OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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Index No.: 6427.00-00

MEMORANDUM FOR

FROM: Ruth Hoffman
Senior Technician Reviewer, Branch 8
Associate Chief Counsel
(Passthroughs and Special Industries)

SUBJECT:

LEGEND

Taxpayer =
Device =

This office received a letter ruling request from Taxpayer. Taxpayer described itself as the lessor of the Device. Taxpayer stated that the Device measures fuel consumed by a highway vehicle for business use on private property. Taxpayer asked that we rule that the tax imposed on this measured diesel fuel is refundable because this portion of the highway vehicle's diesel fuel is used in an off-highway business use, a nontaxable use.

On August 7, 2001, this office sent Taxpayer a letter (attached) that explained that § 6427(l)(1)(A) of the Internal Revenue Code provides that the entity entitled to claim a refund relating to diesel fuel used for a nontaxable use is the ultimate purchaser of the diesel fuel. Therefore, Taxpayer, an equipment lessor rather than the ultimate purchaser of diesel fuel, is not the appropriate entity to claim a diesel fuel tax refund. Consequently, pursuant to section 2.01 of Rev. Proc. 2001-1, 2001-1 I.R.B. 1, the IRS declined to rule. Had we not been administratively constrained from ruling, we would have ruled adversely.

The purpose of this Chief Counsel Advice is to inform you that any claims related to diesel fuel used in highway vehicles that are registered or required to be registered for highway use that are based on the use of the Device would not be allowable. In accordance with § 6110(k)(3), this Chief Counsel Advice should not be cited as

precedent.

Taxpayer argued that the fuel consumed while the Device is operating should be considered used in an off-highway business use notwithstanding §§ 48.4041-7, 48.6421-1(d), and 48.6427-1(d) of the Manufacturers and Retailers Excise Tax Regulations.

Sections 4081(a)(1)(A)(i) and (ii) impose a federal excise tax on certain removals, entries, and sales of taxable fuel from any refinery or any terminal. Section 4083(a)(1)(B) provides that diesel fuel is a taxable fuel.

Section 6427(l)(1) provides that if any diesel fuel on which tax has been imposed by § 4081 is used by any person in a nontaxable use, the ultimate purchaser of the diesel fuel is entitled to a diesel fuel tax refund. Section 6427(l)(2) defines the term "nontaxable use" as any use which is exempt from the tax imposed by § 4041(a)(1) other than by reason of a prior imposition.

Section 4041(b)(1)(A) provides that no tax shall be imposed on diesel fuel sold for use or used in an off-highway business use. Section 4041(b)((1)(C) refers to § 6421(e)(2) for the definition of the term "off-highway business use." Section 6421(e)(2) defines "off-highway business use" as any use by a person in a trade or business of such person or in an activity of such person described in § 212 (relating to production of income) other than as a fuel in a highway vehicle that (at the time of such use) is registered, or is required to be registered, for highway use under the laws of any state or foreign country.

Section 48.6421-1(d) (relating to duel use of gasoline) provides that no credit or payment may be claimed for gasoline used in a highway vehicle that is used in a trade or business solely because the propulsion motor in the vehicle is also used for a purpose other than propelling the vehicle. Thus, if the propulsion motor of a highway vehicle also operates special equipment by means of a power takeoff or power transfer, no credit or payment may be claimed for the gasoline used to operate the special equipment. If a vehicle is equipped with a separate motor to operate the special equipment, a credit or payment may be claimed for the gasoline used in the separate motor. See also §§ 48.4041-7 and 48.6427-1(d).

Two cases have addressed the issue of whether fuel used in the propulsion motor of a highway vehicle to operate special equipment by means of a power takeoff rather than to propel the highway vehicle is fuel used for a nontaxable use. In both cases (discussed below), the courts held that fuel consumed in the propulsion motor of a highway vehicle was not used in an off-highway business use even though the motor was being used to power separate equipment and not to propel the vehicle.

In Western Waste Indus. v. Commissioner, 104 T.C. 472 (1995), the plaintiff argued that it was entitled to a fuel tax credit for the diesel fuel consumed that was not used for the propulsion of its vehicles; that is, fuel used when its registered highway vehicles'

power takeoff units were in operation. Each vehicle was powered by a single motor with fuel that was stored in a single tank. A power takeoff unit activated a vehicle's hydraulic system. The hydraulic system raised and emptied containers and compacted and ejected refuse. The plaintiff argued that the regulations relating to the dual use of fuel should be invalidated. The court found the regulations to be valid. The court rejected the plaintiff's interpretation of the language "used . . . as a fuel in" as meaning "used . . . as fuel for the propulsion of."

In Hi-Way Dispatch, Inc. v. United States, 858 F. Supp. 880 (N.D. Ind. 1994), the plaintiff installed on-board computers in its tractors. These computers measured the amount of diesel fuel consumed while its tractors' engines were idling during driver sleep and/or rest periods. Based on these computers' measurements, the plaintiff claimed a refund of the tax on the diesel fuel consumed during the rest periods. The plaintiff argued that it was entitled to the refund because the fuel was consumed in vehicles that were idling while not on the highway, a nontaxable use. The court found that the plaintiff's use of fuel in the motor that propels the vehicle could not be a nontaxable use under § 6421 and the regulations relating to dual use of fuel. In response to the plaintiff's arguments that advances in computer technology have rendered the regulations obsolete, the court said those arguments should be made to the Congress.

Accordingly, under the regulations, Western Waste, and Hi-WayDispatch, no claim is allowable with respect to fuel used in the propulsion motor of a highway vehicle regardless of whether the motor is performing a nonpropulsion function at the time the fuel is consumed.

If you have any questions concerning ths memorandum,

Attachment

Index No.: 6427.00-00

In re:

Dear :

This is in response to a request for a letter ruling that the tax imposed on diesel fuel that is consumed by should be refunded because the diesel fuel is used in a nontaxable use.

Section 6427(l)(1)(A) of the Internal Revenue Code provides in relevant part that if any person uses diesel fuel on which tax has been imposed by § 4081 in a nontaxable use the Secretary shall pay to the ultimate purchaser an amount equal to the tax imposed on that fuel.

Rev. Proc. 2001-1, 2001-1 I.R.B. 1, prescribes the procedural requirements that must be met before the IRS will issue a letter ruling. Section 2.01 of this revenue procedure provides that a "letter ruling" is a written statement issued to a taxpayer by the national office that interprets and applies the tax laws to the taxpayer's specific set of facts.

The letter ruling request describes as the lessor of the states that the segregates fuel consumed by a highway vehicle for business use on private property from fuel consumed by the same vehicle while on a public highway.

Section 6427(l)(1)(A) identifies the entity that is entitled to claim a refund of the tax imposed on diesel fuel as the ultimate purchaser of the diesel fuel. As an equipment lessor rather than the ultimate purchaser of diesel fuel, is not the appropriate entity to claim a diesel fuel tax refund. Consequently, in accordance with section 2.01 of Rev. Proc. 2001-1, the IRS declines to rule. Section 8.07(1) provides that under these circumstances the IRS will not return correspondence and exhibits.

Pursuant to section 8.07(3) of Rev. Proc. 2001-1, we have asked the Communications, Records, and User Fee Unit of our organization to refund the $500.00

user fee paid. This refund will be issued by that unit and sent under separate cover.

If you have any questions concerning this letter, please contact

Sincerely,

Associate Chief Counsel
(Passthroughs and Special Industries)

By:
Ruth Hoffman
Senior Technician Reviewer, Branch 8

The request for a letter ruling references § 4041(a)(1). Section 4041(a)(1) provides that a tax is imposed on any liquid other than gasoline (i) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle or a diesel-powered train for use as a fuel in such vehicle or train, or (ii) used by any person as a fuel in a diesel-powered highway vehicle or a diesel-powered train unless there was a taxable sale of such fuel under clause (i).

Section 48.4041-0 of the Manufacturers and Retailers Excise Taxes provides that for rules relating to the diesel fuel tax imposed by § 4041 after December 31, 1993, see § 48.4082-4.

Section 48.4082-4(a)(1) provides that tax is imposed by § 4041 on the delivery into the fuel supply tank of the propulsion engine of a diesel-powered highway vehicle (other than a diesel-powered bus) of (i) any diesel fuel or kerosene on which tax has not been imposed by § 4081; (ii) any diesel fuel or kerosene for which a credit or payment has been allowed under § 6427; or (iii) any liquid (other than taxable fuel) for use as a fuel.

Section 48.4082-4(a)(2) provides that the operator of the highway vehicle into which the fuel is delivered is liable for the tax imposed under § 48.4082-4(a)(1).