INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

July 01, 2004

Third Party Communication: None
Date of Communication: Not Applicable

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Index (UIL) No.: 34.00-00, 6421.00-00, 6427.00-00
CASE-MIS No.: TAM-145355-03

LMSB

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Years Involved: 9812 and 9912
Date of Conference: None Held

LEGEND:

Taxpayer =

ISSUE:

Whether, under the circumstances described below, Taxpayer is the proper claimant for purposes of §§ 34, 6421, and 6427 of the Internal Revenue Code with respect to the tax imposed on gasoline and diesel fuel (fuel).

CONCLUSION:

Under the circumstances described below, Taxpayer is the proper claimant for purposes of §§ 34, 6421, and 6427 with respect to the tax imposed on fuel.

FACTS:

Taxpayer is in the business of renting construction equipment to businesses and individuals. None of the equipment in question is a highway vehicle. Taxpayer buys fuel and fills up the fuel tanks of its equipment as needed.

Under Taxpayer's standard rental policy, each piece of equipment is taken by the customer with a full tank of fuel. The customer is expected to return the equipment to Taxpayer with a full tank of fuel. If the customer returns the equipment with less than a full tank, Taxpayer imposes a pre-set fee based upon the number of gallons of fuel required to fill up the fuel tank. The fee exceeds Taxpayer's actual per gallon cost, serving as incentive to the customers to return the equipment with a full tank. In those cases in which a fee is imposed, the charge is separately stated on the final rental invoice as a fuel charge. Title to the equipment remains with Taxpayer at all times.

Taxpayer is not in the business of selling fuel. Refueling activities are incidental to its rental activities. Neither title to the fuel nor the substantial incidents of ownership to the fuel transfers from Taxpayer to its customers. Taxpayer accounts for the fuel costs and revenues consistent with a rental activity for federal income tax purposes and does not account for the fuel charges as sales of fuel.

Taxpayer has claimed credits against its income tax returns for the federal excise tax paid on the fuel that was used to fill the fuel tanks on equipment returned by its customers with less than a full tank of fuel. Taxpayer has taken the position that Taxpayer is the ultimate purchaser of the fuel and is therefore entitled to the credit. The IRS office that submitted the request for technical advice (the office) argues that Taxpayer is reselling the fuel to its customers. Thus, the office argues, Taxpayer is not the ultimate purchaser within the meaning of the statute and is not entitled to the credit.[1]

LAW AND ANALYSIS:

Section 34(a) generally allows a credit against income tax for amounts payable to the taxpayer under §§ 6421 and 6427.

Section 4081 imposes a tax on certain removals, entries, and sales of taxable fuel, including gasoline and diesel fuel.

Section 48.4081-1(b) of the Manufacturers and Retailers Excise Tax Regulations defines "sale" as including the transfer of title to, or substantial incidents of ownership in, taxable fuel (other than taxable fuel in a terminal) to the buyer for a consideration, which may consist of money, services, or other property.

Section 6421(a)(1) provides, in pertinent part, that if gasoline is used in an off-highway business use, the Secretary shall pay (without interest) to the ultimate purchaser of

[1] The office asked only whether Taxpayer is the proper claimant in this case. No opinion is expressed as to whether the fuel is being used for an off-highway business use, when the credits may be taken, or whether any other conditions to allowance of the credit have been met.

such gasoline an amount equal to the amount determined by multiplying the number of gallons so used by the rate at which tax was imposed on such gasoline under § 4081.

Section 6427(l)(1) provides that, if any diesel fuel on which tax has been imposed under § 4081 is used by any person in a nontaxable use, such as an off-highway business use, the Secretary shall pay (without interest) to the ultimate purchaser of such fuel an amount equal to the amount of tax imposed.

Section 48.6427-8(b)(1)(ii) provides that a claim with respect to diesel fuel under § 6427(l)(1) is allowable if, among other conditions, the claimant produced or bought the fuel and did not sell it in the United States.

Revenue Ruling 69-150, 1969-1 C.B. 286, holds that for purposes of the exemption from manufacturers excise tax provided for sales for export, the fuel contained in the tank when the vehicle leaves the United States is considered to be a part of the vehicle, and not a commodity being exported.

In Revenue Ruling 66-302, 1966-2 C.B. 504, a corporation manufacturers and sells aircraft to its distributors. When an aircraft is sold assembled, the corporation always includes a full tank of gasoline. The ruling holds, among other things, that the distributor is considered to be the ultimate purchaser of the gasoline in the tank when the distributor takes delivery at the point of manufacture.

Situation 3 of Revenue Ruling 76-58, 1976-1 C.B. 328, describes a company that manufactures and sells jet aircraft. Each aircraft sold contains a “first tank fill-up” of fuel. The ruling holds, among other things, that the company, in substance, sells the fuel to the purchaser of the aircraft.

The published position of the Internal Revenue Service, Rev. Rul. 69-150, indicates that fuel added to a vehicle becomes part of the vehicle and cannot be viewed as a separate commodity. In this case, there are no bills of lading, receipts, or other documentation indicating a transfer of title of the fuel from Taxpayer to a customer. Taxpayer refuels the equipment after the customer returns the equipment. When the equipment is returned, the customer relinquishes all custody and control of that equipment. Thus, legal title to the fuel does not pass to the customer nor do the parties treat the transaction as a sale of the fuel. As a result, Taxpayer is not selling the fuel to its customers.

A person that buys fuel and does not resell it in the United States is the ultimate purchaser of that fuel and thus is the proper claimant under §§ 6421(a) and 6427(l)(1). In this case, Taxpayer purchases the fuel and does not resell it in the United States. Unlike the manufacturers described in Rev. Rul. 66-302 and Rev. Rul. 76-58, Taxpayer is in the business of leasing (not selling) the equipment in question. At all times, title to the equipment and to the fuel remains with Taxpayer. Accordingly, Taxpayer is the ultimate purchaser of the fuel in question.

CAVEATS:

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