

INTERNAL REVENUE SERVICE

March 9, 1999

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GL-115826-98

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MEMORANDUM FOR MARK J. MILLER, DISTRICT COUNSEL, MIDWEST DISTRICT
CC:MSR:MWD:MIL

FROM: Lawrence H. Schattner
Chief, Branch 3 (General Litigation) CC:EL:GL:Br3

SUBJECT: Proposed Suit Letter
Your ref: CC:MSR:MWD:MIL:GL-703689-98

This responds to your request for review of the proposed suit letter concerning the above referenced taxpayer. This document is not to be cited as precedent.

LEGEND: None required.

ISSUE: Whether refusal to allow the Service's diesel compliance officer (DCO) to sample diesel fuel located on private property is subject to the penalty provided by I.R.C. §§ 7342 and 4083(c)(3).

CONCLUSION: No. I.R.C. § 4083(c)(2) requires the Service to establish an inspection site when it intends to detain any container, which may contain taxable fuel, for the purpose of sampling such fuel.

FACTS:

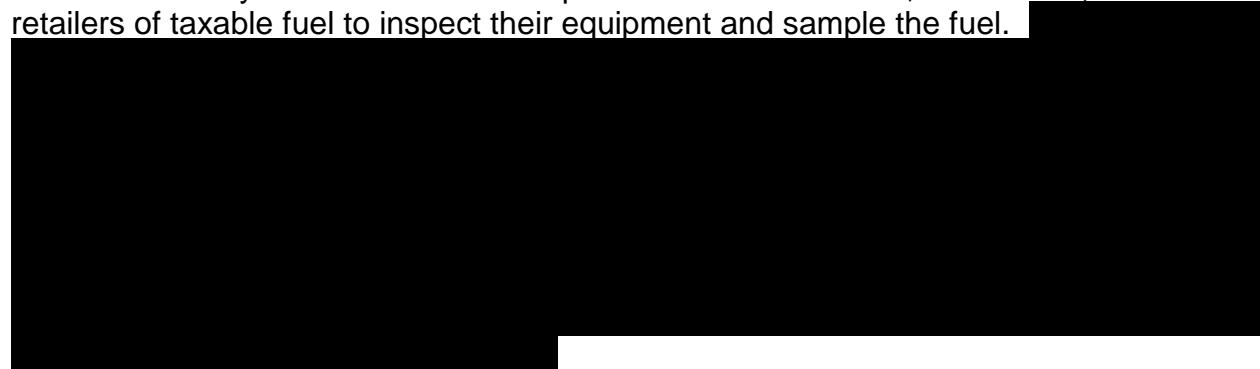
You submitted a proposed suit letter regarding to our office for review. Specifically, you recommended that the Government sue to reduce to judgment three penalties proposed against under I.R.C. § 4083(c)(3) for failure to permit examination and sampling of diesel fuel.

Thereafter, a DCO arrived at the taxpayer's property where The DCO had not obtained a search warrant, but asked to examine and sample the diesel fuel in the taxpayer's The taxpayer refused to permit the inspection. The Service proposes to penalize the taxpayer under I.R.C. §§ 7342 and 4083(c)(3) for failing to permit the examination and sampling.

LAW AND ANALYSIS:

In general, I.R.C. § 4083(c)(1) and (c)(2) sets forth the Service's authority to examine and sample taxable fuel. Specifically, I.R.C. § 4083(c)(1)(A)(i)-(ii) provides that the Service may "enter any place at which taxable fuel is produced or is stored" to sample the fuel and examine the equipment used for processing and storing the fuel. In contrast, I.R.C. § 4083(c)(2) provides that the Service may establish inspection sites at which it may "detain ... any container" which contains (or may contain) taxable fuel. In general, these two subparagraphs describe two different scenarios in which the Service may inspect private property. Both must be analyzed to determine whether either subparagraph authorized the DCO to enter private property to sample the fuel in the

The first, I.R.C. § 4083(c)(1), generally refers to the Service's authority to make a warrantless entry onto the commercial premises of wholesalers, distributors, and retailers of taxable fuel to inspect their equipment and sample the fuel.



Specifically, Treas. Reg. § 48.4083(a) states that a Service employee is authorized to "enter any place and to conduct inspections" consistent with subparagraphs (a) through (c) of that regulation. Treas. Reg. § 48.4083(b) defines the places a Service employee may enter. That regulation states:

(b) *Place of inspection*—(1) *In general.* Inspections may be at any place at which taxable fuel is (or may be) produced or stored or at any inspection site These places may include, but are not limited to—

- (i) Any terminal;
- (ii) Any fuel storage facility that is not a terminal;
- (iii) Any retail fuel facility; or
- (iv) Any designated inspection site. (Emphasis added). ^{1/}

^{1/} A "designated inspection site" is defined in Treas. Reg. § 48.4083(b)(2). It's significance as a place of inspection is discussed in the portion of this memorandum

The Service's authority to make a warrantless entry onto the commercial property on which terminals, fuel storage facilities, and retail fuel facilities are located is based on a judicial exception to the warrant requirement of the Fourth Amendment. In New York v. Burger, 482 U.S. 691 (1987), the Supreme Court considered whether a New York statute authorizing the warrantless inspection of junkyards was consistent with the Fourth Amendment. The court upheld the constitutionality of the statute by reasoning that the business owner's expectation of privacy in commercial property was substantially lower when that property was used in a pervasively regulated industry. The fuel industry is one of the most pervasively regulated industries in existence. Based on this reasoning, we have concluded that I.R.C. § 4083(c)(1)(A) authorizes the Service to make warrantless entries onto terminals, fuel storage, and retail fuel facilities.

[REDACTED]

We apply this analysis to the facts of [REDACTED] case as follows. [REDACTED]

[REDACTED] A terminal is essentially a warehouse of storage tanks, which rents space to fuel producers who, in turn, store large quantities of fuel there for sale to wholesale merchants. A terminal may or may not be owned by one of the major oil companies. An example of a "fuel storage facility that is not a terminal" is a bulk plant. A bulk plant is typically a smaller storage facility than a terminal and is owned by a fuel wholesaler, such as a local fuel company, which buys fuel in bulk from a terminal and delivers that fuel to customers that are distant from a terminal. The typical example of a retail fuel facility is a gasoline station. [REDACTED]

[REDACTED]

Therefore, as discussed below, we consider whether the DCO's actions were authorized under I.R.C. § 4083(c)(2), the second of the two

dealing with the Service's authority under I.R.C. § 4083(c)(1)(B) to inspect private vehicles (cars, trucks, boats, etc...).

subparagraphs identified earlier in this memorandum as setting forth the Service's authority to examine taxable fuel located on or in private property.

In general, I.R.C. § 4083(c)(2) sets forth the Service's authority to detain private vehicles (privately owned cars and trucks) at inspection sites to sample the contents of the fuel tanks. ^{2/} To the extent that this subparagraph refers to privately owned commercial or non-commercial cars and trucks (not located on the premises of a terminal, other fuel storage facility, or retail fuel facility) ^{3/}, the Service may only detain such vehicles at a designated inspection site. [REDACTED]

[REDACTED] A
designated inspection site is defined in Treas. Reg. § 48-4083-1(b)(2) as follows:

(2) *Designated inspection sites.* A designated inspection site is any State highway inspection station, weigh station, agricultural inspection station, mobile station, or other location designated by the Commissioner to be used as a fuel inspection site. A designated inspection site will be identified as a fuel inspection site.

The Service's authority under I.R.C. § 4083(c)(2) to conduct a warrantless inspection of the fuel in private vehicles was held to be constitutionally permissible in Lievesley v. C.I.R. 985 F. Supp. 206 (D. Mass. 1997). However, in the scenario involving the Service had established no inspection site, as required by the regulation, on which to detain private vehicles for a warrantless examination of the [REDACTED] and a sampling of its contents. Under these circumstances, the DCO was without authority to enter [REDACTED] private premises.

For the reasons set forth in this memorandum, we decline to forward your proposed suit letter to the Department.

^{2/} I.R.C. § 4083(c)(2) contains the sole authority for the Service to detain a private individual's car or truck at an inspection site and sample the contents of the fuel tank. However, this is not the sole function of I.R.C. § 4083(c)(2). The authority of this subparagraph augments the authority provided in subparagraph (c)(1) as they both pertain to the fuel industry. I.R.C. § 4083(c)(2) authorizes the Service to detain, examine and sample the contents of private vehicles (such as tanker-trucks, tanker-ships, and tanker trains) that are located at any place where taxable fuel is produced and stored within the meaning of section 4083(c)(1). See Treas. Reg. § 48.4083-1(c). [REDACTED]

^{3/} See footnote 2.

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If you have questions or comments, please call (202) 622-3630.

cc: Assistant Regional Counsel (GL) (Midstates Region)