

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

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CC:LB&I:HMP:NEW:2:FPetrino

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to: Howard Pluskalowski, Team Manager, LB&I:HMP:1519

from: Frederick Petrino
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subject:

Tax years ending December 31, Year 1 through December 31, Year 3 (in this document, the tax years at issue are referred to as year XXX1, XXX2 and XXX3, respectively).

Index (UIL) No. 45O.00-00

This memorandum responds to your request for advice regarding whether the taxpayer is entitled to the Agricultural Chemicals Security Credit for the tax years at issue. The advice in this memorandum is conditioned on the accuracy of the facts you presented to us. If you determine that these facts are incorrect, you should not rely on this advice.



I. Facts

During the course of the examination, (the "taxpayer") filed a claim for refund claiming entitlement to the Agricultural Chemicals Security Credit for the XXX1, XXX2, and XXX3 tax years under the provisions of I.R.C. § 450. The refund claim was based on a study performed by

on behalf of the taxpayer. The study concluded that the taxpayer qualified for the credit for the tax years at issue.

The taxpayer is in the trade or business of manufacturing and distributing

The taxpayer asserts that it manufactures and distributes specified agricultural chemicals as defined in I.R.C. § 450(f). More specifically, the taxpayer manufactures the following chemicals (the "Chemicals"):

. The taxpayer believes that each of these chemicals is a "specified agricultural chemical" as defined under Section 450(f). Accordingly, the taxpayer takes the position that is in the business of manufacturing and distributing "specified agricultural chemicals," and that it is an "eligible agricultural business" under I.R.C. § 450.

The company manufactured the chemicals at various locations across the United States and distributed them to users. The taxpayer operated production facilities and that

. During tax years XXX1 , XXX2 and XXX3 , the Company operated , respectively. The

The

The produce chemicals that can be stored as in storage tanks on site and are distributed via . Each production location varies in size and consists of a processing center and a number of storage tanks. Each processing center is an independent unit owned or operated by the Company.

From tax years XXX1 through XXX3 , the taxpayer also maintained storage tanks and storage tanks at its manufacturing locations. The taxpayer believes that each storage tank and is a separate integrated unit requiring their own security measures. The taxpayer also transports these chemicals in various types of transportation

units (

which the taxpayer also considers separate integrated units. Accordingly, the taxpayer believes that each processing center, storage tank and transportation unit is a qualified "facility" under Section 450.

The taxpayer incurred security expenses with respect to the processing centers and storage tanks that store the chemicals. The taxpayer also claims that they incurred security expenses for the various types of transportation units used in transporting these chemicals. The taxpayer indicates that each transportation unit was dedicated to the conveyance of the specific chemical for which it was designated.

The taxpayer incurred expenses for security expenditures and background checks, for maintenance and rehabilitation, for tank maintenance, for security expenses, for occupation health supplies, for general site safety, for information system expenditures and GPS tracking system expenditures. Attached as Exhibit A is a summary of the total expenditures that the taxpayer incurred and for which it is claiming a credit. Most of these expenditures would have been incurred regardless of whether the taxpayer was a qualified agricultural business or whether it produced specified agricultural chemicals.

It appears that the only chemical that the company distributes and sells with the intention that it will be used in pesticide applications is . The taxpayer provided documentation showing that was registered with the Environmental Protection Agency (EPA) as a pesticide on XXX2. Registration with the EPA is required by law if the chemical is intended for use as a pesticide. The taxpayer registered with the EPA, supporting the taxpayer's position that it distributes or sells with the intention that it be used as an active or inert ingredient in pesticides. The company did not register or

with the EPA. It follows that the company did not distribute or sell these other chemicals with the intention that they be used as an active or inert ingredient in pesticides. The taxpayer does not sell any of its products to ranchers or farmers but as stated above,

alleges that it does sell , an active ingredient in pesticides, for agricultural pesticide use.

As part of its claim, the taxpayer also maintains that the and versions of also qualify because they are listed in the Pesticide Action Network (PAN) database. The taxpayer explains that the PAN database contains information that has been peer reviewed by scientists and lists over 6,400 pesticide active ingredients as well as inert ingredients used in pesticide products.

II. Issues

- (a) Whether the taxpayer is an eligible agricultural business under the provisions of I.R.C. § 450(e)?
- (b) Whether the chemicals that the taxpayer is manufacturing, storing, or distributing are specified agricultural chemicals as defined in I.R.C. § 450(f)?
- (c) Whether the taxpayer's storage facilities, its and its individual transportation units qualify as independent facilities for purposes of computing the agricultural chemicals security credit and for imposing the limitation of \$100,000.00 per facility under I.R.C. § 450(b)?
- (d) Whether the taxpayer qualifies for the agricultural chemicals security credit under the provisions of I.R.C. § 450?

III. Conclusion

- (a) The evidence supports the position that the taxpayer became an eligible agricultural business for the XXX2 and XXX3 tax years as of XXX2, since as of that date it manufactured, stored and distributed one specified agricultural chemical pursuant to the provisions of I.R.C. § 450. The taxpayer, however, was not an eligible agricultural business prior to XXX2 as it did not provide any evidence indicating that any of the chemicals it produced were intended for use as a pesticide prior to that date.
- (b) The taxpayer is manufacturing and/or distributing only

one specified agricultural chemical, _____, under the provisions of I.R.C. § 450(f) for the XXX2 and XXX3 tax years. The remaining chemicals do not qualify as specified agricultural chemicals since there is no objective evidence indicating that they were intended to be used or actually used as pesticides, or as an active or inert ingredient thereof.

- (c) The taxpayer's storage and processing facilities which store or process _____ qualify as independent facilities for purposes of computing the agricultural chemicals security credit and imposing the limitation of \$100,000.00 per facility but only to the extent that they are used to process or store _____ during part of XXX2 (after _____ only) and for the XXX3 tax year. An allocation of enhanced security expenses will be required if the individual storage tanks and processing facilities are also used for the storage or processing of other chemicals as well as _____, unless the taxpayer can show that such enhanced security expenses are directly attributable to _____ facilities. The transportation units, however, do not qualify as a facility for purposes of computing the credit under the provisions of I.R.C. § 450.
- (d) The taxpayer does qualify for the agricultural chemicals security credit under the provisions of I.R.C. § 450 but only to the extent of enhanced security costs associated with processing and storage facilities used to process and store _____ for part of the XXX2 tax year and for the XXX3 tax year, but not for tax year XXX1. An allocation must be made if any of these processing or storage facilities are also used to store or process other chemicals unless the taxpayer can show that the expenses are directly attributable to security expenses related to the manufacture or storage of _____.

IV. Discussion

LAW

I.R.C § 450(a) provides in relevant part that for purposes of section 38, in the case of an eligible agricultural business, the agricultural chemicals security credit for the taxable year

is 30 percent of the qualified security expenditures for the taxable year. The amount of the credit determined under this subsection with respect to any facility for any taxable year shall not exceed (1) \$100,000, reduced by (2) the aggregate amount of credits determined under this subsection with respect to such facility for the 5 prior taxable years. I.R.C § 450(b) The amount of the agricultural security credit cannot exceed \$2,000,000.00 for any tax year. I.R.C § 450(c).

The term "qualified chemical security expenditure" means, with respect to any eligible agricultural business for any tax year, any amount paid or incurred by such business during such tax year for--

- (1) employee security training and background checks,
- (2) limitation and prevention of access to controls of specified agricultural chemicals stored at the facility,
- (3) tagging, locking tank valves, and chemical additives to prevent the theft of specified agricultural chemicals or to render such chemicals unfit for illegal use,
- (4) protection of the perimeter of specified agricultural chemicals,
- (5) installation of security lighting, cameras, recording equipment, and intrusion detection sensors,
- (6) implementation of measures to increase computer or computer network security,
- (7) conducting a security vulnerability assessment,
- (8) implementing a site security plan, and
- (9) such other measures for the protection of specified agricultural chemicals as the Secretary may identify in regulation.

The above expenditures are taken into account only to the extent that such amounts are paid or incurred for the purpose of protecting specified agricultural chemicals. I.R.C § 450(d).

I.R.C § 450(e) provides that "eligible agricultural business" means any person in the trade or business of--

(1) selling agricultural products, including specified agricultural chemicals, at retail predominantly to farmers and ranchers, or

(2) manufacturing, formulating, distributing, or aeri ally applying specified agricultural chemicals."

A "specified agricultural chemical" is defined as--

(1) any fertilizer commonly used in agricultural operations , and

(2) any pesticide (as defined in section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act), including all active and inert ingredients thereof, which is customarily used on crops grown for food, feed, or fiber." I.R.C § 450(f).

The Chemicals

Since the taxpayer is asserting that all three chemicals, , and , qualify as pesticides under I.R.C § 450(f)(2), it is necessary to look at the definition contained in Section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act). FIFRA defines a pesticide as "(1) any substance or mixtures of substances *intended* for preventing, destroying, repelling or mitigating any pest, (2) any substance or mixture of substances *intended* for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer."

One of the most important words in interpreting the FIFRA definition of a pesticide is the word "intended." The EPA's Office of Pesticide Programs (OPP) determines intent by examining claims on the label, advertising, composition/use, and/or mode of action of the product as distributed or sold. Section 40 CFR 152.15 sets forth the criteria to establish intent. A substance is considered to be intended for pesticidal purposes, and thus to be a pesticide requiring registration, if:

(a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):