



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

September 29, 2020

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MEMORANDUM FOR DIRECTOR, SPECIALTY EXAMINATION; CHIEF, ESTATE &
GIFT/EXCISE; EXCISE TAX EXAMINATION TERRITORY AND GROUP MANAGERS

FROM: Wanda R. Griffin
Director, Examination-Specialty Policy **Wanda R. Griffin** Digitally signed by Wanda R. Griffin
Date: 2020.10.02 16:59:00 -04'00'

SUBJECT: Reissued Memorandum- Assessing a Penalty under IRC §6715(a)(2) without a Fuel Sample

The purpose of this memorandum is to reissue interim guidance in SBSE-04-1018-0026 on establishing the presence of dye in a fuel sample subject to a penalty assessed under IRC §6715(a)(2). Please ensure this information is distributed to all affected employees within your organization.

Background/Source(s) of Authority: Section 6715(a)(2) imposes a penalty if “any dyed fuel is held for use or used by any person for a use other than a nontaxable use and such person knew, or had reason to know, that such fuel was dyed.” Three conditions must be met to impose the penalty:

1. The fuel must be dyed,
2. The fuel must be used or held for use in a taxable manner, and
3. The person who used or held the fuel for use must know the fuel was dyed.

To confirm the presence of dye, IRM 4.24.15 states the fuel compliance officer or fuel compliance agent (FCO/FCA) will obtain a fuel sample for dye analysis if dyed fuel subject to an IRC §6715(a)(2) penalty is observed during the screening process. The current IRM procedures do not explicitly address assessing a penalty without a sample. The procedural changes below emphasize the importance of obtaining a sample while also addressing situations in which a penalty may be assessed without a sample.

Procedural Changes:

To ensure IRC §6715(a)(2) penalties are based on the best possible evidence, the FCO/FCA will make all reasonable efforts to obtain fuel samples from each vehicle or storage tank containing fuel subject to the penalty. These efforts include traveling to sites at which the taxpayer’s trucks or fuel storage tanks are located. The FCO/FCA must contact the group manager if circumstances hinder or prevent him or her from

performing the inspections. The group manager will determine the appropriate course of action.

An IRC §6715(a)(2) penalty may be assessed without a fuel sample if the FCO/FCA visually detects that the fuel in the vehicle or storage tank is dyed but is unable to obtain a sample using an approved sampling method. An assessment without a sample can occur, for example, if a pipette screening indicates fuel in the propulsion tank of a pick-up truck is red but a sample cannot be obtained using the sampling pump method. See IRM 4.24.15 for the approved fuel sampling methods.

If the FCO/FCA is not able obtain a sample and cannot visually confirm the fuel in the tank is dyed, an IRC §6715(a)(2) penalty may still be assessed under very limited circumstances. To assess the penalty, the FCO/FCA must obtain written evidence, such as a fuel delivery ticket, verifying conclusively that the fuel in the tank is dyed.

Under no circumstances may the presence of dyed fuel in a tank be solely based on the oral or written testimony of the owner, employee or third party. The oral or written testimony should prompt further investigation with the goal of obtaining a sample, visually confirming the presence of dye in the fuel or, at a minimum, obtaining conclusive written evidence that the fuel is dyed.

Some states with which the IRS has a Fuel Sampling and Information Sharing Agreement, provide the results from tests administered in the field (e.g. Petrospec) or from a state-contracted laboratory in lieu of using the Pacific Northwest National Laboratory (PNNL). In such instances, the written case information along with the test results are sufficient to support a penalty.

Though assessing an IRC §6715(a)(2) penalty without a fuel sample or visual confirmation of dye in the fuel is permitted, the FCO/FCA must, as with all penalties assessed under IRC §6715, determine the number of gallons subject to the penalty. IRC §6715(b)(1) provides that the amount of the penalty under §6715(a) on each act shall be the greater of \$1,000 or \$10 for each gallon of dyed fuel involved. The IRS may not default to assessing a \$1,000 penalty without considering the number of gallons involved. If the FCO/FCA did not inspect the tank, he or she must calculate the penalty based on records and oral or written testimony to determine the number of gallons in the tank at the time of the inspection.

The specific focus of the guidance in this memorandum is on penalties assessed under IRC §6715(a)(2) but the guidance also applies to penalties assessed under IRC §6715(a)(1).

Effect on Other Documents:

The contents of this memorandum will be incorporated in IRM 4.24.15, *Excise Fuel Compliance Inspection, Sampling, and Shipping* by October 30, 2021.

Effective Date:

The changes included in this memorandum are effective September 29, 2020.

Contact: If there are any questions, please contact Excise Tax Policy Program Manager, Kellie McCann, 412-404-9607.

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