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INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

District Director

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No.

Quarters Involved:

Conference Held:

"This document may not be used or cited as precedent. Section 6110 (j) (3) of the Internal Revenue Code."

Legend

Taxpayer =

Issue

Whether Taxpayer, a position holder of finished gasoline and undyed diesel fuel in a terminal, is liable for the tax imposed by § 4081 of the Internal Revenue Code upon the removal of that fuel from the terminal at the terminal rack.

Facts

Taxpayer, a taxable fuel registrant, made pipeline purchases of finished gasoline and undyed diesel fuel (the taxable fuel). Taxpayer timely provided all of the sellers of this fuel with a notification certificate as described in § 48.4081-5 of the Manufacturers and Retailer Excise Tax Regulations. Taxpayer was the position holder with respect to this fuel when the fuel was later removed from terminal at the terminal rack.

When Taxpayer bought the fuel, it asked each seller to charge Taxpayer tax on the sale of the fuel to Taxpayer. Some sellers honored this request and others did not. With respect to fuel that a seller sold Taxpayer at a tax-excluded price, Taxpayer paid tax to the government based on its pipeline purchases and not on the removal of the fuel from the terminal. With respect to fuel that a seller sold Taxpayer at a tax-

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included price, Taxpayer neither reported the fuel on its quarterly excise tax return nor paid any tax on this fuel.

Applicable law

Section 4081(a)(1)(A) imposes a tax on (i) the removal of a taxable fuel from any refinery, (ii) the removal of a taxable fuel from any terminal, (iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing, and (iv) the sale of a taxable fuel to any person who is not registered under § 4101 unless there was a prior taxable removal or entry of such fuel.

Section 4081(a)(1)(B) exempts from tax removals or entries of taxable fuel transferred in bulk to a terminal or refinery if the person removing or entering the taxable fuel and the operator of such terminal or refinery are registered under § 4101.

Section 48.4081-2(c)(1) provides that the position holder with respect to taxable fuel is liable for the tax imposed on the removal of fuel from a terminal at the terminal rack.

Section 4081(e) provides that if any person who paid the tax on taxable fuel imposed by § 4081 establishes to the satisfaction of the Internal Revenue Service that a prior tax was paid to the government (and not credited or refunded) with respect to any such taxable fuel, then an amount equal to the tax paid by such person shall be allowed as a refund (without interest) to such person in the same manner as if it were an overpayment of the tax imposed by § 4081.

Rationale

Tax is imposed on the removal of taxable fuel from the terminal at the terminal rack. The position holder with respect to that fuel is liable for the tax. Section 40.6151(a)-1 of the Excise Tax Procedural Regulations provides that this tax must be paid to the government by the last day of the first calendar month following the quarter in which the liability was incurred. A removal at the terminal rack is not exempt from tax simply because the position holder bought the fuel at a tax-included price.

Because Taxpayer was a taxable fuel registrant when it bought the fuel, tax was not imposed on the sale of the fuel to Taxpayer. See § 4081(a)(1)(A)(iv). This is true even with respect to fuel Taxpayer bought at a tax-included price. Because the sellers were not liable for tax, any amount they paid to the government would be an erroneous payment rather than a tax payment under § 4081. Any such payment would not be a "first tax" payment to which § 4081(e) would apply. (Note, however, that an erroneous payment would be an overpayment under § 6402

for which the seller may claim a credit or refund provided that the claim is timely filed and the provisions of § 6416(a)(1) are met.)

Conclusion

Taxpayer, a position holder of finished gasoline and undyed diesel fuel in a terminal, is liable for the tax imposed by § 4081 on the removal of that fuel from the terminal at the terminal rack.

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(j)(3) provides that it may not be used or cited as precedent. In accordance with section 6110(c), names, addresses, and taxpayer identifying numbers have been deleted.

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