state or local government?

## CONCLUSION(S):

A credit or payment is not allowable to I on fuel used in I's buses other than in the circumstances described below.

Fuel used in I's buses is not for the exclusive use of a state or local government under the circumstances described below.

## FACTS:

I is a private bus operator in State X. I's buses seat more than 20 people. During the periods in issue, I purchased taxed diesel fuel and gasoline for its buses.

As one of its operations, I contracted with State X to provide bus services to transport state employees to and from the parking lots of agencies A and B to the facilities of A and B located in downtown city C. This service is generally operated five days a week, 12 hours a day. I's buses made no intervening stops between the parking lots and the downtown facilities. State X paid I fixed monthly amounts for the bus services. State X paid I the same amount each month, regardless of I's costs. Thus, for example, if the cost of fuel increased, I was not reimbursed for the difference, and if the cost of fuel decreased, State X did not receive any benefit.

I maintained the buses at its own expense. I provided all labor, materials, fuel, services and maintenance for the buses including oil, lubricants, repairs, and tires. State X did not purchase the fuel used in I's buses.

Only employees of State X were permitted to ride the buses on A and B's routes. Riders on A's buses had to show a valid agency A identification badge to ride, and riders on B's buses had to show a valid state issued bus pass. If the rider did not have a state issued bus pass, I charged the rider \$1.00 per trip. When I collected these nominal fares, I deducted and credited to State X the amounts of the fares collected.

I owned all the buses. Under the contract for bus services for B, State X leased from I five of I's buses for exclusive use on B's route. Two of the leased buses operated on gasoline, the other three operated on diesel fuel. The leased buses were painted with B's name and logo. I also operated other buses for B's route that were not leased. Some of the buses used on A and B's routes were also used in I's other operations such as short term public charters and charters for after school activities for school age children. Some of I's buses were not used on A or B's routes.

## LAW AND ANALYSIS:

Issue (1)

Section 4081 imposes a tax on certain removals, entries, and sales of gasoline and undyed diesel fuel.

Section 6427(b)(1)(A) provides that if any diesel fuel on which tax was imposed by § 4081 is used in an automobile bus while engaged in furnishing (for compensation) passenger land transportation available to the general public, the Secretary shall pay (without interest) to the ultimate purchaser of such fuel an amount equal to the product of the number of gallons of such fuel so used multiplied by the rate at which tax was imposed on such fuel by § 4081.

Section 6427(b)(2)(A) provides that the rate of tax taken into account under § 6427(b)(1) shall be 7.4 cents per gallon less than the aggregate rate at which tax was imposed on such fuel by § 4081. However, this reduction does not apply in cases described in section 6427(b)(2)(B) and (C).

Section 6427(b)(2)(C) provides that § 6427(b)(2)(A) does not apply to fuel used in any automobile bus while engaged in furnishing (for compensation) intracity passenger land transportation which is available to the general public and which is scheduled and along regular routes, but only if such bus is a qualified local bus.

Section 6427(b)(2)(D) provides that the term “qualified local bus” means any local bus which has seating capacity of at least 20 adults (not including the driver), and which is under contract (or is receiving more than a nominal subsidy) from any State or local government (as defined under § 4221(d)) to furnish such transportation.

Section 6427(b) was amended by the Energy Tax Act of 1978, Pub. L. 95-618. The Conference Report to the Act, H.R. Rept. No. 496, 95th Cong., 1st Sess., pt. III, at 69-70 (1977), 1978-3 (Vol. 2) C.B. 71, 131-132, states “charter service is to be considered ‘available to the general public’ if the taxpayer offers such service to more than a limited number of persons or organizations. For example, if a bus operator normally provides charter operations through travel agencies, but his buses are available for chartering by the general public, the buses used predominantly in providing such service would be considered ‘intercity or local buses.’ However, if the bus operator is engaged in providing charter services to only one person, group, or organization, or a limited number of persons, with respect to a particular bus, such a bus would not qualify as an ‘intercity or local bus.’ The purpose of this limitation is to provide these exemptions only for buses which are used in a passenger transportation business available to the general public (for compensation) and not . . . for . . . contract use with a limited number of persons.” The report defines “predominantly” as “more than 50 percent”.

Some of T's buses are dedicated to A and B's routes and are not used for any other customer. Other buses are used predominantly (that is, more than 50 percent by

mileage) on A and B's routes. Other buses are not used predominantly on A and B's routes.

The buses that are dedicated to A and B's routes are operated on scheduled regular routes. The use of these buses is limited, however, to only those people who are state employees with a valid agency identification badge or a valid state issued bus pass. These buses are not made available to the general public; rather they are limited to transporting agency personnel between agency parking lots and agency facilities. These buses do not make intervening stops between the parking lots and the agencies' facilities to pick up passengers along the routes. Moreover, I is not compensated directly by its passengers. Accordingly, I is not entitled to make a claim under section 6427(b)(1)(A) or 6427(b)(2)(C) for the buses that are dedicated to A and B's routes. The same conclusion applies to fuel used in buses that are used predominantly on A and B's routes since these buses are not available for hire to more than a limited number of groups or organizations.

With regard to the buses that are neither dedicated to, nor used predominately on, A and B's routes, a credit or payment is allowable to I under § 6427(b)(1)(A) for all the fuel used in a particular bus if the bus is available for charter service to more than a limited number of persons or organizations. For example, a bus would meet this if, after meeting its obligations to A and B, it is available for hire to any group or organization.

Section 6421(b) provides a similar allowance for buses furnishing (for compensation) passenger land transportation available to the general public that use gasoline. As noted, the buses that are dedicated to, and used predominantly on, A and B's routes are not available to the general public. Accordingly, where buses using gasoline furnish identical services as those described in the instant case, the same conclusions are applicable to the gasoline so used.

### Issue (2)

Section 6427(l) provides that payment is allowable to a registered ultimate vendor if tax has been imposed on diesel fuel and the diesel fuel is sold for the exclusive use of a state or local government. Section 6421(c) generally allows a credit or payment for gasoline used for the exclusive use of a state or local government.

Rev. Rul. 79-306, 1979-2 C.B. 361 sets forth a control test to determine whether a sale is for the exclusive use of a governmental entity within the context of a sale of fuel to a transit system. This revenue ruling provides four factors that are indicative of who has control of a transit system: (1) who owns the articles (buses, fuel, tires, capital assets, etc.) used in the operation of the system; (2) who is responsible for the day-to-day operation of the system (including furnishing, supervising, and paying all the labor to operate the system), and who exercises overall supervisory authority (including authority to negotiate contracts for services, materials, supplies, and labor); (3) who

initiates payments for maintenance of the system (including payments for supplies, materials, and wages), and are any or all of these payments reimbursed; and (4) who makes any profits or bears any losses resulting from the operation of the system, and are the amounts of the profits or losses limited.

I retained title to the buses, tires, and fuel used on A and B's routes. I was responsible for day to day operations and exercised supervisory control over the buses. I was responsible for maintaining the buses and I maintained the buses at its own expense. I provided all labor, materials, fuel, services and maintenance for the buses including oil, lubricants, repairs, and tires. I also bore all losses from operating the buses. These losses were not limited in any manner under the contracts with State X.

I did not sell fuel to State X. Under the terms of the contracts, State X paid I a fixed monthly amount. The amount was not dependent on increases or decreases in the cost of fuel; thus, I bore the burden of increased fuel prices used in the buses. See Rev. Rul. 79-112, 1979-2 C.B. 379, which holds that where a school district has a contract with a private bus service and the school district bears no risk in regard to fuel price increases under the contract, the sale of the fuel by the producer is not for the exclusive use of the school district.

Thus, under Rev. Rul. 79-306 and Rev. Rul. 79-112, the fuel used in the buses on A and B's routes was not for the exclusive use of State X.

CAVEAT(S):

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