

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

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date: October 03, 2011

to: Holly L. McCann
Chief, Excise Tax Program

from: Frank Boland
Chief, Branch 7
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

subject: Renewable Diesel Fuel

This Chief Counsel Advice responds to your request for assistance dated July 15, 2011. This advice may not be used or cited as precedent.

ISSUES

1. What is the incidence of tax for renewable diesel?
2. Are renewable diesel production facility operators required to register as refinery operators?
3. Is a renewable diesel credit available if the fuel producer used fossil fuel-derived hydrogen as a catalyst during the hydro-treating process?
4. Should the Internal Revenue Service (Service) deny a renewable diesel credit claim on a liquid if the claimant cannot substantiate that the liquid is registered with the United States Environmental Protection Agency (EPA)?

CONCLUSIONS

1. Renewable diesel is taxed on the removals, entries, and sales that are described in § 4081(a)(1)(A) of the Internal Revenue Code.

2. Renewable diesel production facility operators are required to be registered under § 4101 as refinery operators.
3. A claim for the renewable diesel credit is not invalid merely because the renewable diesel was produced using fossil fuel-derived hydrogen as a catalyst during the hydro-treating process.
4. The Service should deny a renewable diesel credit claim if the United States Environmental Protection Agency (EPA) requires that the liquid be registered and the claimant cannot substantiate that the liquid is so registered.

LAW AND ANALYSIS

Section 40A(f)(3) defines renewable diesel as liquid fuel derived from biomass that meets (A) the registration requirements for fuels and fuel additives established by the EPA under section 211 of the Clean Air Act (42 U.S.C. 7545), and (B) the requirements of ASTM D975 or D396, or other equivalent standard approved by the Secretary of the Treasury. Renewable diesel does not include any liquid for which a credit may be determined under § 40. Renewable diesel does not include any fuel derived from coprocessing biomass with a feedstock which is not biomass. The term “biomass” is defined in § 45K(c)(3) of the Code. Under § 40A(f)(4), renewable diesel includes fuel derived from biomass which meets the requirements of a Department of Defense specification for military jet fuel or an ASTM specification for aviation turbine fuel.

However, § 40A(f) provides that renewable diesel is treated in the same manner as biodiesel for purposes of the Code, except for purposes of the small agri-biodiesel producer credit under § 40A(b)(4).

Section 40A(d) defines “biodiesel” as the monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet (A) 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), and (B) the requirements of the American Society of Testing and Materials D 6751.

Fuel Excise Tax Treatment of Renewable Diesel

Notice 2007-37, 2007-1 C.B. 1002, provides that, for purposes of the Code, Notice 2005-4, 2005-1 C.B. 289, and Notice 2005-62, 2005-2 C.B. 443, renewable diesel is treated as biodiesel except that renewable diesel is diesel fuel as defined in § 48.4081-1(c)(2) of the regulations. Notice 2007-37 thereby distinguishes between the treatment of renewable diesel for purposes of credits and the treatment of renewable diesel for purposes of the fuel excise tax provisions.

Renewable diesel can be used interchangeably with petroleum-based diesel fuel because it is diesel fuel, both chemically and legally. Accordingly, renewable diesel is a taxable fuel under § 4083(a)(1) and is therefore taxed in the same manner as petroleum-based diesel fuel. In accordance with Notice 2007-37, however, renewable diesel is treated as biodiesel for purposes of credits and payments under §§ 34, 40A, 6426, and 6427. Thus, tax is imposed on certain removals, entries, and sales of renewable diesel under § 4081(a)(1)(A).

Registration Requirements

Section 48.4081-1(b) generally defines a refinery to include a facility used to produce taxable fuel and from which taxable fuel may be removed by pipeline, by vessel, or at a rack. Section 48.4081-1(b) defines a refiner as any person that owns, operates, or otherwise controls a refinery. Section 48.4101-1 provides rules relating to registration under § 4101 for purposes of the federal excise tax on taxable fuel imposed by § 4081. Under § 48.4101-1(c)(1)(v), a person that is a refiner is required to be registered under § 4101.

Because a refinery is a facility used to produce taxable fuel, a refinery includes a facility used to produce renewable diesel. Under § 48.4101-1(c)(1)(v), any person that owns, operates, or otherwise controls a refinery is a refiner and must be registered as a refinery operator. Thus, a person that owns, operates, or otherwise controls a facility used to produce renewable diesel and from which renewable diesel may be removed by pipeline, by vessel, or at a rack must be registered as a refinery operator.

Catalysts Derived from Fossil Fuel

Section 40A(f)(3) provides, in part, that renewable diesel does not include any fuel derived from coprocessing biomass with a feedstock which is not biomass. Under this provision, a fuel is not renewable diesel if it is derived from coprocessing biomass with a fossil fuel like petroleum. However, § 40A(f) does not provide any rules regarding the use of catalysts in renewable diesel production. The legislative history to the statute that added the coprocessing rule to § 40A(f)(3) states that the *de minimis* use of catalysts, such as hydrogen, is permitted under the provision. H.R. Rep. No. 110-658 at 75. Section 40A(f) is silent regarding catalysts and the legislative history indicates that the use of catalysts is permitted under the provision but is silent about any restrictions on the source of the catalysts. Therefore, we conclude that the source of the hydrogen catalyst used in the hydro-treating process is irrelevant for purposes of determining whether a fuel is renewable diesel. Accordingly, we also conclude that a renewable diesel credit claim is not invalid simply because the producer of the renewable diesel uses fossil fuel-derived hydrogen as a catalyst during the hydro-treating process.

EPA Registration

Renewable diesel is defined, in part under § 40A(f)(3)(A), as liquid fuel derived from biomass that meets the registration requirements for fuels and fuel additives established by the EPA under section 211 of the Clean Air Act. A fuel “meets” EPA’s registration requirements if EPA does not require that fuel to be registered. If the EPA requires that a fuel be registered, a fuel “meets” the EPA’s registration requirements only if the fuel is actually registered. Thus, this prong of the definition of renewable diesel is satisfied if a fuel is required to be registered by the EPA and it is so registered, or if the EPA does not require a particular type of fuel to be registered under section 211 of the Clean Air Act. Accordingly, we conclude that the Service should deny a renewable diesel credit claim if the EPA requires that the liquid be registered and the claimant cannot substantiate that the renewable diesel is so registered.

Please call (202) 622-3130 if you have any further questions.