

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **201044004**

Release Date: 11/5/2010

CC:PSI:7:CLanglely

PRENO-133522-10

UILC: 6427.01-00

date: October 28, 2010

to: Holly McCann
(Chief, Excise Tax Program)

from: Frank Boland
(Chief, CC:PSI:7)

subject: Sales of taxable fuel to State and local governments; resales to other State and local governments

This memorandum responds to your August 17, 2010, request for assistance regarding certain fuel sales to state and local governments (States). This advice may not be used or cited as precedent.

Generally, the Internal Revenue Code (Code) allows a credit, refund, or payment (except for the amount attributable to the Leaking Underground Storage Tank tax, which is excluded from this discussion) related to gasoline, diesel fuel, or kerosene (taxable fuel) that has been taxed and that is sold to a State for the State's exclusive use. This system is generally administered through claims by registered ultimate vendors (UV) that sell taxable fuel to States at a tax-excluded price and registered credit card issuers that bill States at a tax-excluded price on the State's purchase of taxable fuel with their credit cards. Typically, a UV will sell taxed taxable fuel to a State at a tax-excluded price and make the claim itself. Alternatively, a State will purchase taxable fuel using a credit card. The credit card issuer will bill the State for the taxable fuel at a tax-excluded price and make the claim itself.

The Service has become aware of situations where one State purchases taxable fuel at a tax-excluded price because it is for its exclusive use, and then resells it to another State for the latter State's exclusive use. For example, a State-to-State sale happens when a county and a city want to consolidate resources. The county purchases enough taxable fuel for its own use as well as that of the city, then sells taxable fuel to the city for the city's exclusive use or allows a city employee to purchase taxable fuel with a

credit card issued to the city at county facilities, which will also be for the city's exclusive use.

You asked the following questions regarding the validity of claims when States sell the taxable fuel to other States:

1. Will this resale of taxable fuel from the first State to the second State change the character of the first sale as being for the exclusive use of a State?
2. If the answer to Question 1 is no, is the initial State required to obtain a nontaxable use certificate or other similar certificate on the sales of taxable fuel to the subsequent State? Similarly, does the initial state become a UV, which would require it to register as UV, buy the taxable fuel (probably at a tax-included price), and then make its own UV claim when it sells the taxable fuel to another State?
3. For purposes of the Form 8849, Claim for Refund of Excise Tax, Schedule 2, Sales by Registered Ultimate Vendors, which requires the UV to list the name and taxpayer identification number of the State to which the UV sold taxable fuel, must the UV list the first State or the State that actually used the taxable fuel?
4. May the State that purchased the taxable fuel by certifying that the fuel will be used for the exclusive use of a state sell such fuel to a federal agency without violating the terms of the certificate?

Section 4081(a)(1)(A) imposes a tax on certain removals, entries, and sales of taxable fuel. Nothing in the Code exempts these transactions from tax simply because the person otherwise liable for tax (or that person's buyer) is a State. Rather, the Code allows relief from the amount of the tax by certain credits, refunds, and payments, which, under prescribed conditions, are available to registered credit card issues, registered ultimate vendors, or the state itself.

The type of claim that a UV or a credit card issuer may make varies depending on the identity of the claimant and the type of taxable fuel upon which the claimant is making the claim. However, there are certain conditions that are required by each type of claim. First, the claimant must be registered under § 4101. Second, § 4081 must have imposed tax prior to the sale of the taxable fuel to the State. Third, the sale to the State must be made for the exclusive use of a State. Fourth, the State must sign a certificate under penalties of perjury certifying that the taxable fuel is for the exclusive use of the State and the claimant must have no reason to believe that any information in the certificate is false. Fifth, the claimant generally must have borne the burden of the tax, or received the State's written consent to the allowance of the claim.

In Rev. Rul. 68-141, 1968-1 C.B. 483, a municipality purchased gasoline tax free for its exclusive use but resold some of the gasoline to a county for use by its sheriff's department. The ruling holds that the resale of gasoline to the county is a disposition for the exclusive use of State or local government and is not taxable.

In Example 2 of Rev. Rul. 94-81, 1994-2 C.B. 412, the tribal government of a federally recognized Indian tribe (which is treated like a State in this example) purchased gasoline and diesel fuel for resale at a retail service station located on Indian lands. The ruling holds that there is no exemption that would allow a State (or an Indian tribal government) to purchase fuel tax free for resale to consumers. Therefore, fuel could not be sold tax free to the tribal government for resale to consumers and no one could claim a credit or payment equal to the tax previously imposed.

Although Rev. Rul. 68-141 was issued before the gasoline taxing structure was changed to its present form, the general holding of the ruling is still valid under current law; that is, the sale of gasoline from one State to another State for that State's exclusive use does not change the character of the original sale as being one for the exclusive use of a state or local government. Thus, claims by a registered UV or registered credit card issuer are not invalid simply because their State customer is going to resell the taxable fuel in question to another State for that State's exclusive use. Conversely, if a potential claimant knows that its State customer will resell the taxable fuel to a person that is not a State, such as a federal agency, then the potential claimant knows that some information in the certificate is false and it could not make a valid claim.

Because the character of the initial sale does not change when a State sells taxable fuel to another State, the first State is not required to obtain a formal nontaxable use certificate from the second State. Similarly, the first State does not become a UV by selling taxable fuel to a second State. Therefore, the first State is neither required to register as a UV nor required to reimburse the actual UV for the amount of the tax and subsequently make its own UV claim for that amount. However, it is incumbent upon both States to maintain sufficient records to demonstrate that the taxable fuel was used exclusively for the use of a state.

Accordingly, if a State purchases taxable fuel for its exclusive use, certifying as such to either a UV or credit card issuer, and then subsequently resells the fuel to another State for that State's exclusive use, the answers to your questions are as follows:

1. The resale of taxable fuel from the first State to the second State for the second State's exclusive use does not change the character of the first sale because the fuel is for the exclusive use of a State.
2. Because the character of the initial sale does not change, the first State does not need to obtain a formal nontaxable use certificate from the second State and it does not become a UV.

3. For purposes of the Form 8849, Schedule 2, the UV should list the State to which it initially sold the fuel.
4. The State that purchased the taxable fuel by certifying that the fuel will be used for the exclusive use of a state may not sell such fuel to a federal agency without violating the terms of the certificate. Federal agencies are not States and therefore such fuel would not be going for the exclusive use of a State. See Rev. Rul. 94-81.

Please call Charles J. Langley, Jr. at (202) 622-3130 if you have any further questions.