

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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District Director

Taxpayer Name:
Taxpayer Address:

Taxpayer Identification No.:
Quarters Involved:
Date of Conference:

ISSUES:

- (1) Is aviation fuel used in an aircraft actually engaged in foreign trade when it is used in an aircraft flying from a city in the United States to another city in the United States as a domestic segment of a direct international flight between a city in the United States and a city in a foreign country?
- (2) Did the IRS erroneously credit and pay the taxpayer, under the facts described below, amounts the taxpayer claimed under § 6427 of the Internal Revenue Code for the nontaxable use of aviation fuel?
- (3) Is the taxpayer liable for the tax imposed by § 4091 with respect to the untaxed aviation fuel that it used in its aircraft on domestic segments of direct international flights?

CONCLUSIONS:

- (1) Aviation fuel is used in an aircraft actually engaged in foreign trade when it is used in an aircraft flying from a city in the United States to another city in the United States as a domestic segment of a direct international flight between a city in the United States and a city in a foreign country.
- (2) The IRS erroneously credited and paid the taxpayer certain amounts claimed under § 6427 for the nontaxable use of aviation fuel. The erroneous credits and

payments were with respect to amounts included in 4th quarter claims on Forms 720 and amounts included in claims on Forms 8849.

(3) The taxpayer is not liable for the tax imposed by § 4091 with respect to the untaxed aviation fuel that it used in its aircraft on domestic segments of direct international flights.

FACTS:

The taxpayer is a domestic commercial airline company that provides air transportation of persons and property for hire between the United States and foreign countries. The taxpayer is a calendar year income taxpayer. This technical advice request involves aircraft used by the taxpayer for direct international flights that include at least one domestic segment. The aviation fuel under consideration is aviation fuel purchased and delivered into the fuel supply tank of the taxpayer's aircraft in the United States. The flights under consideration are not chartered flights.

The following examples illustrate the domestic segments of direct international flights at issue:

(a) A direct international flight from city #1 in the United States to city #4 in a foreign country stopped in city #2 and city #3 in the United States. The domestic segments were the flights from city #1 to city #2 and city #2 to city #3. No paid passengers or property were transported from city #1 to city #4. One paid passenger was transported from city #2 to city #4.

(b) A direct international flight from city #5 in a foreign country to city #8 in the United States stopped in city #6 and city #7 in the United States. The domestic segments were the flights from the city #6 to city #7 and city #7 to city #8. Two paid passengers were transported from city #5 to city #8.

Before October 4, 1995, the taxpayer purchased taxed aviation fuel that it used in aircraft flying domestic segments of direct international flights. The taxpayer took credits in the amount of that tax on its Forms 720, Quarterly Federal Excise Tax Return. Further, on January 22, 1997, the taxpayer filed claims for refund on Forms 8849, Claim for Refund of Excise Taxes, for additional gallons of taxed aviation fuel used in aircraft flying domestic segments during tax periods 9403-9509. The IRS credited the amounts claimed on Forms 720 and paid the amounts claimed on Forms 8849 and later notified the taxpayer that the claims were erroneous.

On October 4, 1995, the taxpayer was registered by the IRS as a producer of aviation fuel and thus could purchase untaxed aviation fuel. Beginning October 4, 1995, the taxpayer purchased untaxed aviation fuel. The taxpayer did not pay tax on the untaxed aviation fuel it used in aircraft flying domestic segments of direct international flights.

The District Director asserts that the aviation fuel used in aircraft flying domestic segments of direct international flights is not used in aircraft actually engaged in foreign trade. As such, the District Director finds that the credits and the refunds related to amounts claimed on Forms 720 and Forms 8849 were erroneous with respect to aviation fuel used in aircraft flying domestic segments of direct international flights. Further, the District Director finds that the taxpayer is liable for the tax imposed by § 4091 on the untaxed aviation fuel it used on domestic segments of direct international flights.

LAW AND ANALYSIS:

Section 4091(a)(1) imposes a tax on the sale of aviation fuel by the producer thereof or any producer of aviation fuel.

Section 4091(a)(2), as in effect during the periods at issue, provides that if any producer uses aviation fuel (other than for a nontaxable use as defined in § 6427(l)(2)(B)) on which no tax has been imposed then that use is considered a sale.

Section 4092(a) provides that no tax is imposed on aviation fuel sold by a producer for use by the purchaser in a nontaxable use (as defined in § 6427(l)(2)(B)).

Section 4092(b) provides that, in the case of fuel sold for use in commercial aviation (other than as supplies for vessels or aircraft within the meaning of § 4221(d)(3)), the exemption for nontaxable use in § 4092(a) does not apply to so much of the tax as is attributable to the Leaking Underground Storage Tank trust fund financing rate, and 4.3 cents per gallon for fuel sold after September 30, 1995.

Section 6427(l)(1) provides that, if aviation fuel on which tax was imposed by § 4091 is used by any person in a nontaxable use, the Secretary shall pay (without interest) to the ultimate purchaser of the fuel an amount equal to the aggregate amount of tax imposed on such fuel under § 4091.

Section 6427(l)(2)(B) provides that the term “nontaxable use” means, in the case of aviation fuel, any use which is exempt from the tax imposed by § 4041(c)(1).

Section 4041(g)(1) provides that no tax is imposed by § 4041(c) on aviation fuel sold for use or used as supplies for vessels or aircraft within the meaning of § 4221(d)(3).

Section 4221(d)(3) provides that the term “supplies for vessels or aircraft” means fuel supplies, ships’ stores, sea stores, or legitimate equipment on vessels actually engaged in foreign trade or trade between the United States and any of its possessions. For purposes of the preceding sentence, the term “vessels” includes civil aircraft.

Section 48.4221-4(b)(2) of the Manufacturers and Retailers Excise Tax Regulations provides that the terms “fuel supplies” and “legitimate equipment” include

all articles, materials, supplies, and equipment necessary for the navigation, propulsion, and upkeep of vessels actually engaged in foreign trade, even though such vessels may make intermediate stops in the United States.

Issue (1):

Under §§ 4092(a), 6427(l)(2)(B), 4041(g), and 4221(d)(3), aviation fuel used as supplies for aircraft actually engaged in foreign trade is used in a nontaxable use.

Rev. Rul. 69-259, 1969-1 C.B. 287, describes a domestic airline that operates an airplane (Plane No. 1) that flies from a city in the United States to a city in a foreign country with intermediate stops in the United States. The airline also operates an airplane (Plane No. 2) that flies only within the United States. Plane No. 2 carries some passengers whose ultimate destinations are cities within the United States and other passengers with tickets to a city in a foreign country. The foreign bound passengers are transferred from Plane No. 2 to another airplane for completion of their flights to the foreign country. The ruling holds that Plane No. 1 is engaged in foreign trade within the meaning of the statute and regulations, even though it makes intermediate stops in the United States. The ruling holds that Plane No. 2 cannot be considered as being engaged in foreign trade, even though it carries passengers with tickets to a city in a foreign country. To be considered engaged in foreign trade the airplane itself must travel to a foreign destination. As such, when aviation fuel is used in an aircraft that flies between the United States and a foreign country with intermediate stops in the United States, the aviation fuel is used in an aircraft actually engaged in foreign trade.

In example (a), the aircraft was flying a direct international flight from city #1 in the United States to city #4 in a foreign country. Thus, the aircraft was actually engaged in foreign trade on the domestic segments from city #1 to city #2 and city #2 to city #3.

In example (b), the aircraft was flying a direct international flight from city #5 in a foreign country to city #8 in the United States. Thus, the aircraft was actually engaged in foreign trade on the domestic segments from city #6 to city #7 and from city #7 to city #8.

Issue (2):

The taxpayer's claims on Forms 720 and Forms 8849 raise procedural issues. Section 6427(i)(4)(A), as in effect during the tax periods at issue, provides that if, at the close of any of the first three quarters of a person's taxable year, at least \$750 is payable under § 6427(l) to such person with respect to fuel used during such quarter or any prior quarter during the taxable year, a claim may be filed under § 6427(l) with respect to that fuel. Section 6427(i)(4)(B) provides that no claim filed under § 6427(i)(4) shall be allowed unless filed during the first quarter following the last quarter included in the claim.

A. 4th Quarter Claims on Forms 720

The taxpayer made claims on Forms 720 for tax periods 9412 and 9512. A claim is permitted for 1st, 2nd, and 3rd quarters of the taxable year under § 6427(i)(4)(A). The taxpayer is a calendar year taxpayer. Tax periods 9412 and 9512 are the 4th quarter of the taxpayer's taxable year.

Therefore, the claims on Forms 720 for tax periods 9412 and 9512 were not allowable. The IRS erroneously credited the taxpayer the amounts claimed in the 4th quarter under § 6427 for the nontaxable use of aviation fuel.

B. Claims on Forms 8849

The taxpayer filed Forms 8849 for tax periods 9403, 9406, 9409, 9412, 9503, 9506, and 9509 on January 22, 1997. The taxpayer would need to have filed the claim for tax periods 9403, 9406, and 9409 by December 31, 1994, at the latest. The claim for tax periods 9503, 9506, and 9509 would need to have been filed by December 31, 1995, at the latest. The taxpayer's claims were not timely filed under § 6427(i)(4)(B).

The taxpayer filed a claim on Form 8849 for tax period 9412. A 4th quarter claim was not allowable.

Therefore, the claims on Forms 8849 for tax periods 9403, 9406, 9409, 9412, 9503, 9506, and 9509 were not allowable. The IRS erroneously refunded to the taxpayer the amounts claimed on Forms 8849 under § 6427 for the nontaxable use of aviation fuel.

Further, only one quarterly claim is permitted for aviation fuel used in a quarter. Quarterly claims for tax periods 9403-9509 were made previously by the taxpayer on its Forms 720. As such, even if the claims had been timely, the claims were not allowable because they were second claims.

Issue (3):

As described in Issue (1), aviation fuel used as supplies for aircraft actually engaged in foreign trade is used in a nontaxable use.

Therefore, the taxpayer is not liable for the tax imposed by § 4091 on the untaxed aviation fuel it used in aircraft flying from a city in the United States to another city in the United States as a segment of a direct international flight between a city in the United States and a city in a foreign country.

CAVEAT:

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