

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE MIS No.: TAM-125928-02/CC:PSI:B8

Director, Area
Small Business/Self Employed Operating Division

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No:

Years Involved:

N/A

Date of Conference:

None held

Legend: X =

a =

b =

c =

d =

ISSUE:

Whether, taking into account X's proposed sales described below, X will make "more than casual sales" of aviation fuel for purposes of being registered by the IRS as a producer of aviation fuel under § 4093(b) of the Internal Revenue Code.

CONCLUSION:

Taking into account X's proposed sales, X will make "more than casual sales" of aviation fuel for purposes of being registered by the IRS as a producer of aviation fuel under § 4093(b).

FACTS:

X is a domestic commercial airline that buys and uses aviation fuel.

To determine whether X is to be registered as an aviation fuel producer, the Director

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that submitted this request for technical advice has analyzed X's projected fuel activities during a certain future period (Period). During the Period, X will make a total of approximately a deliveries of aviation fuel into its aircraft and use a total of approximately b gallons.

Also during the Period, X proposes to make a total of approximately c sales of aviation fuel to several commercial airlines and aviation fuel producers. The amount of fuel X will sell will total approximately d gallons. X may also make occasional sales to other airlines and producers during the Period. All of the aviation fuel that X will sell during the Period will be in bulk quantities and will be delivered into the bulk storage tanks of X's buyers.

LAW :

Section 4091(a)(1) imposes a tax on the sale of aviation fuel by the producer or importer thereof or by any producer of aviation fuel.

Section 4091(a)(2) provides that for purposes of § 4091(a)(1), if any producer uses aviation fuel (other than for a nontaxable use as defined in § 6427(l)(2)(B)) on which no tax has been imposed under § 4091(a)(1) or on which tax has been credited or refunded, then such use shall be considered a sale.

Section 4093(b)(1)(A) provides that producer includes any person described in § 4093(b)(1)(B) and registered under § 4101 with respect to the tax imposed by § 4091.

Section 4093(b)(1)(B) provides that a person is described herein if a person is a refiner, blender, or wholesale distributor of aviation fuel or a dealer selling aviation fuel exclusively to producers of aviation fuel.

Section 4093(b)(2) provides that for purposes of § 4093(b)(1), wholesale distributor includes any person that sells aviation fuel to producers, retailers, or to users that buy in bulk quantities and accept delivery into bulk storage tanks. This term does not include any person that (excluding wholesale distributor from § 4093(b)(1)) is a producer or importer.

Section V(C) of Notice 88-132, 1988-2 C.B. 552, as modified by Notice 89-38, 1989-1 C.B. 679, defines wholesale distributor for purposes of the term producer. Section V(C)(1) provides that a wholesale distributor includes any person that (a) holds itself out to the public as being engaged in the trade or business of selling aviation fuel to producers of aviation fuel, to retailers, or to users of aviation fuel that buy in bulk quantities and accept delivery into bulk storage tanks, and (b) actually makes more than casual sales of aviation fuel to the producers, retailers, or users described in (a). For this purpose, bulk storage tank means a container that holds at least 50 gallons and is

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not the fuel supply tank of an aircraft, highway vehicle, or train, and bulk quantities means 25 gallons or more.

Section V(C)(2)(c) provides that a person will be considered to make more than casual sales of aviation fuel if (i) at least 30 percent of its number of sales of aviation fuel during the preceding 12 month period (or some other period as determined by the IRS) is to the producers, retailers, or users described in section V(C)(1)(a) of Notice 88-132 (the 30 percent test), or (ii) at least 50 percent of its volume of aviation fuel during the preceding 12 month period (or some other period as determined by the IRS) is sold to the producers, retailers, or users described in section V(C)1, and at least 500 of its sales (or a proportional number if a period other than 12 months is used) are made to such buyers (the 50 percent test).

RATIONALE:

During the Period, all of X's proposed sales of aviation fuel will be to users that will buy in bulk quantities and accept delivery into bulk storage tanks. Thus, X would meet the 30 percent test. As a result, X would make more than casual sales of aviation fuel for purposes of qualifying as a wholesale distributor to be registered as a producer by the IRS.

The Director suggests, however, that X will not be making more than casual sales of aviation fuel. The Director believes that each delivery of aviation fuel into the fuel supply tank of an X aircraft (that is, each use of aviation fuel by X) should be treated as a sale for purposes of the 30 percent test and that all the fuel that X uses should be treated as sold by X for purposes of the 50 percent test. As authority for this approach, the Director cites § 4091(a)(2), which describes circumstances under which a use of aviation fuel is treated as a sale of that fuel.

Under the Director's approach, X would not meet the 30 percent test because \underline{c} (X's proposed number of bulk sales) would be much less than 30 percent of the sum of \underline{a} plus \underline{c} (the total number of X's sales if the number of X's nonbulk deliveries into its aircraft are treated as sales). Also, X would not meet the 50 percent test because \underline{d} (X's proposed volume of bulk sales) would be much less than 50 percent of the sum of \underline{b} plus \underline{d} (the total volume of volume of X's sales if the number of X's nonbulk deliveries into its aircraft are treated as sales).

We disagree with the Director's analysis because a use of aviation fuel is not treated as a sale for purposes of the definition of wholesale distributor. Words in statutes and other legal documents are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. A sale is the transfer of title in property for a price. See Black's Law Dictionary 1337 (7th ed. 1999); Uniform Commercial Code § 2-106(1) (1998); and § 48.0-2(a)(5) of the Manufacturers and Retailers Excise Tax Regulations.

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Section 4091(a)(2) does not command a contrary result. Under § 4091(a)(2), if a producer uses previously untaxed aviation fuel for a taxable use, then that use is considered a sale but only for purposes of imposing the tax under § 4091(a)(1). Nothing in § 4091(a)(2) or Notice 89-38 suggests that § 4091(a)(2) also affects the ordinary meaning of sale in the definition of wholesale distributor. A use of fuel in fact is not a sale of the fuel but is so treated by § 4092(a)(2) only for the limited purpose of imposing tax.

CAVEATS

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent. In accordance with § 6110(c), names, addresses, and identifying numbers have been deleted.

Temporary or final regulations pertaining to one or more of the issues addressed in this memorandum have not yet been adopted. Therefore, this memorandum will be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusion in the memorandum. See section 18.04 of Rev. Proc. 2002-2, 2001-1 I.R.B. 82, 110. However, a technical advice memorandum generally is not modified or revoked retroactively if the taxpayer demonstrates that the criteria in section 18.06 of Rev. Proc. 2002-2 are satisfied.