

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: December 10, 2014

to:

(Large Business & International)

from:

(Large Business & International)

subject: Alternative Fuel Mixture Credit

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

This advice relies on facts you have provided to our office. If you find that any facts are incorrectly stated, we request that you advise us immediately so that we can modify and correct this advice.

ISSUE

What does compressed natural gas ("CNG") mean under Internal Revenue Code ("Code") section 6426?

CONCLUSION

Since CNG is not defined under the Code or the Treasury Regulations, it is reasonable to conclude that CNG for purposes of section 6426 is generally defined in

accordance with its ordinary and common meaning within the CNG industry at the time the statute was amended to include the reference to CNG. Therefore, CNG is defined as natural gas in its gaseous form that is contained under a pressure of approximately 2,400 to 3,600 psi and of the quality required for use as a fuel in vehicles. This definition is consistent with the statutory language and legislative history of sections 4041 and 6426 in which CNG is referenced.

FACTS

(the "Taxpayer"), a
 , filed amended Federal corporate tax returns for the tax periods
 ending and , and requested refunds in the
 amounts of \$ and \$ for those respective tax periods. Taxpayer
 also requested refunds on timely filed returns in the amounts of \$ for the tax
 period ending and \$ for the tax period ending

The requested refunds are based on Taxpayer's claim that it created and used alternative fuel mixtures within the meaning of section 6426(e)(2) at

Taxpayer states: "A portion of the compressed natural gas purchased from the vendor . . . is mixed with fuel (>.1% of the volume of the is a), to form an alternative fuel mixture in accordance with 26 USC 6426(e)(2). This alternative fuel mixture is used [in the business] to fire the furnaces ."

Taxpayer also states that the natural gas it receives is compressed at a pressure of 200-680 pounds per square inch ("psi"). Taxpayer believes that the psi of the natural gas used for its purposes is not the same psi as is required for an automobile, and the natural gas that it receives has a much higher psi than the gas that is delivered to a residence. Taxpayer also explains that the purchased natural gas and the fuel both flow into a (i.e., a large canister) where they are mixed.

LAW AND ANALYSIS

Under section 4081, a manufacturer's level excise tax is imposed upon: (1) the removal of any "taxable fuel" from a refinery or terminal, (2) the entry of any taxable fuel into the United States for consumption, use or warehousing, or (3) the sale of any taxable fuel to any person who is not registered with the IRS to receive untaxed fuel, unless there was a prior taxable removal or entry. I.R.C. § 4081(a)(1)(A). "Taxable fuel" means gasoline, diesel fuel (including any liquid, other than gasoline, which is suitable for use as a fuel in a diesel-powered highway vehicle or train), and kerosene. I.R.C. § 4083(a).

Prior to the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 ("OBRA"), section 4041 imposed a backup retail excise tax on diesel fuel and

kerosene not taxed under section 4081 as well as on “special motor fuels” (i.e., any liquid other than gas oil, fuel oil, or any product taxable under section 4081).¹ Since liquefied natural gas (“LNG”) is a liquid, it was included as a special motor fuel subject to taxation under section 4041. Prior to OBRA, CNG, which is a gas and not a liquid, was not subject to the retail excise tax under section 4041. Rev. Rul. 72-213, 1972-1 C.B. 328.

Following OBRA in 1993, the tax base was expanded to include CNG as an additional transportation fuel subject to the section 4041 retail excise tax. I.R.C. § 4041(a)(3). CNG is not defined in section 4041 or in the legislative history.²

The retail excise tax under section 4041 was imposed on CNG when there was a taxable sale of CNG by any person to an owner, lessee, or other operator of a motor vehicle or motorboat for use as a fuel in the motor vehicle or motorboat, or used by any person as a fuel in a motor vehicle or motorboat unless there was a prior taxable sale. CNG was taxed at 48.54 cents per MCF (1,000 cubic feet) at standard temperature and pressure. Pub. L. 103-66, § 13241(e)(1). At the time OBRA was enacted, LNG was taxed at a special motor fuels rate of 18.4 cents per gallon, which was higher than the tax rate on CNG.

The Taxpayer Relief Act of 1997, Pub. L. 105-34, 111 Stat. 875, adjusted the excise tax rate per gallon under section 4041(a)(2) for special motor fuels to reflect the energy equivalence of the fuel to gasoline. No adjustment was made to the tax rate for CNG.³

The American Jobs Creation Act of 2004, Pub. L. 108-357, 118 Stat. 1459, introduced new excise tax credits, the alcohol fuel mixture credit and the biodiesel mixture credit, under section 6426 when prior reduced rates of excise tax for most alcohol-blended fuels under former subsections (k) of section 4041 and (c) of section 4081 were eliminated. The sum of these new credits under section 6426 could be taken against the manufacturer’s level excise tax imposed under section 4081 on taxable fuels.⁴

In 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59, 119 Stat. 1144 (“SAFETEA”), introduced two new excise tax credits under section 6426: (1) the alternative fuel credit and (2) the alternative fuel mixture credit.⁵

¹ Comm. on the Budget, Conf. Rep., H.R. Rep. No. 103-213, at 660-61.

² Comm. on the Budget, Conf. Rep., H.R. Rep. No. 103-213, at 662.

³ J. Comm. on Tax’n, General Explanation of Tax Legislation Enacted in 1997, JCS 23-97, at 116-17 (Comm. Print 1997).

⁴ J. Comm. on Tax’n, General Explanation of Tax Legislation Enacted in the 108th Congress, JCS 5-05, at 220-26 (Comm. Print 2005).

⁵ J. Comm. on Tax’n, General Explanation of Tax Legislation Enacted in the 109th Congress, JCS 1-07, at 93 (Comm. Print 2007).

SAFETEA amended section 4041 to change the retail excise tax rate for CNG to “18.3 cents per energy equivalent of a gallon of gasoline.” Pub. L. 109-59, § 11113(a)(2)(A).

SAFETEA amended section 6426 to include an alternative fuel credit only against the retail excise tax under section 4041 and to allow an alternative fuel mixture credit only against the manufacturer’s level excise tax under section 4081. Pub. L. 109-59, § 11113(b)(1).

The alternative fuel credit was based on the “product of 50 cents and the number of gallons of an alternative fuel or gasoline gallon equivalents of a nonliquid alternative fuel sold by the taxpayer for use as a fuel in a motor vehicle or motorboat, or so used by the taxpayer.” Pub. L. 109-59, § 11113(b)(2). SAFETEA included CNG as an “alternative fuel” for purposes of section 6426.

The alternative fuel mixture credit was based on the “product of 50 cents and the number of gallons of alternative fuel used by the taxpayer in producing any alternative fuel mixture for sale or use in a trade or business of the taxpayer.” Pub. L. 109-59, § 11113(b)(2). For purposes of the alternative fuel mixture credit, the mixture must be “sold by the taxpayer producing such mixture to any person for use as fuel, or . . . used as a fuel by the taxpayer producing such mixture.” Pub. L. 109-59, § 11113(b)(2). The Conference agreement on H.R. 3 provided that the use of the mixture for purposes of the alternative fuel mixture credit was not restricted to use as a fuel in a highway vehicle.⁶

If a term is used in the Code without definition and the legislative history fails to provide any insight or guidance as to the appropriate definition, the ordinary and common usage of the term is the definition that will be used in applying the provision of the Code. Texaco v. Commissioner, 101 T.C. 571, 575 (1993) (citations omitted) (emphasis added). Where Congress has used technical words or terms of art, it is proper to explain them by reference to the art or science to which they are appropriate. Shell Petroleum v. United States, 182 F.3d 212, 217 (3d Cir. 1999) (citations omitted). Courts ordinarily look to the meaning of a statutory term at the time the statute was adopted. Id. (citations omitted). Reliance on expert definitions of terms of art is a sound “general rule of construction.” Id. at 220 (citations omitted). Where technical experts differ in their use of a term, however, the presumption that Congress has adopted an industry definition grows weaker and the courts will rely more heavily on other tools to ascertain Congress’s meaning. Id. This includes traditional tools of statutory interpretation. Id. at 221. In appropriate cases, the Supreme Court has looked to the legislative record to confirm that Congress intended to adopt the technical definition of a term of art or has declined to accept a trade definition that conflicted with the legislative history. Id. at 221 n.16 (citations omitted).

⁶ Conference Report of the Committee of Conference on H.R. 3, H.R. Rep. No. 109-203, 109th Cong., 1st Sess., July 28, 2005, at 1121, n.36.

CNG is not defined under the Code or the Treasury Regulations. However, the Code, the Treasury Regulations, and the legislative history to sections 4041 and 6426, describe CNG's use as a transportation fuel in highway motor vehicles and motorboats and distinguish CNG from liquefied natural gas. See, e.g., I.R.C. §§ 4041, 6426; Treas. Reg. § 48.4041-21; J. Comm. on Tax'n, General Explanation of Tax Legislation Enacted in 1997, JCS 23-97, at 116 (Comm. Print 1997).

The meaning of CNG as commonly used is also instructive.

The preamble to section 48.4041-21 of the Treasury Regulations provides: "CNG is a gas at the time it is delivered in the fuel supply tank of a motor vehicle or motorboat and when it is actually combusted in the engine." TD 8609, 1995-2 C.B. 229. It also provides: "The CNG industry has recently begun to sell CNG on the basis of CNG's Gasoline Gallon Equivalent (GGE). Generally, a GGE represents a particular fuel's energy content relative to the energy content of gasoline; thus, vehicles can travel approximately the same distance with a GGE of CNG as with a gallon of gasoline." Id.

Revenue Ruling 72-213 explains: "When placed in the supply tank of a vehicle for use, [CNG] is contained under a pressure of approximately 2,400 to 3,600 pounds per square inch absolute and at normal ambient temperatures ranging from approximately 0 degrees Fahrenheit to 100 degrees Fahrenheit."

In making energy and price comparisons for alternative fuels, a Congressional Research Service report stated that CNG "is generally stored under pressure at between 2,000 to 3,500 pounds per square inch (psi). The energy content varies with the pressure." CRS RL32712 (May 18, 2006).

According to the U.S. Energy Information Administration, CNG is natural gas "compressed to a pressure at or above 200-248 bar (i.e., 2900-3600 pounds per square inch) and stored in high-pressure containers. It is used as a fuel for natural gas-powered vehicles." See <http://www.eia.gov/tools/glossary>.

It is therefore reasonable to conclude that the definition of CNG for purposes of section 6426 is the same as its ordinary and common meaning within the CNG industry at the time section 6426(d) was enacted. Rev. Rul. 72-213, which preceded the inclusion of the term CNG in the Code, defined CNG as being contained under a pressure of approximately 2,400 to 3,600 psi when placed in the supply tank of a vehicle. Therefore, CNG is generally defined as natural gas in its gaseous form that is contained under a pressure of approximately 2,400 to 3,600 psi and of the quality required for use as a fuel in vehicles. This definition is consistent with the statutory language and legislative history of sections 4041 and 6426.

This advice has been coordinated with the Office of Associate Chief Counsel (Passthroughs and Special Industries), Branch 7. Please call the undersigned attorney at _____ if you have any further questions.

Associate Area Counsel
(Large Business & International)

By: _____

Attorney (_____)
(Large Business & International)