

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

Number: **AM2010-002**

Release Date: 7/9/2010

CC:PSI:B07:TCortright
POSTN-115389-10

UILC: 40.00-00

date: June 28, 2010

to: Holly L. McCann
(Chief, Excise Tax Program)

from: Associate Chief Counsel
(Passthroughs & Special Industries)

subject: Cellulosic Biofuel and "Black Liquor" Producers

This memorandum responds to your request for assistance dated April 8, 2010. This advice may not be used or cited as precedent.

ISSUES

1. For purposes of the cellulosic biofuel producer credit in § 40(b)(6) of the Internal Revenue Code, whether black liquor sold or used before January 1, 2010, "meets" EPA's registration requirements for fuel and fuel additives as described in § 40(b)(6)(E)(i)(II)?
2. Whether a producer of cellulosic biofuel that is registered by the Internal Revenue Service (IRS) as an alternative fueller (AM) under § 4101 of the Code, but is not registered as a producer of cellulosic biofuel (CB) under § 4101, may claim the credit under § 40(b)(6) of the Code?
3. Whether a registered producer of cellulosic biofuel may claim the credit under § 40(b)(6) of the Code for cellulosic biofuel it produced before the effective date of its registration as a CB by the IRS under § 4101 of the Code?
4. Whether a registered producer of cellulosic biofuel is allowed a credit under both § 6426(e) and § 40 of the Code for the same volume of fuel?

FACTS

In a June 3, 2009, memorandum (CCA 200941011) responding to your request for advice, we determined that black liquor (a byproduct of certain paper milling processes) is a liquid fuel derived from biomass under § 6426(d)(2)(G) and thus eligible for the \$0.50 per gallon alternative fuel mixture credit under § 6426(e). We further stated that black liquor *may* qualify for the \$1.01 per gallon cellulosic biofuel producer credit under § 40(b)(6) or for the alternative fuel mixture credit, but not both. The CCA is silent, however, on whether black liquor actually meets the definition of cellulosic biofuel under § 40(b)(6)(E)(i).

The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152) (the Reconciliation Act) amends the definition of cellulosic biofuel, effective for fuels sold or used after December 31, 2009. The technical explanation (JCX-18-10, Technical Explanation of the Revenue Provisions of the “Reconciliation Act of 2010,” as Amended, in Combination with the “Patient Protection and Affordable Care Act”, March 21, 2010) to the revenue provisions of the Reconciliation Act states that as a result of the amendment, the cellulosic biofuel producer credit “cease[s] to be available” for “fuels containing significant water, sediment, or ash content, such as black liquor.” Thus, for black liquor sold or used after December 31, 2009, no credit is allowable under § 40(b)(6). In addition, the § 6426(e) alternative fuel mixture credit expired December 31, 2009.

For black liquor sold or used before January 1, 2010, however, a number of black liquor producers have indicated they intend to claim a credit. In addition, a number of these black liquor producers have applied to the IRS on Form 637 (Application for Registration (For Certain Excise Tax Activities)) to be registered by the IRS as producers of cellulosic biofuel. In light of these facts, you have asked a number of questions relating to these claims under § 40(b)(6) and Form 637 applications.

LAW AND ANALYSIS

EPA Registration Requirements

1. Statutory Language (before the Reconciliation Act).

Section 40(b)(6) of the Code allows a credit to the registered producer of cellulosic biofuel for each gallon of cellulosic biofuel it produces in the United States and sells for use or uses in a trade or business in the United States. Section 40(b)(6)(E)(i) defines cellulosic biofuel to mean any liquid fuel that:

- (l) is produced from any lignocellulosic or hemicellulosic material that is available on a renewable or recurring basis, and

(II) meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency (EPA) under section 211 of the Clean Air Act (42 U.S.C. 7545).

Black liquor is a liquid fuel produced from wood, which is a lignocellulosic or hemicellulosic material that is available on a renewable or recurring basis. Thus, black liquor meets the requirement of § 40(b)(6)(E)(i)(I).

Section 40(b)(6)(E)(i)(II) requires fuel to "meet" EPA's registration requirements for fuel and fuel additives under section 211 of the Clean Air Act. Section 211 of the Clean Air Act generally applies to mobile source motor vehicle fuels (that is, gasoline, diesel, and additives to gasoline and diesel) that are introduced into commerce. "Mobile source" generally means highway motor vehicle fuel (that is, not racing or off-road gasoline or farm or construction diesel fuel), but theoretically could include fuel used in motorboats, aircraft, and diesel-powered trains. It does not, however, include fuel used in home heating or a factory generator. Thus, the relevant EPA regulations (found in 40 CFR 79.4) only require EPA registration for motor vehicle fuels and motor vehicle fuel additives.

Section 40(b)(6), however, allows the cellulosic biofuel producer credit for any use of fuel in a trade or business, not just uses in a motor vehicle. Thus, to limit the requirement of § 40(b)(6)(E)(i)(II) to fuels used in a motor vehicle could be contrary to the statutory language of § 40(b)(6).

There are other difficulties in interpreting the statute's "meets" language. For example, the allowable uses of fuel for the § 40(b)(6) credit -- any use of fuel -- contrasts with other provisions of the Code, such as the § 6426(d)(1) alternative fuel credit, which allows a credit only for motor vehicle, motorboat, or aviation uses. In other words, Congress knows how to limit a credit to fuels used in a motor vehicle. In addition, it is useful to note that § 4081(a)(2)(D), relating to a reduced rate of tax for diesel-water fuel emulsions, requires the emulsion additive to be registered with the EPA under section 211 of the Clean Air Act. Thus, Congress knows how to require fuel to actually be registered by EPA when that is its intent.

2. Legislative History.

The legislative history does not clarify whether black liquor "meets" EPA's registration requirements. The cellulosic biofuel producer credit was enacted in section 15321 of The Food, Conservation, and Energy Act of 2008 (Pub. L. 110-234). The legislative history for the credit (H.R. Rept. 110-627, at 1048 (2008)) interprets the EPA registration requirement for cellulosic biofuel this way: "Thus, to qualify for the credit, *the fuel must be approved* by the EPA" (emphasis added). This language could be interpreted to require EPA registration of any fuel before it would qualify as cellulosic biofuel.

Nevertheless, the conference report does not explicitly state that the fuel must be registered; rather, it provides that the fuel must be “approved” by the EPA, without additional explanation. Further, as noted above, notwithstanding the legislative history, Congress actually crafted the § 40(b)(6) cellulosic biofuel producer credit to apply to any use as a fuel in a trade or business. Thus, there is apparent conflict between what the statute actually requires (any use as a fuel) and what the legislative history could be interpreted to require (EPA registration for use as a fuel in a highway motor vehicle).

Because Congress did not plainly require EPA registration of cellulosic biofuels, however, and in light of the conflicts noted above, we conclude that fuel does not necessarily have to be registered by EPA to “meet” EPA’s registration requirements as contemplated in § 40(b)(6)(E)(i)(II).

3. IRS Proposed Published Guidance.

The IRS has proposed guidance on another statutory provision with identical language. Section 40A(d)(1) (relating to biodiesel), like § 40(b)(6)(E) (relating to cellulosic biofuel) provides that the relevant fuel must, among other things, “meet the EPA registration requirements for fuels and fuel additives under section 211 of the Clean Air Act (42 U.S.C. 7545).” The legislative history for biodiesel is silent on this issue. In a notice of proposed rulemaking (REG-155087-05, 2008-38 I.R.B. 726, 73 FR 146, July 29, 2008), however, the IRS provided that “fuel meets the EPA registration requirements if the EPA does not require the fuel to be registered.” In other words, because the EPA requires registration only for fuel used in motor vehicles, biodiesel that is used for heating or marine purposes does not have to be registered by EPA. Biodiesel that is used as a fuel in motor vehicles, however, must be registered by EPA. To apply this reasoning to § 40, cellulosic biofuel that is not used for fuel in a motor vehicle does not have to be registered by the EPA. Practically speaking, black liquor cannot be used as a fuel in a motor vehicle.

You have asked whether black liquor “meets” EPA’s registration requirements under § 40(b)(6)(E)(i)(II). Identical statutory language should be treated the same way for purposes of administering both the cellulosic biofuel and biodiesel credits. Therefore, fuel meets EPA’s registration requirements if the EPA does not require the fuel to be registered. EPA requires registration only of motor vehicle fuels and fuel additives. Thus, because black liquor is not a motor vehicle fuel or fuel additive, black liquor “meets” EPA’s registration requirements for purposes of § 40(b)(6)(E)(i)(II).

As a result of this determination, because black liquor meets both parts of the definition of cellulosic biofuel, black liquor that is produced before January 1, 2010, is cellulosic biofuel under § 40(b)(6)(E). For the cellulosic biofuel producer credit to be allowed, however, the statute requires the producer of the cellulosic biofuel to meet *IRS’s* registration requirements, discussed below.

IRS Registration Requirements

1. Producer of Cellulosic Biofuel Must be Registered as CB by IRS.

Section 40(b)(6)(G) provides that a claimant of the cellulosic biofuel producer credit must be registered by the IRS as a producer of cellulosic biofuel (CB) under § 4101. Notice 2008-110, 2008-2 C.B. 1298, tells taxpayers how to obtain the CB registration. Section 3(c) of the notice provides that “taxpayers shall apply for registration as a [CB] on Form 637, in accordance with the instructions on that form.” The notice further provides that the IRS will register an applicant as a CB only if the IRS “determines that the applicant is or is likely to become a producer of cellulosic biofuel within a reasonable period of time....”

Many of the producers of black liquor currently hold registration status as an alternative fueller (AM). You have asked whether a taxpayer may claim the cellulosic biofuel producer credit using the AM registration status instead of applying for and receiving a CB registration. Section 40(b)(6)(G) requires claimants to be registered as a producer of cellulosic biofuel and Notice 2008-51 mandates that taxpayers apply for the CB registration to show, in part, that the taxpayer is or is likely to become a producer of cellulosic biofuel within a reasonable period of time. The AM registration does not satisfy this requirement. Thus, a cellulosic biofuel claim by a taxpayer that is not registered as a producer of cellulosic biofuel (CB) is not allowable.

2. Timing of IRS Registration.

You have also asked whether the producer of cellulosic biofuel must be registered by the IRS at the time it produces the cellulosic biofuel to claim the credit under § 40(b)(6) of the Code. Under § 40(b)(6)(G), each cellulosic biofuel claimant must be registered by the IRS before making any claim. But once registered, a claimant may claim for any open past period. The § 40(b)(6) credit is a nonrefundable general business credit that is claimed on an income tax form. Generally, the provisions for determining the period of limitations on credits and refunds are found in § 6511. Therefore, the claim may be made on a timely filed or amended income tax return after the claimant is registered by the IRS as a CB registrant and before the relevant period of limitations has expired.

Denial of Double Benefit

Some producers of cellulosic biofuel have claimed and received credit or payment for the \$0.50 per gallon alternative fuel mixture credit as AM registrants under §§ 6426(e) and 6427(e). Others may intend to do so. Your last question regards claims by producers of cellulosic biofuel that are both AM and CB registrants.

Under § 6426(h), no alternative fuel mixture credit will be determined for any fuel to which credit may be determined under § 40. Therefore, a black liquor producer may not claim a credit under § 6426(e) if a credit could be determined under § 40(b)(6).

Under § 40(f), however, the producer may elect out of the § 40 credits. We conclude that a claim under § 6426(e) operates as a § 40(f) election out of the cellulosic biofuel producer credit.

The cellulosic biofuel producer credit is \$1.01 per gallon (for cellulosic biofuel that is neither alcohol nor ethanol, such as black liquor). The alternative fuel mixture credit is \$0.50 per gallon. You have further asked whether a producer of cellulosic biofuel could allocate the claim between these two credits. (For example, claim \$0.50 per gallon under § 6426(e) plus \$0.51 per gallon (the difference between \$1.01 and \$0.50) under § 40(b)(6) for the same gallon of black liquor.)

Section 6426(h) denies such an allocation because it prohibits a double benefit to any particular gallon of fuel. This is unlike other coordination provisions, such as § 6427(e)(3), which allows payment of an amount in excess of the amount credited against the claimant's excise tax for the same gallon of fuel. Further, any claim under § 6426(e)(1) is treated as a § 40(f) election. Thus, a producer of cellulosic biofuel may claim a credit under either § 6426(e) or § 40(b)(6) (assuming the relevant conditions to allowance are met), but not both, for the same volume of fuel.

CONCLUSIONS

1. Black liquor sold or used before January 1, 2010, "meets" EPA's registration requirements for fuel and fuel additives in § 40(b)(6)(E)(i)(II), for purposes of the cellulosic biofuel producer credit in § 40(b)(6), because black liquor is not required to be registered by the EPA.

2. A producer of cellulosic biofuel that is registered as an AM, but is not registered as a CB, may not claim the credit under § 40(b)(6) until such producer is registered as a CB.

3. A registered producer of cellulosic biofuel may claim the credit under § 40(b)(6) for cellulosic biofuel produced before the date the claimant is registered as a CB by the IRS, within the applicable period of limitations on credit or refund under § 6511.

4. A registered producer of cellulosic biofuel is not allowed a credit under both § 6426 and § 40 for the same volume of fuel.

CONTACT INFORMATION

Please contact Taylor Cortright at (202) 622-3130 if you have any further questions.