

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

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date: February 18, 2009

to: Fuel Policy Manager
(Thomas P. Ludwig)

from: Chief, Branch 7
Office of Associate Chief Counsel
(Passthroughs and Special Industries)
(Frank Boland)

subject: Statute of Limitations for Certain Excise Tax Credits

This Chief Counsel Advice responds to your request for assistance. In accordance with § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

Your request involves the allowance of credits for alcohol fuel mixtures, biodiesel mixtures, and alternative fuel mixtures. Generally, you would like to know whether the limitations on filing claims for payment under § 6427(i)(3) of the Internal Revenue Code have any effect on claims for credits that are taken on delinquent returns or on filed returns in which the credit and tax liability is being increased.

Facts: The following fact patterns are examples of the issues you would like us to address:

Fact Pattern 1. A taxpayer produces and sells a biodiesel mixture that is diesel fuel. The production occurs outside of the bulk/transfer terminal system. Although the taxpayer is liable for a § 4081 tax on its sale of the mixture under § 48.4081-3(g) of the Manufacturers and Retailers Excise Tax Regulations, the taxpayer does not pay tax or file a return relating to this sale. In addition, the taxpayer did not claim any payment allowable for its sale of the biodiesel mixture, which would have exceeded \$200. After the statutory period for filing a claim for credit under IRC § 6427(i)(3)(C) has expired, a revenue agent secures a delinquent Form 720 from the taxpayer.

Fact Pattern 2. The facts are the same as Fact Pattern 1 except that the taxpayer filed a timely return; however, the taxpayer did not pay the correct

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amount of § 4081 tax or take the correct mixture credit. After the statutory period for filing a claim for credit under IRC § 6427(i)(3)(C) has expired, a revenue agent wants to allow an additional credit and assess additional tax.

Issue:

Whether the § 6426 biodiesel mixture credit may be taken up to the amount of the § 4081 tax on the delinquent (or incorrect) excise tax return with the balance of the biodiesel mixture credit used as a fuel tax credit against the taxpayer's income tax return on Form 4136, *Credit for Federal Tax Paid on Fuels* under § 34 or whether the entire biodiesel mixture credit must be claimed on the taxpayer's income tax return using Form 4136.

Law:

Section 6426 allows a credit against the tax imposed by § 4081 an amount equal to the biodiesel mixture credit.

Section 6427(e)(1) provides that if any person produces a biodiesel mixture described in § 6426, the Secretary shall pay (without interest) to such person an amount equal to the biodiesel mixture credit with respect to such mixture. However, under § 6426(e)(3), no amount is payable under § 6427(e)(1) with respect to any mixture with respect to which an amount is allowed as a credit under § 6426.

Section 6427(i)(3)(A) provides that a claim may be filed under § 6427(e)(1) by any person with respect to a mixture described in § 6426 for any period for which \$200 or more is payable and that is not less than one week. Section 6427(i)(3)(C) provides that these claims must be filed on or before the last day of the first quarter following the earliest quarter included in the claim.

Section 34(a)(3) allows a refundable income tax credit of an amount payable to the taxpayer under § 6427. However, this credit is not allowed for any amount paid under § 6427.

Conclusion:

In both fact patterns above, the taxpayer's claim must first be taken as a credit against its § 4081 liability for the period to which the claim relates, even if the taxpayer has a delinquent return or has filed a return showing an incorrect amount of § 4081 tax. Because the time for claiming a payment under § 6427 for amounts that exceed the taxpayer's section 4081 liability under § 6427 has now expired, the taxpayer must take that amount on its income tax return as an income tax credit under § 34.

If the taxpayer had received a payment under § 6427 for any amount for which the taxpayer was allowed a credit under § 6426, then the amount of that payment

constitutes an excessive amount for purposes of § 6206 and may be assessed as if it were a tax imposed by § 4081. See §2(d)(2) of Notice 2005-4, 2005-1 C.B. 289.

These conclusions also apply to claims for alcohol fuel mixtures and alternative fuel mixtures under similar facts.

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Please call (202) 622-3130 if you have any further questions.