

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

CC:PSI:7:CLangley
POSTN-110602-12

UILC: 87.00-00, 6601.00-00

date: June 7, 2012

to: Holly McCann
Chief, Excise Tax Program

from: Frank Boland
Chief, CC:PSI:7

subject: Black Liquor and Cellulosic Biofuel Repayments

This responds to your request for non-taxpayer specific legal advice regarding black liquor and cellulosic biofuel repayments. This advice may not be used or cited as precedent.

ISSUES

1. Whether a taxpayer's repayment of the alternative fuel mixture credit paid under § 6427 or taken under § 34 of the Internal Revenue Code must be paid with interest.
2. Which year is the proper year to include § 87 income for a taxpayer that files a timely federal income tax return to claim a credit for black liquor used as a fuel before January 1, 2010.
3. Which year is the proper year to include § 87 income for a taxpayer that files a timely federal income tax return to claim a credit for black liquor used as a fuel before January 1, 2010, if some of that credit is limited by § 38(c).
4. Which year is the proper year to include § 87 income for a taxpayer that files an amended federal income tax return to claim a credit for black liquor used as a fuel before January 1, 2010.
5. Whether a taxpayer's method of accounting changes the outcome of issues 2 through 4 described above.

CONCLUSIONS

1. A taxpayer's repayment of a payment made under § 6427 is not paid with interest. A taxpayer's repayment of a credit made under § 34 that is an overpayment described in § 6401(b) (that is, the credit did not reduce the amount of income tax that was due from

PMTA 2012-17

the taxpayer) is not paid with interest. A taxpayer's repayment of a credit made under § 34 that is an overpayment that is not described in § 6401(b) (that is, the credit reduced the amount of income tax that was due from the taxpayer) is paid with interest. Furthermore, if any of the repayment consists of a § 34 credit that was used to offset income tax, any interest owed to the government for an underpayment of tax under § 6601 has an equal amount of interest payable to the taxpayer for an overpayment under § 6611.

2. The proper year to include § 87 income for a taxpayer that files a timely federal income tax return to claim a credit for black liquor used as a fuel before January 1, 2010, is the taxable year in which the taxpayer qualifies for the credit.
3. The proper year to include § 87 income for a taxpayer that files a timely federal income tax return to claim a credit for black liquor used as a fuel before January 1, 2010, is the taxable year in which the taxpayer qualifies for the credit, regardless of whether some of that credit is limited by § 38(c).
4. The proper year to include § 87 income for a taxpayer that files an amended federal income tax return to claim a credit for black liquor used as a fuel before January 1, 2010, is the taxable year in which the taxpayer qualified for the credit.
5. A taxpayer's method of accounting does not change the outcome described above in issues 2 through 4.

FACTS

Black liquor is a liquid byproduct of certain paper milling processes that, before January 1, 2010, met the definition of alternative fuel under § 6426(d)(2)(G). A registered alternative fueler, typically a paper manufacturer, could mix black liquor with a taxable fuel, use the mixture as a fuel, and then claim a \$.50 per gallon alternative fuel mixture credit under §§ 6426(a)(1) and 6427(e)(1). Under § 6426(a)(1), a claimant entitled to the alternative fuel mixture credit must first use the credit to offset any § 4081 fuel tax liabilities. Afterwards, § 6427(e) allowed the claimant to claim a payment for any remainder. Section 6427(i) sets forth various timing and dollar threshold requirements to make a § 6427 claim for a payment. If a claimant did not meet these requirements for any reason, § 34(a)(3) allowed this amount to be a refundable income tax credit. Generally, paper manufacturers claiming a credit for black liquor did not have fuel tax liabilities under § 4081 so the full amount of the credit was available as either a payment under § 6427(e) or a refundable income tax credit under § 34.

Black liquor also met the definition of a cellulosic biofuel under § 40(b)(6)(E) before January 1, 2010. A registered cellulosic biofuel producer, typically a paper manufacturer, that produced and used black liquor as a fuel in a trade or business could claim a \$1.01 per gallon cellulosic biofuel producer credit under § 40(b)(6). This credit is a non-refundable general business credit. Section 6426(h) did not allow both claims

on the same gallon of fuel, so an eligible claimant had to choose between the refundable alternative fuel mixture credit and the non-refundable cellulosic biofuel producer credit. However, claimants that chose the refundable credit were permitted to payback some or the entire claim they received and submit a new claim for the § 40 nonrefundable credit.

The Code has since been amended so that beginning on January 1, 2010, black liquor no longer qualified as either an alternative fuel or cellulosic biofuel.

LAW

Section 34(a)(3) allows a refundable credit against income tax for amounts payable under § 6427.

Section 38(a) provides for a general business credit against tax that includes the amount of the current year business credit. Section 38(b)(3) provides that the amount of the current year business credit for the alcohol credit is determined under § 40(a).

Section 38(c)(1) provides that the general business credits allowed for any taxable year shall not exceed the excess (if any) of the taxpayer's net income tax over the greater of either the tentative minimum tax for the taxable year, or 25 percent of so much of the taxpayer's net regular tax liability as exceeds \$25,000.

Section 40(a)(4) includes the cellulosic biofuel producers credit in the alcohol credit for purposes of § 38.

Section 40(b)(6) generally allows a \$1.01 per gallon credit for each gallon of qualified cellulosic biofuel produced.

Section 40(b)(6)(C) defines "qualified cellulosic biofuel production" to include any cellulosic biofuel that the taxpayer produces and uses as a fuel in its trade or business.

Section 40(f) allows a taxpayer to elect for § 40 not to apply for any taxable year.

Section 45K(c)(3) defines "biomass" to mean any organic material other than (A) oil and natural gas (or any product thereof), and (B) coal (including lignite) or any product thereof.

Section 87(1) provides that gross income includes the amount of the alcohol fuel credit determined with respect to the taxpayer for the taxable year under § 40(a).

Section 6401(b)(1) generally provides that if the amount allowable as refundable credits exceeds the tax imposed by subtitle A, then the amount of such excess shall be considered an overpayment.

Section 6426(a) provides that the alternative fuel mixture credit described in § 6426(e) is allowed against the tax imposed by § 4081 provided the taxpayer is registered under § 4101.

Section 6426(d)(2)(G) defines “alternative fuel” as any liquid fuel derived from biomass (as defined in § 45(c)(3)).

Section 6426(e) generally provides for a \$.50 per gallon alternative fuel mixture credit against a claimant’s § 4081 fuel tax liability for producing a mixture of alternative fuel and taxable fuel and using the mixture as a fuel in the producer’s trade or business.

Section 6426(h) disallows a credit under § 6426(e) for any credit with respect to a fuel that may be determined under § 40(b).

Section 6427(e)(1) generally provides that if any person produces an alternative fuel mixture described in § 6426 in such person's trade or business, the Secretary shall pay (without interest) to such person an amount equal to the alternative fuel mixture credit with respect to such mixture. Section 6427(e)(3) prohibits such a payment for any amount that is allowed under § 6426.

Section 6601 generally provides that if any amount of tax imposed by Title 26 is not paid on or before the last day prescribed for payment, interest on such amount at the underpayment rate established under § 6621 shall be paid for the period from such last date to the date paid.

ANALYSIS

Generally, black liquor claimants did not have any fuel tax liabilities under § 4081. Thus, the entire amount of the alternative fuel mixture claim could have been claimed as a payment under § 6427(e). Section 6427(e) payments were made without interest and since the repayment of these do not create an underpayment, the repayment does not require interest be paid. Additionally, a taxpayer’s repayment of a credit made under § 34 that is an overpayment described in § 6401(b) (that is, the credit did not reduce the amount of income tax that was due from the taxpayer) is not required to be paid back with interest.

A taxpayer’s repayment of a credit made under § 34 that is an overpayment that is not described in § 6401(b) (that is, the credit reduced the amount of income tax that was due from the taxpayer) is paid with interest under § 6601. This is because it creates an underpayment of tax in that the taxpayer received a benefit to the extent of a reduction in the income tax that it would otherwise have to pay. However, if any of the repayment consists of a § 34 credit that was used to offset income tax, any interest owed to the government for an underpayment of tax under § 6601 has an equal amount of interest payable to the taxpayer for an overpayment under § 6611.

Section 87(1) provides that gross income includes “the amount of the alcohol fuel credit determined with respect to the taxpayer for the taxable year under § 40(a).” Based on the express language of the statute, the proper year to include § 87 income is the taxable year in which the taxpayer qualifies for the credit. Because the specific language of § 87 clearly expresses the year in which the income is to be included, the general rules of § 451 and the regulations thereunder do not override § 87. We do not believe it is necessary to consider the legislative history of § 87(1) because the statute is not ambiguous. See generally Lamie v. United States Trustee, 540 U.S. 526, 534-536 (2004). Nevertheless, a review of the legislative history provides further support for our conclusion. Section 87 was enacted by the Crude Oil Windfall Profit Tax Act of 1980 (Pub. L. 96-223, § 232(c)(1)). The conference report accompanying the enactment of § 87 as part of the Act states, “the credit generally is available only to a person who blends or uses alcohol in a trade or business and must be included in income in the taxable year it is earned (rather than in the taxable year following the year for which it is allowed).” H.R. Rep. No. 96-817, pt. 3, at 142 (1980) (Conf. Rep.). See also the General Explanation of the Crude Oil Windfall Profit Tax Act of 1980, JCS-1-81, at 90. Cf. Rev. Rul. 2003-3, 2003-1 C.B. 252.

Section 87 requires a taxpayer to include in gross income the amount of the § 40(a) credit determined for that taxable year. Therefore, § 87 income is taken into account in the same taxable year that the taxpayer qualifies for the credit. Furthermore, § 87 does not limit the amount that must be taken into income by the § 38(c) limitations. Therefore, the full amount must be taken into income in the year that the taxpayer qualifies for the credit regardless of the § 38(c) limitations. Additionally, if a taxpayer amends a return to take the credit under § 40(a), it must also amend its return to take that amount into income in the same year that the taxpayer qualified for the credit. This applies regardless of the taxpayer’s method of accounting.

If you have any questions concerning this memorandum, please contact Charles J. Langley, Jr. at (202) 622-3130.