

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

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subject: Tax treatment under § 61 of the Internal Revenue Code of excise tax credits under § 6426(c) and payments under § 6427(e) for the sale of biodiesel mixture fuels

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

ISSUE

Are the § 6426(c) excise tax credits and the § 6427(e) payments items of gross income under § 61 of the Internal Revenue Code (Code)?

CONCLUSION

The § 6426(c) excise tax credits and the § 6427(e) payments are not items of gross income under § 61.

FACTS

Blenders that produce and sell qualifying biodiesel mixtures to third parties have claimed § 6426(c) biodiesel mixture credits against their excise tax liability, and payments under § 6427(e). Blenders submit these claims to the IRS on Schedule C of Form 720, *Quarterly Federal Excise Tax Return*.

Some blenders included the § 6426(c) biodiesel mixture credits and the § 6427(e) payments in income through a negative adjustment to their biodiesel mixture cost of goods sold. On amended income tax returns, some blenders claimed a refund of income tax asserting that the § 6426(c) excise tax credits and the § 6427(e) payments are not includible in gross income. You ask whether this assertion is correct.

### LAW AND ANALYSIS

Section 6426(a)(1) allows a credit against the excise tax imposed by § 4081 on taxable fuel for each gallon of biodiesel used by the blender to produce any biodiesel mixture for sale or use in the blender's trade or business. To the extent that the biodiesel mixture credit exceeds a person's § 4081 liability for any particular quarter, a payment under § 6427(e) or a refundable income tax credit under § 34 is allowable to the blender. See § 2(d)(1) of Notice 2005-4, 2005-1 C.B. 289.

As an alternative to the credit under § 6426(a)(1), a blender may choose to claim the non-refundable income tax credit allowable under § 40A. A blender who chooses the § 40A income tax credit is required by § 87 to include the amount of the credit in gross income. You ask whether blenders that do not opt for the § 40A credit, but instead claim the § 6426(c) excise tax credit and the § 6427(e) payment, must include those amounts in gross income for income tax purposes.

The biodiesel mixture credit under § 6426(c) is essentially a refundable federal tax credit. That is, through the payment mechanism of § 6427(e) and the refundable income tax credit of § 34, a blender can receive the full amount of the credit even if the credit exceeds the amount of the blender's excise and income tax liabilities for the year. Federal tax credits are an element in the Code's formula for computing a taxpayer's tax due (or refunded). The Code computes a taxpayer's income tax liability by starting with gross income, allowing certain deductions to arrive at taxable income, applying a tax rate to determine tax liability, and applying certain refundable and non-refundable credits and payments against the tax liability. A taxpayer whose refundable credits and payments exceed its tax liability is considered to have made an overpayment of tax. See § 6401(b). Where Congress has decided that a particular credit should itself be treated as an additional item of gross income, it has done so expressly.<sup>1</sup> In our view, in the absence of a specific statutory provision or judicial doctrine requiring inclusion, federal tax credits are not gross income for purposes of determining a taxpayer's federal income tax liability.

Our conclusion is consistent with the intent of Congress when it enacted the biodiesel mixture credit. The American Jobs Creation Act of 2004 (Act), P. L. 108-357, added several new provisions regarding biodiesel fuels to the Code, including §§ 6426(c), 6427, 40A, and 87. The Act's legislative history provides that the § 40A credit must be

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<sup>1</sup> Thus, § 87 includes in gross income the credits for alcohol and biodiesel fuels determined under §§ 40 and 40A; § 54(g) includes in gross income the credits for holders of clean renewable energy bonds; and § 1397E(j) includes in gross income the credits for holders of qualified zone academy bonds.

included in gross income but is silent regarding the § 6426(c) credit and the § 6427 payment. See H.R. Conf. Rep. No. 108-755 at 306-310 (2004). We think the fact that §§ 6426(c), 6427, and 40A were enacted together, yet Congress chose only to specifically provide that the credit under § 40A is includible in gross income, indicates that Congress intended to exclude from gross income the § 6426(c) credit and the § 6427 payment.

Rev. Rul. 67-2, 1967-1 C.B. 13, addressing when farmers include in gross income the income tax credit for gasoline used on a farm under current § 34(a)(1) is distinguishable from the biodiesel mixture credit at issue here. The credit at issue in the revenue ruling was measured by multiplying the number of gallons of gasoline used for farming purposes by the rate of Federal gasoline tax which applied on the date the farmer purchased the gasoline. Congress considered the credit discussed in Rev. Rul. 67-2 to be, in effect, a “refund of the gasoline tax paid with respect to gasoline used on the farm for farming purposes.” S. Rep. No. 89-324, 1965 U.S.C.C.A.N. 1745-1746. Because farmers would have deducted the gasoline tax expense, they should include in gross income the amount refunded through the income tax credit to the extent of the tax benefit derived from the deduction. See also Pub. 510 (Rev. July 2012), *Excise Taxes*, at pages 22-23 which illustrates the application of the rule in Rev. Rul. 67-2. By contrast, Congress did not structure the biodiesel mixture credit as a refund of a previously deducted expense. Instead, “Congress believed that providing a new income tax credit for biodiesel fuel will promote energy self-sufficiency.” Staff of the Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 108<sup>th</sup> Congress 227 (Comm. Print 2005). Thus, Rev. Rul. 67-2 is inapposite.

By electing the § 6426(c) excise tax credit and/or the § 6427(e) excise tax payment instead of the § 40A income tax credit, a blender is not required by § 87 or by § 61 to include in its gross income the amount of the § 6426(c) excise tax credits and/or the § 6427(e) payments that it claims.

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Please call (     )                    if you have any further questions.

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