

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

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date: December 2, 2011

to: Holly L. McCann
Chief, Excise Tax Program

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

subject: Examinations of excise tax-related income tax credit claims

This Chief Counsel Advice responds to your request for assistance dated November 3, 2011. This advice may not be used or cited as precedent.

ISSUES

1. Is a claim on Form 4136, Credit for Federal Tax Paid on Fuels (which is attached to an income tax return), made under Subtitle A (Income Taxes) of the Internal Revenue Code (Code) or under Subtitle D (Miscellaneous Excise Taxes) of the Code?
2. May the IRS assert an excessive claim penalty under § 6675 of the Code for credits claimed on Form 4136, Form 8864, Biodiesel and Renewable Diesel Fuels Credit, or Form 6478, Alcohol and Cellulosic Biofuel Fuels Credit?

CONCLUSIONS

1. A claim on Form 4136, which is attached to an income tax return, is made under Subtitle A of the Code.
2. The IRS cannot assert an excessive claim penalty under § 6675 for credits claimed on Forms 4136, 8864, or 6478.

BACKGROUND, LAW, AND ANALYSIS

Issue 1

Section 34(a) provides a credit against the tax imposed by Subtitle A for the taxable year in an amount equal to the sum of the amounts payable to the taxpayer under §§ 6420, 6421, and 6427. However, § 34(b) provides that a credit under § 34(a) is not allowed for any amount payable and claimed by a person under §§ 6421 or 6427. Section 34 claims are made on Form 4136 as an attachment to an income tax return.

Section 6420 generally allows a payment to the ultimate purchaser of gasoline used on a farm for farming purposes. Under § 6420(g), however, only persons not subject to income tax may claim payments under § 6420; all others must make these claims under § 34.

Similarly, § 6421 generally allows a payment to an ultimate purchaser of gasoline used for certain nontaxable purposes. Under § 6421(i), however, only certain prescribed persons may claim payments under § 6421; all others must make these claims under §34. Also, § 6427 generally allows a payment to certain persons related to other fuels used for certain nontaxable purposes. Under § 6427(k), however, only certain prescribed persons may claim payments under § 6427; all others must make these claims under §34.

You asked whether a claim made on Form 4136 attached to an income tax return is made under Subtitle A or under Subtitle D of the Code. While the credit provided under § 34 is calculated in reference to the payments provided by §§ 6420, 6421, and 6427, which in turn, are calculated by reference to fuel tax rates provided in Subtitle D, the plain language of § 34 states that the credit provided thereunder is against tax imposed by Subtitle A rather than against tax imposed by Subtitle D.

Issue 2

Section 40 provides an income tax credit as a component of the § 38 general business credit for certain sales and uses of alcohol and cellulosic biofuel. The § 40 credit is claimed on Form 6478.

Section 40A provides an income tax credit as a component of the § 38 general business credit for certain sales and uses of biodiesel and renewable diesel used as fuel. The § 40A credit is claimed on Form 8864.

Section 6675(a) provides, in part, that if claims are made under §§ 6420, 6421, or 6427 for an excessive amount, the person making the claims is liable for a penalty. Section 6675(b) defines the term “excessive amount,” in part, as the amount by which (1) the

amount claimed under §§ 6420, 6421, or 6427, as the case may be, for any period, exceeds (2) the amount allowable under such section for such period.

You asked whether the IRS can assert an excessive claim penalty under § 6675 for credits claimed on Forms 4136, 8864, or 6478. Rev. Rul. 79-298, 1979-2 C.B. 5, holds that the civil penalty under § 6675 of the Code for excessive excise tax claims filed does not apply to an excessive credit taken on an income tax return. Accordingly, we conclude that the IRS cannot assert an excessive claim penalty under § 6675 for fuel credits claimed on Forms 4136, 8864, or 6478.

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