

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Telephone Number:

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Date:
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In Re:

LEGEND:

Taxpayer = .

Dear

This letter responds to a letter ruling request dated September 7, 2010, and subsequent correspondence, requesting a ruling under § 40 of the Internal Revenue Code (the Code).

FACTS

Taxpayer owns and operates a facility that uses a moderate temperature and pressure catalytic process to convert cellulosic feedstock into a liquid fuel (Cellulosic Fuel) and certain by-products such as water, light gases (such as hydrogen), and energy to meet the operating needs of the facility. Cellulosic Fuel will either be sold or further processed into gasoline (Processed Gasoline), diesel fuel (Processed Diesel Fuel), and heating oil and fuel oil (Processed Fuel Oils). The cellulosic feedstock is typically wood waste, energy crops and agricultural residues such as corn stover, switch grass and sorghum.

Currently, Taxpayer uses all of the Processed Gasoline and Processed Diesel Fuel produced by the facility to test and register these fuels with the Environmental Protection Agency (EPA) under section 211 of the Clean Air Act. The Cellulosic Fuel and Processed Fuel Oils are not required to be registered by the EPA under the Clean Air Act.

Upon receipt of a favorable ruling, Taxpayer intends to register with the Internal Revenue Service as a producer of cellulosic biofuel under § 4101 of the Code.

Taxpayer will sell Cellulosic Fuel, Processed Fuel Oils, and, once EPA registration is obtained, Processed Gasoline and Processed Diesel Fuel to fleet operators operating in the United States, and to U.S. terminal operators and refiners for resale to consumers who will use the product as a fuel within the United States.

A. Cellulosic Fuel and Processed Fuel Oils

Processed Fuel Oils are the lower grade fuels that result from the upgrading of Taxpayer's Cellulosic Fuel. For commercial purposes, Cellulosic Fuel and Processed Fuel Oils (together, the Fuel Oils) are not distinct products.

Fuel Oils can be used for the same purposes as petroleum-based No. 6 fuel oil. No. 6 fuel oil is suitable for use in marine diesel and other low- speed diesel engines, which are internal combustion engines.

Taxpayer anticipates that Fuel Oils will be sold to refiners, terminal operators and purchasers for ship fleets. Taxpayer represents that the purchasers will mix Fuel Oils with petroleum-based No. 6 fuel oil. Fleet purchasers will use the resulting fuel oil mixture to power vessels or other machinery. Refiners and terminal operators will sell the resulting fuel oil mixture to persons for use as fuel, predominantly in marine diesel engines.

B. Processed Gasoline and Processed Diesel Fuel

A portion of Taxpayer's Cellulosic Fuel is upgraded via processing in a hydrotreater (or another similar refining process) where it is commingled with vacuum gas oil or other petroleum feedstock such as naphtha or light cycle oil. Vacuum gas oil and other petroleum feedstocks are products of fossil-based crude oil refining.

The upgrading of the Cellulosic Fuel produces, after separation, the following: Processed Gasoline, Processed Diesel Fuel, and Processed Fuel Oils.

Taxpayer will sell Processed Gasoline and Processed Diesel Fuel to refiners, terminal operators and fleet users, such as ground delivery or trucking companies. The purchasers will mix Processed Gasoline with petroleum-based gasoline and will mix Processed Diesel Fuel with petroleum-based diesel fuel suitable for use in an internal combustion engine.

Fleet purchasers will use the gasoline or diesel fuel mixture to power their vehicles or other machinery. Refiners and terminal operators will sell the resulting gasoline mixtures and diesel mixtures to other persons for use as fuel, predominantly in vehicles using gasoline or diesel fuel.

C. Non-Alcohol Fuel; Sediment and Ash Content

Taxpayer represents that the Cellulosic Fuel, Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel are not alcohols. Determined by weight, the Cellulosic Fuel, Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel, are not more than 4% of any combination of water and sediment or more than 1% ash content.

RULING REQUESTED

Taxpayer requests a ruling that it may claim the \$1.01 credit under § 40(b)(6) (the "Credit") with respect to its sales of Cellulosic Fuel, Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel because the production and sale of Cellulosic Fuel, Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel constitute "qualified cellulosic biofuel production" as defined in § 40(b)(6)).

LAW AND ANALYSIS

Section 40 provides for a cellulosic biofuel producer credit. The credit is allowed to a taxpayer for cellulosic biofuel that the taxpayer produces before January 1, 2013, and sells for use or uses for a purpose described in § 40(b)(6)(C).

Section 40(b)(6)(A) provides generally that the cellulosic biofuel producer credit of any taxpayer is \$1.01 for each gallon of qualified cellulosic biofuel production.

Section 40(b)(6)(C) defines "qualified cellulosic biofuel production" to mean any cellulosic biofuel which is produced by the taxpayer and which during the taxable year is (i) sold by the taxpayer to another person (I) for use by such other person in the production of a qualified cellulosic biofuel mixture in such other person's trade or business (other than casual off-farm production), (II) for use by such other person as a fuel in a trade or business, or (III) who sells such cellulosic biofuel at retail to another person and places such cellulosic biofuel in the fuel tank of such other person, or (ii) is used or sold by the taxpayer for any purpose described in clause (i).

Section 40(b)(6)(D) defines "qualified cellulosic biofuel mixture" to mean a mixture of cellulosic biofuel and gasoline or of cellulosic biofuel and a special fuel which (i) is sold by the person producing such mixture to any person for use as a fuel, or (ii) is used as a fuel by the person producing such mixture.

Section 40(b)(6)(E)(i) defines "cellulosic biofuel" to mean, for purposes of § 40(b)(6), any liquid fuel which (I) is produced from any lignocellulosic or hemicellulosic matter 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 under section 211 of the Clean Air Act (42 U.S.C. 7545).

Section 40(b)(6)(E)(iii) excludes from the definition of “cellulosic biofuel” any fuel if (I) more than 4 percent of such fuel (determined by weight) is any combination of water and sediment, (II) the ash content of such fuel is more than 1 percent (determined by weight), or (III) such fuel has an acid number greater than 25.

Under § 40(b)(6)(G), no credit will be determined under paragraph § 40(b)(6) with respect to any taxpayer unless such taxpayer is registered with the Secretary as a producer of cellulosic biofuel under section 4101.

Section 40(d)(2) defines “special fuel” to include any liquid fuel (other than gasoline) which is suitable for use in an internal combustion engine.

A. Cellulosic Biofuel

As noted above, Taxpayer’s facility converts cellulosic feedstock, typically wood waste, energy crops and agricultural residues such as corn stover, switch grass and sorghum, into Cellulosic Fuel. Cellulosic Fuel is then sold, or, further processed into Processed Gasoline, Processed Diesel Fuel, and Processed Fuel Oils. Thus, Taxpayer’s fuels are produced from a lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis.

Taxpayer anticipates registering Processed Gasoline and Processed Diesel Fuel under section 211 of the Clean Air Act. Cellulosic Fuel and Fuel Oils are not required to be registered by the EPA under section 211 of the Clean Air Act. The IRS generally has determined that 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 Cellulosic Fuel and Processed Fuel Oils are not motor vehicle fuels or fuel additives, they “meet” EPA’s registration requirements for purposes of § 40(b)(6)(E)(i)(II) of the Code.

Taxpayer represents that Cellulosic Fuel, Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel, are not more than 4% of any combination of water and sediment or more than 1% ash content.

Accordingly, the Cellulosic Fuel and Processed Fuel Oils are cellulosic biofuels within the meaning of § 40(b)(6)(E). Processed Gasoline and Processed Diesel Fuel will be cellulosic biofuels within the meaning of § 40(b)(6)(E), when they have been registered with the EPA under § 211 of the Clean Air Act.

B. Qualified Cellulosic Biofuel Production

1. Cellulosic Fuel and Processed Fuel Oils (the Fuel Oils)

Taxpayer intends to sell Cellulosic Fuel and Processed Fuel Oils (the Fuel Oils) to refiners, terminal operators and purchasers for ship fleets.

Fuel Oils sold to refiners and terminal operators will be mixed with No. 6 fuel. No.6 fuel oil is a special fuel within the meaning of § 40(d)(2). The resulting fuel mixtures will then be sold by the refiners or terminal operators to any person for use as fuel. Thus, the mixtures of Fuel Oils and No. 6 fuel are qualified cellulosic biofuel mixtures under § 40(b)(6)(D)(i), and the production and sale of the Fuel Oils to the refiners and terminal operators constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(I).

Fuel Oils sold to fleet operators will be mixed with No. 6 fuel and the mixture will be used as a fuel by the fleet operators, to power ship vessels and other machinery. Thus, the mixtures of Fuel Oils and No. 6 fuel are qualified cellulosic biofuel mixtures under § 40(b)(6)(D)(ii) and the production and sale of Fuel Oils to fleet operators constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(I). Further, Fuel Oils will be sold to the fleet operators for use as fuel in the fleet operators’ trade or business. Accordingly, Taxpayer’s production and sale of Fuel Oils constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(II).

2. Processed Gasoline and Processed Diesel Fuel

Taxpayer will sell Processed Gasoline and Processed Diesel Fuel to refiners, terminal operators and fleet users, such as ground delivery or trucking companies.

Processed Gasoline sold to refiners and terminal operators will be mixed with petroleum-based gasoline. The resulting mixture will be sold by the refiners or terminal operators to any person for use as fuel. Thus, the mixtures of Processed Gasoline and gasoline are qualified cellulosic biofuel mixtures under § 40(b)(6)(D)(i), and the production and sale of the Processed Gasoline to the refiners and terminal operators constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(I).

Processed Diesel Fuel sold to refiners and terminal operators will be mixed with petroleum-based diesel fuel. Diesel fuel is a special fuel within the meaning of § 40(d)(2). The resulting mixture will be sold by the refiners or terminal operators to any person for use as fuel. Thus, the mixtures of Processed Diesel Fuel and diesel fuel are qualified cellulosic biofuel mixtures under § 40(b)(6)(D)(i), and the production and sale of the Processed Diesel Fuel to the refiners and terminal operators constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(I).

Processed Gasoline and Processed Diesel Fuel sold to fleet operators will be mixed with petroleum-based gasoline and diesel fuel, respectively. The mixtures will be used as fuel by the fleet operators, to power vehicles, vessels or other machinery. Thus, the mixtures of Processed Gasoline and gasoline, and Processed Diesel Fuel and diesel fuel are qualified cellulosic biofuel mixtures under § 40(b)(6)(D)(ii) and the production

and sale of the Processed Gasoline and Processed Diesel Fuel to fleet operators constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(I). Further, Processed Gasoline and Processed Diesel Fuel are sold to the fleet operators for use as fuel in the fleet operators’ trade or business and, accordingly, constitute “qualified cellulosic biofuel production” under § 40(b)(6)(C)(i)(II).

CONCLUSION

The production and sale of Cellulosic Fuel, Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel constitute “qualified cellulosic biofuel production” as defined in § 40(b)(6). Provided Taxpayer satisfies all of the other requirements set forth in § 40(b)(6), Taxpayer will be eligible to claim the credit under § 40(b)(6) for each gallon of “qualified cellulosic biofuel production.” The volume of Processed Fuel Oils, Processed Gasoline and Processed Diesel Fuel that is “qualified cellulosic biofuel production” and therefore eligible for the credit may be determined based on the use of generally accepted scientific practices. .

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

This private letter ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, the supporting material is subject to verification or examination.

Sincerely,

Stephanie Bland
Senior Technician Reviewer, Branch 7
Office of Associate Chief Counsel
(Passthroughs & Special Industries)