

INTERNAL REVENUE SERVICE

Number: **200130047**
Release Date: 7/27/2001
Index Nos.: 6416.00-00
6427.00-00

CC:PSI:8/PLR-124819-00

MAY 3 2001

In re:

Legend:

X =

Dear

This responds to your November 6, 2000, request for a ruling whether, under the circumstances described below, X is the proper person to claim a credit or refund under §§ 6416(a)(4) and (b)(2) of the Internal Revenue Code with respect to the gasoline tax and § 6427(l)(5) with respect to the diesel fuel tax. You also ask whether, if X is the proper person to make these claims, it may make the claims on Form 720, Quarterly Federal Excise Tax Return.

The following facts and representations have been submitted in the request.

With respect to gasoline, X is a wholesale distributor as that term is defined in § 6416(a)(4)(B). With respect to diesel fuel, X is a registered ultimate vendor as that term is defined in § 48.6427-9(b)(2) of the Manufacturers and Retailers Excise Tax Regulations. Unrelated to its status as a wholesale distributor and an ultimate vendor, X is a position holder with respect to gasoline and diesel fuel in a terminal and as such X files Form 720. State is a local governmental unit. Issuer is an issuer of credit cards. Merchant is any retailer of gasoline and diesel fuel that accepts a credit card of Issuer.

X has an agreement (Agreement) with State to sell gasoline and diesel fuel (Fuel) for the exclusive use of State. Under the Agreement, X has caused Issuer to issue to State certain credit cards that State may use at Merchant to obtain Fuel. X represents that the Agreement provides that when Fuel is delivered from Merchant's

fuel pump to State upon State's presentation of Issuer's card, title to Fuel transfers from Merchant to X and from X to State. X further represents that the title transfers from Merchant to X and from X to State are recognized as sales under applicable state law.

State pays X a price based on a formula set forth in the Agreement. This formula is based on a specified average wholesale price plus a set amount to cover X's profit and certain other costs. The price paid by State is unrelated to Merchant's pump price. Thus, the price that State pays X for Fuel may be higher or lower than Merchant's pump price. Issuer pays Merchant the pump price for Fuel bought by X less credit card fees. X pays Issuer Merchant's pump price for Fuel, which includes the amount of the federal excise tax. The Agreement also provides that X, and not State, will claim any credit or refund with respect to those taxes.

X bills State each month for its Fuel purchases. After receipt of the bill, State has a set number of days to pay X. If State fails to pay, the credit risk falls on X and not on Issuer or Merchant. Thus, as represented by X, the person actually extending credit to State is X and not Issuer.

Section 4081 imposes a tax on certain removals, entries, and sales of taxable fuel, including gasoline and diesel fuel.

Section 48.4081-1(b) defines sale as including the transfer of title to, or substantial incidents of ownership in, taxable fuel (other than taxable fuel in a terminal) to the buyer for a consideration, which may consist of money, services, or other property.

Section 6402 provides that the IRS may credit the amount of any overpayment against any liability in respect of an internal revenue tax on the part of the person that made the overpayment and to refund any balance to that person.

Section 6416(b)(2) provides that the tax paid under § 4081 on gasoline is deemed to be an overpayment if the gasoline was sold to a state or local government for its exclusive use.

Section 6416(a)(4) provides that a wholesale distributor that buys gasoline on which the § 4081 tax has been paid and that sells the gasoline to its ultimate purchaser is treated as the person (and the only person) that paid the tax to the government.

Notice 89-29, 1989-1 C.B. 669, provides guidance with respect to the application of § 6416(a)(4). The sixth paragraph of Notice 89-29 states:

If a wholesale distributor (1) purchases gasoline at a price that includes the tax, (2) sells such gasoline . . . directly to the ultimate purchaser for an exempt purpose . . . , and (3) meets the other requirements of section 6416 of the Code and this Notice, then the wholesale distributor is treated as the person who paid

the tax to the government and is the only person eligible to claim a credit or refund under section 6416. In such a case the person that actually paid the tax on the gasoline is not eligible to claim the credit or refund. However, if the tax is not included in the price of the gasoline purchased by the wholesale distributor, or the gasoline is not sold directly to the ultimate purchaser by the wholesale distributor, then only the person who actually paid the tax to the government may file a claim under section 6416.

Section 6427(l)(5)(A) provides that if diesel fuel on which tax was imposed by § 4081 is used by a state or local government, then the ultimate vendor of the fuel is eligible for a credit or refund with respect to the tax if the ultimate vendor is registered under § 4101 and meets the requirements of § 6416(a)(1)(A), (B), or (D).

Section 48.6427-9(b)(1) defines ultimate vendor as including a person that sells undyed diesel fuel to a state for its exclusive use.

Section 48.6427-9(b)(2) defines registered ultimate vendor as an ultimate vendor that is registered under § 4101 as an ultimate vendor.

X is the proper person to claim a credit or refund under §§ 6416(a)(4) and § 6427(l)(5) only if, among other conditions, X sold Fuel to State. In a typical retail sale in which a credit card is used, the person extending credit does not obtain title to the merchandise and thus does not become the seller to the retail customer. The person extending credit may assume the risk of default by the customer but this type of risk is assumed by any lender that finances a retail sale.

In this case however, X, rather than Merchant, has contracted with State for the sale of Fuel. X, rather than Merchant, sets the price that State pays. X not only assumes the risk that State will default, but X also assumes the risk that the price to be paid by State will be lower than the pump price that X must pay Merchant. Thus, when State uses Issuer's credit card to obtain Fuel from Merchant, the transaction is a sale of Fuel from Merchant to X and then from X to State.

Accordingly, we conclude that, based on the facts and representations that have been submitted with the request, X is the proper person to claim a credit or refund under §§ 6416(a)(4) and (b)(2) because it is a wholesale distributor that bought gasoline at a tax-included price and sold the gasoline to State for State's exclusive use. X is the proper person to claim a credit or refund under § 6427(l)(5) because it is a registered ultimate vendor that sold taxed diesel fuel to State for State's exclusive use.

We further conclude that X may make its claim under §§ 6416(a)(4) and (b)(2) on either Form 720 or Form 8849, Claim for Refund of Excise Taxes, in accordance with the requirements of the Code and the instructions for those forms. X may make its claim under § 6427(l)(5) on either Form 720, Form 8849, or Form 4136, Credit for Federal Tax Paid on Fuels, in accordance with the requirements of the Code and

instructions for those forms.

No ruling is being provided on whether X meets the procedural requirements for claiming a credit or refund under § 6416(a)(4) or 6427(l)(5).

This letter ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Temporary or final regulations pertaining to one or more of the issues addressed in this letter ruling have not yet been adopted. Therefore, this letter ruling will be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusion in the letter ruling. See section 12.04 of Rev. Proc. 2001-1, 2001-1 I.R.B. 1, at 46. However, a letter ruling generally is not modified or revoked retroactively if the taxpayer demonstrates that the criteria in section 12.05 of Rev. Proc. 2001-1 are satisfied.

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

Enclosures (2):
Copy of this letter
Copy for § 6110 purposes