IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CIVIL ACTION NO. 16-cv-02921

PLAINTIFF'S OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I AND PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I

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I. INTRODUCTION

Exxon Mobil Corporation's ("ExxonMobil") motion for partial summary judgment (ECF No. 58) seeks confirmation that it can deduct as cost of goods sold ("COGS") the section 4081 Fuel Excise Tax that its subsidiary Exxon Mobil Oil Corporation ("EMOC") paid with the section 6426(b) Alcohol Credits it received in 2008 and 2009.[1] The government has cross-moved for partial summary judgment (ECF No. 67) asserting that ExxonMobil "*never paid*" and "never incurred" the amounts at issue. Def's Mem. in Supp. of Def's Cross-Mot. for Partial Summ. J.; Resp. to Pl.'s Mot. for Partial Summ. J. 2, Mar. 1, 2018, ECF No. 68 ("Gov't Mem.") (emphasis in original). There is no question of fact. The only issue is whether ExxonMobil's use of the Alcohol Credit as a "credit against" its Fuel Excise Tax is a payment in satisfaction of that tax.

ExxonMobil's position is simple: the Alcohol Credit is independent from the Fuel Excise Tax, and ExxonMobil can use the Alcohol Credit to pay its Fuel Excise Tax just like it could use cash to do so. Because it paid its Fuel Excise Tax with Alcohol Credits, ExxonMobil is entitled to a COGS deduction for those payments in computing its federal income tax. In its opening memorandum ExxonMobil explained that the plain language of the relevant statutes, established tax principles, and the inequitable and arbitrary results that stem from the government's position show that EMOC's Alcohol Credit was a payment in satisfaction of its Fuel Excise Tax. Mem. Of Law In Supp. of Pl.'s Mot. for Partial Summ. J. on Count I, Dec. 8, 2017, ECF No. 59 ("Pl.'s Mem."). The government's view that the Alcohol Credit is not a payment of the Fuel Excise tax

[1] Unless otherwise indicated, all "section" and "§" references are to the Internal Revenue Code of 1986, 26 U.S.C. ("I.R.C." or "Code"), as amended and in effect during the income tax periods at issue (2008 and 2009). Corresponding regulations found in Title 26, Code of Federal Regulations, are cited as "Treas. Reg."

is based on a misreading of the relevant statutes and a mischaracterization of the way the federal tax system operates. For the reasons described below and in ExxonMobil's opening memorandum, the Court should grant ExxonMobil's motion for partial summary judgment and deny the government's cross-motion for partial summary judgment.

II. THE LAW DOES NOT SUPPORT THE GOVERNMENT'S AFFIRMATIVE CASE

A. Contrary to the government's sweeping generalization, a tax credit can satisfy a tax liability

As a general matter the law is clear that a tax credit can satisfy a tax liability. And yet the government asserts that "it is well settled that tax credits reduce the tax liabilities to which they apply." Gov't Mem. at 12. The government apparently believes that a credit can never constitute a payment of a tax. This assertion fails in light of the well-known circumstances in which tax credits satisfy the underlying tax, such as the credit against the income tax for wage withholding under section 31 and the credit against the income tax for tax withheld on non-U.S. persons under section 33. If these credits were not payments of the underlying tax, then employees would have their taxes "reduced" by the amount their employers had withheld from their paychecks and remitted to the Treasury on their behalf, and those whose tax returns resulted in refunds would be considered to have paid no tax at all. Of course, this is clearly not the case. These credits reduce only the balance of the tax liability that remains unpaid. Sections 31 and 33, both of which use "credit against" just like section 6426(a), permit credits that plainly are payments in satisfaction of the underlying taxes. It cannot be disputed that employees pay their income taxes in part (if not entirely) with their withholdings via the section 31 credit. Context, most importantly whether the credit is independently determined from the underlying tax, determines whether a credit is a payment or a reduction of that tax. The independently

calculated Alcohol Credit when claimed as a credit against the Fuel Excise Tax is a payment in satisfaction of that tax.

Confronted with the inescapable conclusion that the credits under sections 31 and 33 are payments of the underlying tax, the government asserts that this is the case only because of a "special exception" under section 6211. Gov't Mem. at 15. The government is mistaken. Section 6211 is not a "special exception" to some general rule that all credits reduce a tax liability. Section 6211 serves a distinct role for a completely unrelated set of rules, the so-called "deficiency procedures" that determine the U.S. Tax Court's jurisdiction.[2] A deficiency is generally calculated as the amount by which the "tax imposed" exceeds the amount of tax shown on a taxpayer's return. I.R.C. § 6211(a). Section 6211(b) merely states that "*for purposes of this section*" (emphasis added), the tax imposed and the tax shown on the return both shall be determined without regard to any payments, regardless of whether those payments take the form of payments of estimated tax, credits under sections 31 or 33, or any credits under sections 6851 or 6852 (relating to termination assessments). Ignoring the italicized language, the government argues that section 6211 is the only reason that sections 31 and 33 credits are payments rather than reduction to taxes. Gov't Mem. at 15. But this argument falls apart when its logical implications are considered. For example, quarterly estimated income tax payments are also listed in section 6211(b)(1), but it would be illogical to assert that absent section 6211 (which, again, merely defines the term "deficiency") these would be reductions, rather than payments of tax. The more sensible view is that Congress wanted to spell out the complex deficiency

[2] The deficiency procedures laid out in sections 6211 through 6216 provide taxpayers certain notice rights and ability to contest IRS determinations in the U.S. Tax Court in the case of a "deficiency," as that term is defined in section 6211(a).

calculation in detail. Because different types of credits are treated differently under section 6211, it is important to clarify how credits under sections 31 and 33 fit into that calculation.[3]

Further, to the extent the government is suggesting it is meaningful that there is no similar special rule for credits against the Fuel Excise Tax, it is mistaken. The Fuel Excise Tax can never contribute to a "deficiency" under section 6211, because it is not subject to the deficiency procedures.[4] Thus, no special mention of the Fuel Excise Tax in section 6211 (or elsewhere in the deficiency procedures) would be appropriate.

The government goes on to misstate ExxonMobil's position as "all tax credits generally function as payments of tax." Gov't Mem. at 15. ExxonMobil's position is that this particular credit (the Alcohol Credit) is a payment of a tax (the Fuel Excise Tax), not that all credits are payments. Thus, the proper inquiry here is not whether all credits are a payment of tax, but whether the Alcohol Credit claimed against the Fuel Excise Tax has that effect.

For this reason, generalized statements in the government's opening memorandum about the term "credit" are not helpful, because a credit in some contexts may refer to a payment of a liability while in other contexts it may refer to a reduction of a liability. As the Supreme Court and Fifth Circuit have long recognized, the same term may have a different meaning in different statutory contexts. *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (Courts do not "construe the meaning of statutory terms in a vacuum. Rather, we interpret the words in their context and with

[3] For instance, some credits are treated as "rebates" under section 6211(b)(2) and others are treated as "negative tax" under section 6211(b)(4). But this treatment is limited to calculating a "deficiency" under section 6211(a). Because of the complexity of the calculation and the fact that different credits are treated differently under section 6211, it is meaningless to draw any implication from that statute for how credits operate outside of the provision.

[4] Section 6211(a) refers only to "tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44." The Fuel Excise Tax is imposed under section 4081, which is in chapter 32 of subtitle D of the Code.

a view to their place in the overall statutory scheme") (internal quotation omitted); *United States v. Thomas*, 877 F.3d 591, 597 (5th Cir. 2017) ("It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by context.") (internal quotation omitted). As ExxonMobil explained in its opening memorandum, the best evidence of how the Alcohol Credit operates is the language of the relevant statutes, which demonstrate that the Alcohol Credit claimed against the Fuel Excise Tax is a payment in satisfaction of that tax. *See* Pl.'s Mem. at 8-16.

The fallacy of relying on dictionary definitions in the case is also evident when many of the definitions cited in the government's opening memorandum actually favor ExxonMobil's position. The government cites *Black's Law Dictionary* for the proposition that a "tax credit" is an "amount subtracted from one's total tax liability." Gov't Mem. at 22-23 (citing *Black's Law Dictionary*). This means that the "tax liability" is fixed before subtracting the tax credit, which in turn means that the tax credit is a payment in satisfaction of that tax liability. The definition also is consistent with how the Code defines a "tax liability" for income tax purposes. Section 26(b)(1) provides that "regular tax liability" is "the tax imposed by this chapter [1, relating to the income tax] for the taxable year." Tax credits are not taken into account to determine "regular tax liability." In fact, the purpose of section 26 is to ensure that the aggregate amount of certain types of income tax credits do not exceed a taxpayer's "regular tax liability." *See* I.R.C. § 26(a)(1). Likewise, the practitioner's guide that the government cites is equally unhelpful to its position. According to that publication, "a credit is any amount that is allowable as a subtraction from tax liability for the purpose of computing tax due." Gov't Mem. at 14 (citing J. E. Maule, *Tax Credits: Concepts and Calculation*, Tax Mgmt. Portfolios No. 506 at 15 (2016)). Again, this

means that the liability is fixed, and the credit subtracts from that fixed liability to arrive at the remaining amount due.[5]

B. EMOC paid its Fuel Excise Tax and that payment is included in COGS

As noted above, the crux of this dispute is whether EMOC paid the Fuel Excise Tax that it seeks to deduct as COGS.[6] The government correctly states that taxpayers like ExxonMobil that sell inventory in their businesses are allowed to recover their costs by deducting COGS. Gov't Mem. at 9. It also correctly states that the Fuel Excise Tax may be included in COGS. *Id.* But the government then errs by stating that when EMOC included Fuel Excise Taxes in its COGS, it "was required to reduce those excise taxes by the [Alcohol] Credits that it received." *Id.* at 20.

Rather than a reduction in Fuel Excise Tax liability, the Alcohol Credit is a government subsidy that a taxpayer can use to pay its independently calculated Fuel Excise Tax. The law is clear that when two independent obligations offset each other (A owes B $10 but B owes A $7, so A pays B $3), the offsetting of those two obligations constitutes two payments (A paid $10 and B paid $7) and not a reduction of the greater obligation. Treas. Reg. § 1.461-4(g)(1)(ii)(A) (a payment includes the netting of offsetting accounts); *Bailey v. Comm'r*, 103 F.2d 448, 450 (5th Cir. 1939) (set off representing the netting of offsetting obligations was treated for tax

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[5] The government's references to the Gertzman treatise are also unhelpful. The government cites that treatise for the proposition that "Taxes are not deductible unless the taxpayer can prove that it incurred and paid the claimed amount of tax to the governmental authority that imposed the tax." Gov't Mem. at 9-10 *citing* Stephen Gertzman, Federal Tax Accounting ¶ 3.04[5][c] (2017). ExxonMobil certainly agrees, but that section relates to the when the taxpayer can take a deduction, not its substantive entitlement to a deduction in the first instance. In any event, as discussed in ExxonMobil's opening memorandum and in greater detail below, Congress imposed the Fuel Excise Tax on EMOC at the rates specified in section 4081(a), EMOC paid the Fuel Excise Tax in part with its Alcohol Credits, and EMOC is entitled to a COGS deduction for that payment.

[6] A COGS deduction is a subtraction from gross receipts in determining gross income. I.R.C. § 61(a)(3); Treas. Reg. § 1.61-3(a).

purposes as two separate payments of the "gross" amounts). *See also*, Stephen Gertzman, Federal Tax Accounting ¶ 3.04[3] (2017) ("For purposes of claiming a deduction, payment may be made in cash, property, or services or by offset of an amount due the debtor from the creditor."). Each payment must be given its proper tax treatment. ExxonMobil discussed this fundamental principle of tax law in detail in its opening memorandum (Pl.'s Mem. at 16-18), and the government did not directly respond to its arguments. In this context, those principles require that an independently calculated tax credit be respected as a separate payment from the government to the taxpayer. The tax consequences of that payment, whatever they happen to be, are distinct from the tax consequences resulting from the use of that credit to satisfy the separate tax obligation back to the government. *See Consolidated Edison Co. of New York v. United States*, 10 F.3d 68 (2d Cir. 1993) (analyzing the income tax consequences of the credit separately from the payment of the underlying tax).

ExxonMobil agrees with the government's statement that taxes are not deductible unless paid. Gov't Mem. at 9-10. The government is incorrect, however, in asserting that ExxonMobil did not bear the economic burden of the Fuel Excise Tax. EMOC earned the Alcohol Credits through its blending activities and used those credits just like it would use cash to pay its Fuel Excise Tax. In any event, whether ExxonMobil or EMOC "bore the economic burden" is irrelevant to the question of whether a deduction is allowable. *Id*. at 20. The government cites no authority for its broad proposition that it is "well settled that taxpayers may deduct from gross income, or include in their cost of goods sold, only their actual expenses for which they bore the economic burden." *Id*. If a taxpayer receives some reimbursement that results in another party

effectively bearing the economic burden, the law is clear that the tax consequences of that reimbursement are addressed separately.[7]

The parties agree that the Alcohol Credit is not an item of gross income, so the only question is the amount of EMOC's COGS deduction for the Fuel Excise Tax. Because the Alcohol Credit is independent of the Fuel Excise Tax, it cannot "reduce" that tax. EMOC engaged in the activity that entitled it to the subsidy provided by Congress for blending ethanol with gasoline (the Alcohol Credit), and section 6426(b) fixes the amount of that subsidy based on a rate multiplied by the number of gallons of ethanol blended with a taxable fuel. Separately, Congress also imposed an excise tax (the Fuel Excise Tax) on the removal of taxable fuel from a terminal. Section 4081(a) fixes that excise tax based on a tax rate multiplied by the number of gallons of taxable fuel removed (among other activities).[8] EMOC's activities subjected it to the Fuel Excise Tax, and it paid a portion of that Fuel Excise Tax with the Alcohol Credit it earned through its separate blending activities. Again, a payment includes the netting of offsetting obligations. Because EMOC's Fuel Excise Tax exceeded its Alcohol Credit for each quarter, EMOC satisfied the balance with a combination of cash, carried forward overpayments from previous quarters, and credits for estimated tax payments. Like the Alcohol Credit, each of these methods was a payment of EMOC's Fuel Excise Tax.

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[7] Such a reimbursement may be income or it may be something else, such as a tax-free government subsidy or a gift. *Cf. Old Colony Tr. Co. v. Comm'r*, 279 U.S. 716 (1929) (discussed below). However, where another party bears the economic burden for the taxpayer, the federal income tax consequences for the taxpayer are as though it received a separate payment from that other party.

[8] The government suggests that EMOC's Fuel Excise Tax determined under section 4081(a) and shown on Form 720 was "tentative" (Gov't Mem. at 13), but provides no explanation as to why this would be the case. There is nothing "tentative" about the liability fixed by section 4081(a); as the Conference Report says, "the full rate of tax for taxable fuels is imposed . . ." H.R. Rep. 108-755, at 307 (2004) (Conf. Rep.). The law is clear that the blenders of ethanol-based fuels must pay the Fuel Excise Tax imposed under section 4081(a).

The parties employ dueling analogies to explain this issue. ExxonMobil explained that its use of the Alcohol Credit is just like the use of a gift card that was received in a tax-free manner. Each is a payment in full or partial satisfaction of an expense with any remaining balance paid through other means. *See* Pl.'s Mem. at 7-8. The government claims that the gift card analogy is inapposite simply because EMOC did not use the Alcohol Credit to "actually pa[y]" the Fuel Excise Tax as the customer does with a gift card. Gov't Mem. at 20. The government does not explain its position further. As explained above, ExxonMobil did pay its Fuel Excise Tax with the Alcohol Credit. The Alcohol Credit, a gift card, and cash are each just a different form of payment.

After failing to explain why the gift card analogy does not apply, the government suggests that a better analogy is a mail-in rebate. Gov't Mem. at 20-21. Of course, the government prefers this analogy because, if correct, it would allow the case to be analyzed under the framework of *Affiliated Foods, Inc. v. Commissioner*, 128 T.C. 62 (2007) and Rev. Rul. 84-41, 1984-1 C.B. 130, both of which were decided in the rebate context. But the rebate analogy fails completely. A rebate is linked to and limited by the amount originally paid, and can never exceed it. The Alcohol Credit, on the other hand, is calculated independently of the Fuel Excise Tax, can exceed it without limitation (resulting in a non-taxable cash payment or refundable income tax credit), and can be claimed by taxpayers with no Fuel Excise Tax liability.[9] The

[9] The government wrongly claims that it is "*impossible* for a blender of alcohol into gasoline to have *zero* excise-tax liability." Gov't Mem. at 45 (emphasis in original). If a blender mixes ethanol with gasoline and then sells the resulting mixture to a registered taxpayer in an above-the-rack sale (*i.e.*, the mixture does not leave the bulk terminal transfer system), it will incur no Fuel Excise Tax. *Cf.* Treas. Reg. § 48.4081-3(f) (intra-system sales only subject to the Fuel Excise Tax if the purchaser is unregistered). That interim purchaser will later pay Fuel Excise Tax on the mixture when it removes the mixture from the terminal.

government's rebate analogy simply does not apply to the Alcohol Credit, and neither *Affiliated Foods* nor Rev. Rul. 84-41 applies.[10]

C. ExxonMobil is not seeking a double benefit

The government framed its argument by claiming that allowing EMOC to deduct the Fuel Excise Tax it paid with the Alcohol Credit would be an impermissible "double benefit." Gov't Mem. at 1. In the government's view, ExxonMobil "contends that it is entitled not only to the substantial *excise-tax* benefit from the [Alcohol] Credits, but also to an *income-tax* benefit resulting from the addition of the unpaid sum to its cost of goods sold." *Id.* at 2 (emphasis in original). The government has improperly characterized the ability to deduct the cost of producing a product (fuel) for purposes of the income tax as a "benefit." The income tax impact for the payment of a deductible expense is not an extra advantage but rather is simply the ordinary and expected result of the payment of a deductible cost, which is a "benefit" Congress has always allowed to taxpayers. There is no indication that Congress sought to take away or alter this result with respect to the Alcohol Credit.

Accordingly, portraying ExxonMobil as seeking a double benefit obfuscates the government's attempt to claw back part of the subsidy, but only for blenders that used the subsidy to pay their Fuel Excise Tax. If a blender entitled to a $100 Alcohol Credit received it as a $100 tax-free payment and then used that cash to pay a deductible expense, no one would argue

[10] Instead of discussing the tax consequences for the purchase of the mixer (which resulted in the rebate), the better parallel to the question in this case would be the tax consequences once the customer in the government's example used the $40 Visa pre-paid card it received as a mail-in rebate. *See* Gov't Mem. at 21. If the recipient of that $40 Visa pre-paid card used the card to purchase office supplies, it would be entitled to a $40 deduction. The deduction would not be disallowed (or reduced) because the taxpayer used a Visa pre-paid card to make the purchase. The subsidy provided by section 6426(b) is the equivalent to the Visa pre-paid card. It is not taxable upon receipt and can be used to satisfy deductible expenses.

that the blender's deduction should be reduced. The result should be the same if the blender instead used that Alcohol Credit to pay its Fuel Excise Tax. Under the government's theory, however, the reduction of its COGS deduction means that each $100 of Alcohol Credit used against the Fuel Excise Tax is worth only $65.[11] Rather than causing a "double" benefit, allowing a COGS deduction for Fuel Excise Tax paid with the Alcohol Credit ensures that the subsidy is not subject to income tax and ensures parity with a blender who received a $100 tax-free cash payment. Every blender should receive the same, single tax-free benefit Congress provided as the subsidy for ethanol blending, no matter how it is used. Otherwise, entities like EMOC that engaged in both blending and fuel removal activities would be at an unintended disadvantage compared to those who blend with little or no Fuel Excise Tax.

The government's position is even weak on constitutional grounds. The Sixteenth Amendment allows Congress "to lay and collect taxes on incomes," but "income" derived from the sale of inventory is limited to only the gain recognized from the sale of those products (that is, the amount received minus the costs of producing the product), not the total amount received. U.S. Const. amend. XVI. *See* section 61(a)(3) (gross income includes *gains* derived from dealings in property); Treas. Reg. § 1.61-3(a) (In a manufacturing business, "'gross income' means the total sales, less the cost of goods sold . . . ."). In describing the alleged second "benefit" that ExxonMobil seeks with respect to EMOC's COGS, the government is essentially seeking to tax ExxonMobil on an amount that is greater than the gain it actually realized from selling fuel. This is inconsistent with section 61 and the Constitution.[12]

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[11] Based on the 35 percent corporate income tax rate applicable during the years at issue, reducing the COGS deduction by $100 results in paying an addition $35 of income tax, making the value of the $100 Alcohol Credit only $65.

[12] *Max Sobel Wholesale Liquors v. Comm'r*, 630 F.2d 670, 671 (9th Cir. 1980) ("'Gross income,' I.R.C. § 61, is determined by subtracting all 'above the line' items from gross receipts. *See* Reg. § 1.61-3(a).

D. ExxonMobil is not seeking a "windfall"

The government describes EMOC's COGS deduction of its Fuel Excise Tax paid with the Alcohol Credit as an "enormous income tax benefit" and a "windfall." Gov't Mem. at 1, 48. While ExxonMobil is seeking a $337 million income tax refund, ExxonMobil paid (through EMOC) over $6 *billion* in Fuel Excise Tax[13] and paid nearly $2 *billion* in U.S. federal income tax over the same period. Thus, seen in context, ExxonMobil is not pursuing a windfall. No matter how this issue is decided, ExxonMobil still will have contributed significantly to the fisc in 2008 and 2009. More importantly, the amount that ExxonMobil is seeking to recover is not relevant to the proper tax treatment. What is relevant is that ExxonMobil paid its Fuel Excise Tax with Alcohol Credits, and therefore is entitled to a cost of goods sold deduction, for which it now seeks a refund.

E. The "plain language" of the relevant statutes shows that the Alcohol Credit claimed under section 6426(a) is a payment mechanism

The dispute is ultimately an issue of statutory construction. The government argues that sections 4081, 6426, 6427, and 9503, read together, "make clear that the [Alcohol] Credit

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The very definition of 'gross income' has been thought to mandate the exclusion of certain amounts (*e.g.*, the cost of goods sold) from that figure, even in the absence of specific statutory authority for such exclusion."); *Pittsburgh Milk Co. v. Comm'r*, 26 T.C. 707, 715 (1956) ("Under both the Sixteenth Amendment and the Internal Revenue Code, the tax is imposed only on 'income,' and not upon every conceivable type of receipt. . . . Gains are taxed . . . but no more than the actual gross income can be subjected to income tax, in any event.") (internal citations omitted).

[13] Specifically, EMOC paid $3,106,273,065 of Fuel Excise Tax in 2008 and $2,899,496,300 of Fuel Excise Tax in 2009 using a combination of cash, estimated tax payments, carried-forward overpayments, and Alcohol Credits. The government calculated totals of $3,106,273,216 and $2,899,496,315 for 2008 and 2009, respectively. *See* Gov't Mem. at 11 n.7 & ex. A. The government's figures are wrong: when it attempted to calculate the section 4081 tax from EMOC's Forms 720 by calculating the difference between the "total tax" and the non-section 4081 taxes shown on the forms, it did not did not subtract out the Leaking Underground Storage Tank Tax on Kerosene Used in Aviation for Nontaxable Uses imposed under section 4041(d)(2) (Form 720, Line 111), which is not a section 4081 tax. EMOC paid $151 of this tax in 2008 and $15 of it in 2009, which explains the difference between the government's figures and the correct ones.

reduces a taxpayer's fuel excise-tax liability under § 4081, and, consequently, reduces the excise-tax expense that the taxpayer is permitted to include in its cost of goods sold." Gov't Mem. at 21. As discussed below, the government incorrectly construes each of these provisions and how they work together.

1. The provisions providing the Alcohol Credit – Sections 6426(a) and 6427(e)

The government states that "if Exxon[Mobil] were correct that one-hundred percent of a taxpayer's [Alcohol] Credit always constituted a tax-free payment (rather than a credit against fuel excise taxes), then § 6426(a) and § 6427(e)(3) would also be superfluous. By itself, § 6426(e)(1) is all that would be necessary to establish an obligation for the government to pay a per-gallon sum to a blender of alcohol and gasoline."[14] Gov't Mem. at 23. Apparently, the government believes that the presence of a cash payment mechanism means that any provision allowing the Alcohol Credit to be claimed as a credit against one or more specific taxes would be unnecessary. But the government's reasoning is flawed. If the law only provided for a cash payment, then taxpayers would not be able to claim the Alcohol Credit quarterly against their Fuel Excise Tax, which allows them to receive the benefit more quickly than waiting for a government check. Other provisions of the Code also allow taxpayers the option between receiving a cash payment and claiming a credit. *See, e.g.*, I.R.C. § 6415(b) (a carrier entitled to a cash refund of collected transportation excise tax may instead claim a credit on a subsequent return). The evident purpose of such provisions is to provide a payment mechanism that allows

[14] ExxonMobil assumes the government intended to reference to "§ 6427(e)(1)" rather than "§ 6426(e)(1)."

taxpayers to receive the government subsidy quickly by offsetting a liability owed to the government.[15]

The government also asserts that if ExxonMobil were correct, the language in section 6426(a) that allows the taxpayer to claim the Alcohol Credit "against the tax imposed by section 4081" would be superfluous because if the Alcohol Credit "were a tax-free payment that had no effect on the taxpayer's fuel excise-tax liability, the Code's reference to 'the tax imposed under section 4081' would be superfluous, contrary to general rules of statutory construction." Gov't Mem. at 23. The government's logic is flawed. The phrase "against the tax imposed by section 4081" is necessary so that when the blending subsidy is used to satisfy a tax obligation, taxpayers know against which tax obligation the credit will be used. *Id*. A separate provision, section 34(a)(3), allows the Alcohol Credit to be claimed against a different tax, the income tax. These provisions and section 6427(e) provide different payment mechanisms for the same Alcohol Credit (credits against the Fuel Excise Tax or income tax, or cash). Because each of these provisions impacts how and when blenders receive the subsidy, they are not superfluous. In any event, the language "against the tax imposed by section 4081" supports ExxonMobil's position because it shows that the Fuel Excise Tax is "imposed" by section 4081 and only section 4081. There is nothing in section 4081 that provides that the amount of tax imposed by that section is reduced by credits made available in other sections of the Code. Rather, section 4081 fixes the Fuel Excise Tax obligation and that is the amount that is included in COGS.

As a general matter, the government is correct when it points out that sections 6426(a) (allowing taxpayers to claim the Alcohol Credit against their Fuel Excise Tax) and 6427(e) (allowing taxpayers to receive a cash payment of the Alcohol Credit) are "complementary."

[15] As discussed below, the legislative history indicates that this is precisely the result Congress intended.

Gov't Mem. at 21. That, of course, has been the heart of ExxonMobil's argument. If a taxpayer receives a $100 tax-free payment under section 6427(e), it would be entitled to a $100 COGS deduction if it used the cash for a qualifying expenditure. It should also receive a $100 COGS deduction if it pays its Fuel Excise Tax with a $100 Alcohol Credit claimed against that tax.

The government quibbles with ExxonMobil's position that the language of section 6427(e)(3) implies that blenders may choose to claim the Alcohol Credit as a credit against the Fuel Excise Tax or as a cash payment.[16] As noted in ExxonMobil's opening memorandum, if Congress had required blenders to first claim the Alcohol Credit against their Fuel Excise Tax to the extent of that tax, it would have stated that a section 6427(e) payment is only permitted to the extent the Alcohol Credit was not "allowable" under section 6426(a). *See* Pl.'s Mem. at 10. Instead, section 6427(e)(3) states that no cash payment is available for the Alcohol Credit under section 6427(e)(1) "with respect to which an amount is *allowed* as a credit under section 6426." (emphasis added). ExxonMobil reiterates here that its position does not depend on blenders having a "choice" of how to receive the Alcohol Credit. Rather, the optionality is just another

[16] The government, however, does not address any of the cases ExxonMobil cited on the distinction between "allowable" and "allowed" in section 6427(e)(3). Instead, it states that "the phrase 'allowed as a credit' is a common phrase that defines tax credits in the Code generally, and the [Alcohol] Credit includes that phrase specifically. As a result, it was proper for § 6427(e)(3) to include the word 'allowed,' and no inference should be taken from the absence of the word 'allowable.'" Gov't Mem. at 21-22. That the phrase is "common" is irrelevant to what the phrase actually means. The issue is not how common the phrase is but whether "allowed" means the credit must actually be claimed. Drawing "no inference" is contrary to a significant body of precedential authority, which ExxonMobil cited in its opening memorandum. The government also states that "moreover, the phrase 'shall be allowed as a credit' in § 6426(a) is mandatory language, which confirms that the tax credit under § 6426(a) must be applied first, before a taxpayer may receive a payment under § 6427(e)(1)." *Id* at 22. This is preposterous: it is never "mandatory" for a taxpayer to take a credit to which it is entitled, it always can leave the credit off the return. Finally, the government's citation of a Joint Committee on Taxation publication is unavailing, as such post-enactment writings are poor indicators of Congress' intent. *United States v. Woods*, 134 S. Ct. 557, 567 (2013).

indication that Congress wanted to equalize the income tax consequences between the different methods of claiming the Alcohol Credit.[17]

2. The provision directing the Fuel Excise Tax to the Highway Trust Fund – Section 9503(b)(1)

In its opening memorandum ExxonMobil explained how section 9503(b)(1) reflected that the Fuel Excise Tax specified under section 4081 was imposed on blenders, without reduction for any Alcohol Credits claimed against the Fuel Excise Tax under section 4081. Pl.'s Mem. at 19. This is readily apparent from section 9503(b), which states that "taxes received under sections 4041 and 4081 shall be determined without reduction for credits under section 6426 . . . ." The government attempts to avoid this clear language by claiming that the "taxes received" language applies only for purposes of section 9503(b)(1). Gov't Mem. at 25. Of course, the language applies only to section 9503(b)(1), because that is the only statute that determines which excise taxes that the government collects are deposited into the Highway Trust Fund. Limiting the application to section 9503(b)(1) does not mean that the language tells us nothing about the way the rest of the provisions enacted or amended by the AJCA operate, however. Integrated statutory provisions must be read together to produce a "harmonious whole." *Doe v. KPMG LLP*, 398 F.3d 686, 688 (5th Cir. 2005). If Congress believed that some lesser amount of Fuel Excise Tax were being received by the Highway Trust Fund–and thus being paid by blenders–it would have referred to "taxes received" by the Highway Trust Fund being *increased*

[17] The government also critiques ExxonMobil's reference to the heading of section 6427(e)(3), "Coordination with other repayment provisions." *See* Gov't Mem. at 24. Of course, the heading of section 6427(e)(3) is not the linchpin of ExxonMobil's argument. ExxonMobil points to the heading simply to show that it is consistent with its view of the statutory text. In any event, Congress knew what it was doing when it placed the rule that coordinates section 6426(a) and section 6427(e) under this heading, because the heading properly reflects that section 6426(a) is a payment mechanism.

by credits under section 6426. It did not, because section 4081 imposes the Fuel Excise Tax on blenders without reduction for the Alcohol Credit.

3. The provision allowing for an unrelated credit against the Fuel Excise Tax – Section 4081(b)(2)

The government argues that its interpretation of section 6426 "is further supported by the use of the phrase 'credit against the tax imposed' in § 4081(b)." Gov't Mem. at 26. This is incorrect, as shown by the way section 4081(a) and (b) operate together. As discussed above, section 4081(a) imposes the same per gallon excise tax rate on gasoline whether the gasoline contains ethanol or not. Section 4081(b) imposes an *additional* tax at the same rate specified in section 4081(a) on gasoline "removed or sold by the blender thereof." To ameliorate what would otherwise be double taxation on the same fuel, section 4081(b)(2) provides a credit against the tax imposed under section 4081(b)(1) if the "the blender establishes the amount of tax paid with respect to such fuel by reason of [section 4081(a)]." In the government's view, this credit is a reduction, not a payment, of the tax imposed under section 4081(a), and because sections 4081(b)(2) and the Alcohol Credit provision (section 6426(a)) both use the "credit against" language, the Alcohol Credit likewise is a reduction, not a payment. Gov't Mem. at 26.

ExxonMobil readily concedes that the language is the same and that the section 4081(b)(2) "credit" is indeed a reduction of the excise tax imposed under section 4081(b)(1) (the excise tax imposed on removal or subsequent sale of taxable fuel by a blender). But, as discussed above, credits can operate differently in different contexts. In some contexts, "credit against" clearly refers to a payment in satisfaction. *See* sections 31 and 33, discussed above. In section 4081(b), it is clear that Congress is using the phrase to mean a reduction. As the government notes, the purpose of section 4081(b)(2) is to "avoid double taxation on the same fuel." Gov't Mem. at 26. Hence, that provision allows the taxpayer a credit for any excise tax

previously imposed on the same fuel under section 4081(a). In a typical scenario, the first taxpayer will remove fuel from a terminal (incurring the Fuel Excise Tax imposed under section 4081(a)) and sell it to a second taxpayer who adds ethanol and then sells the blended product. Since the Fuel Excise Tax was imposed on the first taxpayer, the second taxpayer should not also have to pay it (except to the extent of the added material), and section 4081(b)(2) ensures that the second taxpayer does not. *See* Treas. Reg. § 48.4081-3(g)(1).

Again, context is critical here. The goal of preventing double taxation is very different from the goal of providing a subsidy for ethanol-blended fuels. In the case of the section 4081(b)(2), the credit is effectively an exemption from tax that prevents the same fuel from being taxed twice, not an independently calculated subsidy. Significantly, a section 4081(b)(2) credit is never refundable. It is also significant that, unlike the Alcohol Credit claimed under section 6426(a), the section 4081(b)(2) credit reduces dollar for dollar the Fuel Excise Tax paid into the Highway Trust Fund compared to what would be owed in absence of the provision. There is no "special rule" that accomplishes this: it simply occurs automatically as a result of a reduced amount of section 4081 tax being imposed. Accordingly, the Alcohol Credit claimed under section 6426(a) is distinguishable from the "credit" under section 4081(b)(2), notwithstanding that "credit against" appears in both statutes.

F. The government's "design of the statute" argument is unconvincing

The government asserts that "interpreting § 6426's excise-tax credit as a reduction of Exxon[Mobil]'s deductible excise-tax expense is consistent with the design of the statute." Gov't Mem. at 27. But the government's argument in this respect fails to recognize a key change that the AJCA made: in addition to providing a subsidy through a credit against the Fuel Excise Tax (which replicated the pre-AJCA reduced rates), Congress also made the subsidy available as a tax-free cash payment under section 6427(e) or a tax-free refundable income credit

under section 34(a)(3). As discussed below, this failure leads the government to misconstrue both (1) the AJCA's other provision and (2) what the legislative history says about these changes.

1. The government's attempt to "integrate" the pre-and post-AJCA regimes overlooks a critical element

The government discusses in detail the "integration" of the income tax consequences and the excise tax consequences of the pre-AJCA regime. *See* Gov't Mem. at 27-29. In the government's view, a blender with excise tax liability post-AJCA must reduce its excise tax deduction to match the income tax consequences of the pre-AJCA reduced excise tax rates. In making this argument, the government fails to address other meaningful aspects of the changes Congress made in the AJCA. Specifically, the government never accounts for how its "integration" theory can be reconciled with the AJCA allowing for the first time for the blending incentive to be available as a tax-free cash payment or tax-free refundable income tax credit. *See* sections 34(a)(3) and 6427(e). The ability of blenders to receive tax-free cash payments or claim refundable income tax credits clearly put them in a better position after the AJCA, and any integration of the income tax and excise tax consequences that existed in the pre-AJCA regime is therefore impossible. The government has ignored these features that pull the rug out from under its argument that the income tax consequences of the AJCA regime should be "equivalent" to the income tax consequences of the pre-AJCA regime.

2. The government misreads the legislative history

The Court should decide this case based on the language Congress used in the AJCA and the application of long-standing federal tax principles to that language. This, of course, was the central thrust of ExxonMobil's opening memorandum. To the extent there is a need to look to legislative history, that legislative history supports ExxonMobil's position, not the government's.

In support of its position, the government relies heavily on a single sentence in the Conference Report that states that payments of the Alcohol Credit are "intended to provide an equivalent benefit to replace the partial exemption for fuels to be blended with alcohol and alcohol fuels being repealed by the provision." Gov't Mem. at 30-31 citing H.R. Rep. No. 108-755, at 307-08 (2004) (Conf. Rep.). The government neglects to quote the entire paragraph as ExxonMobil did in its opening memorandum (*see* Pl.'s Mem. at 14), and thus takes the phrase "equivalent benefit" completely out of context. Significantly, the Conference Report clearly refers *only* to cash payments of the Alcohol Credit made under section 6427(e), not Alcohol Credits claimed against the Fuel Excise Tax under section 6426(a). *See* H.R. Rep. No 108-755, at 308 (2004) (Conf. Rep.); Pl.'s Mem. at 14. This is clear from the sentence that immediately precedes the one on which the government relies, which states, "[t]o the extent the alcohol fuel mixture credit exceeds any section 4081 liability of a person, the Secretary is to pay such person an amount equal to the alcohol fuel mixture credit with respect to such mixture." H.R. Rep. No. 108-755, at 308 (2004) (Conf. Rep.). As discussed in ExxonMobil's opening memorandum, it would be impossible for "equivalent benefit" to refer to the income tax consequences of claiming the Alcohol Credit because (1) the income tax consequences under the new system were clearly different given that the government agrees that a section 6427(e) cash payment and a section 34(a)(3) refundable income tax credit allow the blending subsidy to be received tax-free and (2) the AJCA expanded the blending subsidy to a new class of taxpayers, namely those without income tax or excise tax liability, who could have not received any benefit from the blending subsidy under the pre-AJCA system, regardless of how much ethanol they blended. *See* Pl.'s Mem. at 14-15.

Critically, the sentences following the language the government quotes show that the "equivalent benefit" refers to when the new blending subsidy would be received, not whether it would be taxable.[18] These sentences describe a time-frame for when payments of the Alcohol Credit must be made, and explain that interest must be paid if the payments are not timely. The full passage ExxonMobil quoted in its opening memorandum (*see* Pl.'s Mem. at 14) plainly shows that "equivalent benefit" refers to when payments of the Alcohol Credit under section 6427(e) are to be made, rather than the income tax treatment of those payments.

The government also states that "[i]f Exxon[Mobil]'s position were correct, the 'Reasons for Change' in the legislative history would have stated affirmatively the intent of Congress to provide an extra tax benefit to incentivize the production of alcohol fuel blends." Gov't Mem. at 30. This statement ignores that the "Reasons for Change" section of the House Way & Means Committee Report, which clearly states that Committee "believe[d] that alcohol-blended fuels should be taxed at rates equal to gasoline or diesel." H.R. Rep. No. 108-548, pt. 1, at 141 (2004). Thus, in the AJCA, Congress required blenders of ethanol-based fuels to pay more Fuel Excise Tax than they previously had because the vehicles that used those fuels "contribute[d] to the wear and tear of the same highway system used by gasoline or diesel vehicles." *Id*. Congress was unequivocal that it wanted to increase the Fuel Excise Tax that blenders paid, and thereby increase the funding of the Highway Trust Fund.[19] Of course, this is also evident from the

[18] "If claims for payment are not paid within 45 days, the claim is to be paid with interest. The provision also provides that in the case of an electronic claim, if such claim is not paid within 20 days, the claim is to be paid with interest." H.R. Rep. No. 108-755, at 308 (2004) (Conf. Rep.).

[19] As a result of the AJCA, the Fuel Excise Tax on gasoline paid by taxpayers and collected by the government increased from $18.2 billion in 2004 to $23.7 billion in 2005. *See* IRS, Federal Excise Taxes or Fees Reported to or Collected by the Internal Revenue Service, Alcohol and Tobacco Tax and Trade Bureau, and Customs Service, by Type of Excise Tax, Fiscal Years 1999-2016, https://www.irs.gov/pub/irs-soi/histab20.xls.

removal of former section 4081(c) (which had provided reduced rates of Fuel Excise Tax for ethanol-blended fuel). But nothing in the legislative history suggests that Congress intended to deny such blenders the long-standing "tax benefit" of deducting that Fuel Excise Tax paid when computing their income tax.

Unsurprisingly, both the House and Conference Reports provide that when a blender claims the Alcohol Credit as a "credit against" its Fuel Excise Tax under section 6426(a), the Alcohol Credit is treated as a "payment of the taxpayer's [Fuel Excise] tax liability at the time of the taxable event." *Id.* at 142; H.R. Rep. No. 108-755, at 304 (2004) (Conf. Rep.). The government strangely asserts that *this* language–rather than the "equivalent benefit" language discussed above–is limited to timing. Gov't Mem. at 32-33. To respond to this argument, one must simply look at the entire passage, and see that it has nothing to do with when the subsidy is received:

> In lieu of the reduced excise tax rates, the provision provides that the alcohol mixture credit provided under section 40 may be applied against section 4081 excise tax liability (hereinafter referred to as 'the alcohol fuel mixture credit'). The credit is treated as a payment of the taxpayer's tax liability received at the time of the taxable event. The alcohol fuel mixture credit is 52 cents for each gallon of alcohol used by a person in producing an alcohol fuel mixture for sale or use in a trade or business of the taxpayer. The credit declines to 51 cents per gallon after calendar year 2004. For mixtures not containing ethanol (renewable source methanol), the credit is 60 cents per gallon.

H.R. Rep. No. 108-755, at 304 (2004) (Conf. Rep.).[20]

[20] The government implies the "treated as a payment" language should be given less weight because, in addition to appearing in the House Report, it "appears in the portion of the Conference Report that discusses the House Bill, but not in the portion of the Conference Report that discusses the Conference Agreement." Gov't Mem. at 33 n.16 (emphasis in original). The government's critique fails to recognize that the Conference Report also says that the Senate amendment, which the enacted legislation generally followed, was "similar to the House bill." H.R. Rep. No. 108-755 at 305 (2004) (Conf. Rep.).

The government refers to a revenue estimate from the Joint Committee on Taxation ("JCT Revenue Estimate") as evidence Congress did not intend to impose the same rates of Fuel Excise Tax on ethanol-blended fuel as on other types of fuel, notwithstanding the plain language of section 4081and the language of the Conference Report. Gov't Mem. at 32. As ExxonMobil explained in its opening memorandum, revenue estimates are notoriously poor indicators of legislative intent. *See* Pl.'s Mem. at 26. In any event, the JCT Revenue Estimate the government relies on is almost impossible to evaluate, since it provides no explanation whatsoever with respect to its conclusion that increasing the Fuel Excise Tax on ethanol-blended fuel would have "No Revenue Effect."

Finally, the government attempts to denigrate the CRS Reports that it asserts that ExxonMobil "relied on" because it erroneously states that "the new excise tax credit was enacted in § 40, rather in § 6426." Gov't Mem. at 40-41. First, ExxonMobil does not rely on the CRS Reports to support its position, but rather relies on a straight forward reading of the statutes at issue. ExxonMobil cited the CRS Reports because it was telling that these reports came to the same conclusion that ExxonMobil urges this Court to adopt. Significantly, Congress relies on CRS Reports to analyze, appraise, and evaluate legislation, and courts regularly use them to resolve ambiguities. *See* Pl's Mem. at 15 citing 2 U.S.C. § 166(d)(1) and *Sierra Club v. Abston Constr. Co. Inc*., 620 F.2d 41, 44 (5th Cir. 1980). Second, the government cites this small error in the CRS report as a reason that it should be disregarded entirely, asserting that "[i]f *Sunoco* offered the CRS Report as an expert report, the Court would almost certainly exclude it under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)." Gov't Mem. at 41 (emphasis added). The government's entire memorandum should not be disregarded due to referring to the wrong plaintiff. The CRS Report likewise should not be disregarded due to a minor mistake.

In short, nothing in the legislative history suggests the departure from the general rule that a taxpayer may deduct its Fuel Excise Tax paid in COGS, and there are significant indications that Congress (1) wished to impose the Fuel Excise Tax on ethanol-blended fuels at the same rate as other fuels and (2) wished to treat the taxpayer's use of the Alcohol Credit as a payment of the tax so imposed.

G. The cases that the government cites do not support its position

The government boldly asserts that "every court that has considered the issue has accepted the IRS's position" that when a taxpayer receives a tax credit against a deductible tax, the amount of that deduction is reduced. Gov't Mem. at 18. The government oversells the import of these cases and misapplies their holdings to the facts at issue.

1. Cases addressing whether a tax credit is an item of gross income

A *federal* tax credit is an item of gross income only when a provision of the Code specifically says so, as several provisions do. *See* Pl.'s Mem. at 22 (listing such provisions). The government cites a number of cases that hold that certain state tax credits must be included in gross income under section 61(a). These cases are irrelevant here because there is no question that the Alcohol Credit–whether claimed as a "credit against" a taxpayer's Fuel Excise Tax, as a cash payment section 6427(e), or as a refundable income tax credit under section 34(a)(3)–is not includable in gross income and therefore is not directly taxable. Further, state tax credits are includable in income as a general rule if they are refundable. As a result, these cases the government cites do not apply.

For instance, the government cites *Tempel v. Commissioner*, 136 T.C. 341, 350-51 (2011), *aff'd sub nom.* 744 F.3d 648 (10th Cir. 2014), for the proposition that a tax credit "merely represents the right to reduce a taxpayer's State tax liability." Gov't Mem. at 16. That was true of the tax credits in *Tempel*, which were not independent of the underlying tax liability,

but it is not true of the independently calculated Alcohol Credit. The full context of the *Tempel* case is helpful in understanding the distinction.

In *Tempel*, the taxpayers received Colorado state income tax credits for donating conservation easements, and sold those credits to third parties (as Colorado law allowed). The question before the Tax Court was not the federal income tax consequences of receiving a state tax credit but rather whether the character of the gain on the sale of the state tax credit was ordinary or capital. In commenting on whether the state tax credits were ordinary income when received, the Tax Court stated:

> We know of no authority, and respondent has not cited any, for the proposition that a State income tax credit results in ordinary income upon its later sale. On the contrary, courts and the Commissioner's rulings frequently treat government-granted rights as capital assets. It is also apparent that the transferred State tax credits never represented a right to receive income from the State. Instead, they merely represented the right to reduce a taxpayer's State tax liability. It is without question that a government's decision to tax one taxpayer at a lower rate than another taxpayer is not income to the taxpayer who pays lower taxes. A lesser tax detriment to a taxpayer is not an accession to wealth and therefore does not give rise to income.

Tempel, 136 T.C. at 350-51.

The tax credits in *Tempel* were generally nonrefundable and thus not calculated independently from the underlying tax, so the Tax Court's conclusion that they did not constitute gross income was the correct one. Because the amount of the credit was tied to and generally limited by the amount of the taxpayer's Colorado income tax liability, the court was correct to note in dicta that had the transferors claimed the credits for themselves, the credits would have reduced their Colorado income tax liability for purposes of computing their federal deduction for state taxes under section 164(a).[21] Here, the result is different because the Alcohol Credit is

[21] In theory, the credits at issue in *Tempel* were partially refundable, but the ability to receive this refund was limited and tied to the amount of taxes collectively paid to the state. "Colorado allowed conservation easement credit recipients to use their credits to receive a limited refund provided that the State had

calculated independently from a blender's Fuel Excise Tax liability (if any). A blender whose Alcohol Fuel Credit exceeds its Fuel Excise Tax for a given quarter is entitled to a cash payment (or refundable *income* tax credit) for the difference, without limitation. *See* I.R.C. §§ 34(a)(3), 6427(e).

Similarly, in *Maines v. Commissioner*, 144 T.C. 123 (2015), the Tax Court held that the refunded portions of a refundable *state* income tax credits were items of gross income, and distinguished these credits from the nonrefundable credits at issue in *Tempel*. The government states that the *Maines* court "bifurcated the credit into the portion that reduced the taxpayer's state-tax liability and the portion that was refunded," treating the latter as gross income, and that the Alcohol Credit should be treated the same way. Gov't Mem. at 16-17. As ExxonMobil explained in its extended discussion of *Maines* in its opening memorandum, the Tax Court did not treat different portions of the same credit differently for income tax purposes. *See* Pl.'s Mem. at 27-29. The only issue before the *Maines* court was the income tax treatment of the portions of the credits paid in cash (*i.e.*, refunded), which it correctly concluded were included in income. That conclusion is not relevant here, because there is no dispute about whether the Alcohol Credit is included in income (it is not). The Tax Court did not consider the portion of the credits that the taxpayer had claimed against its New York State taxes, but merely noted that the taxpayer treated these payments as taxable as well. But to the extent that *Maines* treated both

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exceeded constitutional tax collection limits commonly known as 'Amendment 1' or the 'Douglas Bruce Amendment' establishing the taxpayer bill of rights ('TABOR'). . . . The refund in certain circumstances could reach a maximum of $50,000." *Tempel*, 136 T.C. at 343. In any event, in the years at issue in *Tempel* it was not possible for taxpayer's to receive a refund, so the Tax Court properly analyzed the case as one involving nonrefundable credits. *Id.* at 349-50 (no evidence that the taxpayers "sold credits they could have otherwise used to receive a refund."). *See also*, *Maines v. Commissioner*, 144 T.C. 123, 135 (2015) ("In the year in which the taxpayers in *Tempel* received and sold their credits, Colorado made it impossible for them to receive a refund.").

the refunded portion and the nonrefunded portion as taxable, it is odd that the government would urge that "bifurcation" be applied to this case. The government agrees that the refundable portion (*i.e.*, when the Alcohol Credit results in a cash payment under section 6427(e)) is *nontaxable*, so applying the rationale of *Maines* would suggest that the nonrefunded portion (*i.e.*, when the Alcohol Credit is used as a "credit against" the Fuel Excise Tax) should be nontaxable as well. If so, then that would mandate no reduction to the COGS deduction.

Finally, the government states that "if—contrary to settled authority—a tax credit were treated as a payment of a taxpayer's liability (as Exxon[Mobil] urges), the payment would be taxable as income to the taxpayer under the long-standing principle established in *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 729 (1929) (third party's payment of a taxpayer's tax liability constitutes taxable income to the taxpayer)." Gov't Mem. at 15-16. ExxonMobil is not arguing that some "third party" or even the government paid EMOC's Fuel Excise Tax. Rather, ExxonMobil is arguing that EMOC itself used the Alcohol Credit to pay its own Fuel Excise Tax. For that reason, *Old Colony Trust* is irrelevant.

2. The "reduction of deductible tax expense" cases

The government cites other cases and authorities that relate to a reduction in deductible tax expense, but, again, these are easily distinguishable because these authorities all relate to *rebates* and *exemptions* from tax, not independently calculated credits.

The government states that in *Hurd Millwork Corp. v. Commissioner*, 44 B.T.A. 786 (1941) the "Board of Tax Appeals (a predecessor to the Tax Court) agreed with the Commissioner that a taxpayer could not deduct real-estate taxes on its federal income-tax return where the local government had eliminated the tax liability to encourage the taxpayer to rebuild a manufacturing facility that had burned down." Gov't Mem. at 18. What the government fails to note is that exemptions operate differently than credits. Exemptions are effectively built into the

statutory provisions that impose the tax so that the reduced rate reflects the tax actually imposed. This is precisely how the incentive for ethanol blending worked before the AJCA: a reduced excise tax rate applied to blended fuel under former section 4081(c). As a result, a blender's COGS deduction for the Fuel Excise Tax reflected the lower rate actually imposed (and paid). An independently calculated credit means that "the full rate of tax for taxable fuels is imposed . . . ." H.R. Rep. 108-755, at 307 (2004) (Conf. Rep.). Because the incentive in *Hurd Millwork* was part and parcel of the tax rate imposed, there were no tax credits at issue, and therefore the case is inapposite.[22]

Hart Furniture Co. v. Commissioner, 12 T.C. 1103 (1949), *rev'd on other grounds*, 188 F.2d 968 (5th Cir. 1950), dealt with a benefit that was labeled a "credit," but was in fact a rebate that was dependent on the underlying liability. At issue was a "credit for contributions paid in to approved state [unemployment] funds" against the federal excise tax on wages. *Id*. at 1107. The court noted that "the purpose of the credit was to place states upon a footing of equal opportunity. By a state's compliance with the terms of the Federal statute, the tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents." *Id*. n.1 (internal citations and quotations omitted). Significantly, the credit was not refundable (it was limited to 90 percent of the tax imposed) and was therefore not independent of the underlying tax. *Hart* is therefore also distinguishable from the independently calculated Alcohol Credit. *Hart* was effectively disallowing what would have been a double

[22] Other cases cited by the government that involve exemptions or rebates are similarly of little help. *Cummings v. United States*, 866 F. Supp. 2d 44 (D. Mass. 2011), dealt with an exemption from real property tax and is therefore irrelevant for the same reasons as *Hurd Millwork Corp*. Similarly, *Synder v. Commissioner*, 894 F.2d 1337, 1990 WL 6953 (6th Cir. 1990) (unpublished). dealt with reduction to the taxpayer's pari-mutuel (gambling) tax obligation rather than a credit. Neither case is helpful to the government's position.

deduction (the taxpayer was able to deduct the contribution to the state unemployment fund). Like the credit in section 4081(b)(2) discussed above, the credit against the federal unemployment tax was in reality an abatement, such that "no actual or apparent liability existed." 12 T.C. at 1108. Here, ExxonMobil seeks a single deduction for the Fuel Excise Tax EMOC paid with the Alcohol Credit. As discussed in ExxonMobil's opening memorandum, the full Fuel Excise Tax rate was imposed on ExxonMobil; there was no abatement, only a subsidy to encourage blending that EMOC could use as a credit against its Fuel Excise Tax liability.

Finally, the government's reliance on Rev. Rul. 79-315, 1979-2 C.B. 27, is similarly misplaced. That ruling dealt with rebates of Iowa state income tax paid, not refundable credits. The amount of the rebate was defined by reference to the taxpayer's Iowa state income tax liability, and could never exceed the amount of that liability. Thus, because Rev. Rul. 79-315 dealt with rebates the amount of which were defined by reference to the amount of state income tax paid, it does not (as the government asserts) stand for the proposition that "[t]he principle that tax credits reduce a taxpayer's deductible tax expense does not depend on the credit and the tax being somehow linked." Gov't Mem. at 34. Like *Hurd Millwork*, Rev. Rul. 79-315 does not relate to tax credits at all, and is simply irrelevant to this case.

3. Other cases

The other cases the government cites are likewise irrelevant to the question at issue. The government cites *Rand v. Commissioner*, 141 T.C. 376, 388 (2013), in attempt to show that refundable credits reduce, rather than satisfy a taxpayer's tax liability. Gov't Mem. at 17. However, the holding of *Rand* was limited to the narrow question of accuracy-related penalties and the meaning of the phrase "amount shown as the tax by the taxpayer on his return." *Rand*,

141 T.C. at 380. That analysis is not relevant to this case.[23] And even if *Rand* were relevant, it actually supports ExxonMobil's position because it defines the "tax" as a specific amount for general purposes, and then requires adjustments of that amount for purposes of computing the section 6662(a) penalties.

The government also cites *Randall v. Loftsgaarden*, 478 U.S. 647 (1986), without the proper context to support the proposition that tax credits reduce the taxes otherwise payable. Gov't Mem. at 16. *Randall* was a non-tax civil dispute in which the plaintiffs purchased interests in a tax shelter from the defendant.[24] The issue before the Supreme Court was the amount of damages to which the plaintiffs were entitled, which under rescission principles generally would be based on the plaintiffs' payments for interests in the tax shelter. The Supreme Court held that the relevant statute did not require the plaintiffs to reduce their damages by the amount of tax benefits they received from participating in the tax shelter. In dicta, the Supreme Court stated:

> The tax benefits attributable to ownership of a security initially take the form of tax deductions or tax credits. These have no value in themselves; the economic benefit to the investor --the true 'tax benefit' -- arises because the investor may offset tax deductions against income received from other sources or use tax credits to reduce the taxes otherwise payable on account of such income. Unlike payments in cash or property received by virtue of ownership of a security --such as distributions or dividends on stock, interest on bonds, or a limited partner's

[23] The section 6662(a) penalty applies to certain "underpayments," which is defined under section 6664(a) as the amount by which any "tax imposed" exceeds the excess of (1) "the amount shown as the tax by the taxpayer on his return," (2) tax previously assessed or collected, (3) and "rebates," which includes credits. At issue in *Rand* was whether the "amount shown as the tax by the taxpayer on his return" included refundable credits or not. *Rand*, 141 T.C. at 380. The Tax Court held that the "tax shown as the tax by the taxpayer on his return" is reduced (but not below zero) by any refundable credits the taxpayer claims. Significantly, the Tax Court's holding was that "the amount shown as the tax by the taxpayer on his return when calculating an underpayment should be reduced by refundable credits." *Id.* at 388. The Tax Court did not address whether the credits actually reduced or satisfied the tax at issue, only how they affected the amount "shown on the return" by looking at how that phrase–which has no relevance to the question in this case–was used in other places in the Code.

[24] The plaintiffs had claimed increases in their bases in the tax shelter investments, which were structured as partnership interests, through a nonrecourse loan. These increases purportedly led to deductible losses in excess of their investment.

> distributive share of the partnership's capital gains or profits --the 'receipt' of tax deductions or credits is not itself a taxable event, for the investor has received no money or other 'income' within the meaning of the Internal Revenue Code.

Randall, 478 U.S. at 656-57.

Randall does not help the government's case. First, the tax benefit at issue in *Randall* was a basis increase that allowed the taxpayers to claim deductions for additional losses from a partnership. As a result, tax *credits* were not implicated at all. Second, *Randall* is not a tax case, and the Supreme Court's dicta, even if it were applicable, should not be the deciding factor in this case. Third, a close reading of the Supreme Court's language indicates that it supports ExxonMobil's position. The Supreme Court stated that "the investor may offset tax deductions against income received from other sources or use tax credits to reduce the taxes otherwise payable on account of such income." The credits do not reduce the obligation but instead "offset" the amount "otherwise payable." This is consistent with the discussion above that offsetting one amount against another amount "otherwise payable" so that the cash transferred is only the net amount constitutes a payment of the full (unnetted) amount. *Cf.* Treas. Reg. § 1.461-4(g)(1)(ii)(A).

III. THE GOVERNMENT'S CRITICISMS OF EXXONMOBIL'S ARGUMENTS ARE WITHOUT MERIT

ExxonMobil's position set forth in its opening memorandum does not require further elucidation, and ExxonMobil addressed many of the government's criticisms of its affirmative case in its response to the government's affirmative case above. Nonetheless, the government made several errors in the section of its opening memorandum entitled "Exxon[Mobil]'s counter arguments are unpersuasive" that ExxonMobil will now address.

A. The government is wrong that ExxonMobil urges section 4081 to be "read in isolation" from section 6426

The government grossly mischaracterized ExxonMobil's position. ExxonMobil never argued that section 4081 should be "read in isolation." Gov't Mem. at 33. ExxonMobil simply pointed out that after the AJCA, there was no longer a reduced excise tax rate for blended fuels. Instead, the Alcohol Credit is provided in a separate provision, is calculated independently without regard to any activities that are subject to the Fuel Excise Tax, is based on the number of gallons of ethanol blended with the taxable fuel (rather than based on the number of gallons of taxable fuel removed as the Fuel Excise Tax is), and is available to taxpayers even if they have no Fuel Excise Tax liability. This is why the Alcohol Credit must be analyzed as an independent subsidy rather than a "rebate." *See* section II.B, *supra*. This is consistent with the established federal tax principles (discussed above and in ExxonMobil's opening memorandum), which require offsetting amounts each to be treated as a separate payment.

B. The government is wrong that sections 87, 280C, and 280D are irrelevant

Curiously, after devoting an entire section of its opening memorandum to addressing the interaction of what it describes as "the relevant Code provisions" (which the government limits to sections 4081(b), 6426(a), 6427(e), and 9503(b)) (Gov't Mem. at 21), the Government claims that sections 87, 280C, and 280D are "irrelevant." Gov't Mem. at 35.

With respect to section 87 and similar provisions that require the inclusion of a federal tax credit in income, ExxonMobil simply cited these provisions to show that the Alcohol Credit was not an item of gross income, whether claimed as a "credit against" the Fuel Excise Tax under section 6426(a), or as a cash payment or refundable income tax credit under sections 6427(e) and 34(a)(3). *See* Pl.'s Mem. at 22. Indeed, the government does not argue that the Alcohol Credit is directly included in gross income, but rather argues that "because the [Alcohol]

Credit directly reduces the taxpayer's excise-tax liability, there was no need for Congress to provide for its inclusion in income, because the reduction in the taxpayer's deductible excise-tax expense would have the same tax effect." Gov't Mem. at 36.[25] It is here that sections 280C and 280D are meaningful. Both of those provisions show that when Congress wants a federal tax credit to reduce a liability that will be deductible when paid (including a federal excise tax liability), it will provide a specific rule for doing so. The strong implication under the long-standing *expressio unius* doctrine is that in the absence of such a specific rule, no reduction is required. *See* Pl.'s Mem. at 21-22.

The government cites a 45 year-old decision from another circuit to suggest that the *expressio unius* doctrine is "considered unreliable," Gov't Mem. at 35-36, ignoring decades of Supreme Court decisions providing the contrary.[26] It also states that the doctrine must be based

[25] The government does state that "It has not been conclusively established that the payment to [a blender who claimed the Alcohol Credit in cash] would be 'tax-free,'" adding that "Exxon[Mobil] cannot simultaneously rely on and disregard that integrated tax advice [referring to I.R.S. Chief Counsel Adv. 201342010 (Aug. 29, 2013) and I.R.S. Chief Counsel Adv. 201406001 (Feb. 7, 2014).] Gov't Mem. at 45 n.21. The government does not provide any argument that a payment under section 6427(e) could be taxable, but suggests that this Court "need not determine whether a payment under § 6427(e) would be taxable or tax free." *Id*. In the first place, the IRS has been unwavering in its guidance that a section 6427(e) payment is tax-free: I.R.S. Chief Counsel Adv. 201342010 (Aug. 29, 2013) clearly stated this, and I.R.S. Chief Counsel Adv. 2014046001 (Feb. 7, 2014)–which supplemented I.R.S. Chief Counsel 201342010 (Aug. 29, 2013)–did not change this result, it simply stated that credits claimed under section 6426(a) reduced COGS. More importantly, ExxonMobil does not need to rely on I.R.S Chief Counsel Adv. 201342010 (Aug. 29, 2013) for the proposition that the Alcohol Credit claimed as a cash payment under section 6427(e) is not includable in income: this is clear from the lack of a provision like section 87 requiring such an inclusion. Further, section 6427(j) provides that Alcohol Credits paid under section 6427(e) are treated "as if such payments constituted refunds of overpayments" of Fuel Excise Tax. A refund of overpaid tax is not itself an item of gross income; it is simply the return to the taxpayer of its own money.

[26] *See, e.g., Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress ha[d] included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."); *Leatherman v. Tarrant Cty Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) ("Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*."). *Drake v. Panama Canal Comm'n*, 907 F.2d 532, 535 (5th Cir. 1990) ("Congress' failure to furnish a mechanism for judicial review in the case of § 3761(a), while

on "sensible inferences." *Id*. at 36. The inferences that ExxonMobil asks the Court to draw from sections 280C and 280D are quite sensible: statutes exist that require reduction of a deduction where a taxpayer claims a credit with respect to a deductible expense. Such provisions have existed with respect to ordinary and necessary business expenses (where the credit granted is claimed against the income tax but tied to the amount of deductible expense incurred) as well as deductible federal excise taxes (where the credit is claimed directly against the deductible excise tax); and the absence of such a provision with respect to the Alcohol Credit means no such reduction is required, especially given that the AJCA contained exactly such a provision with respect to a different tax credit. While section 280D is no longer in the Code, it nevertheless clearly shows that Congress knew how to legislate the reduction of a federal excise deduction on account of a credit if it chose to do so.

C. **The government is wrong that Form 720 is irrelevant**

ExxonMobil does not reference Form 720 in an attempt to change the plain meaning of a statute and does not rely on the structure of Form 720 for its position as the government seems to imply. Indeed, ExxonMobil agrees with the government that the "plain meaning of the statutes" is the most important factor in this case. Gov't Mem. at 38 citing *Mills v. Comm'r*, 114 T.C. 184, 195 (2000). However, ExxonMobil points to Form 720, the form prescribed by the IRS, to show that the Alcohol Credit and the Fuel Excise Tax operate consistently with ExxonMobil's reading of the statutory language. Form 720 itself treats the Alcohol Credit as a payment of the

providing a 'detailed mechanism for judicial consideration' of §§ 3771(a) and 3772 claims, is a strong indication that the statutory scheme of the PCA [Panama Canal Act] precludes review of Appellants' claims."). It is especially baffling that the government attempts to denigrate the *expressio unius* doctrine when one of the cases it cites relies on it. *Rand*, 141 T.C. at 387 ("Under the *canon expressio unius est exclusio alterius*, if a statute provides specific exceptions to a general rule, we may infer that Congress intended to exclude any further exceptions.").

Fuel Excise Tax as well as a payment of any other excise taxes shown on the form. Tax forms are designed to reflect the underlying statutory provisions, and Form 720 is no exception. Indeed, to the extent that the Alcohol Credit exceeds the taxpayer's quarterly Fuel Excise Tax, the government will automatically process the balance against other taxes shown on Form 720, just as if those taxes were paid with cash.[27] Thus, if the Alcohol Credit exceeds the Fuel Excise Tax, it is a payment of the Fuel Excise Tax and any and all other taxes reported on the form. No one would argue that the taxpayer's COGS deduction should be reduced when taxes other than the Fuel Excise Tax are paid with the Alcohol Credit. There is no indication from Congress that the Alcohol Credit should be treated differently for federal income tax purposes depending on which tax it is used against. The correct approach is that when used against an excise tax (including, but not limited to, the Fuel Excise Tax), the Alcohol Credit is a payment of that tax. Moreover, as noted, if the Alcohol Credit exceeds the Fuel Excise Tax the excess also may be taken in cash. That excess certainly does not reduce COGS, nor is it subject to income tax.

D. The government is wrong to suggest that the Court should disregard informal guidance completely, but is also wrong to describe IRS notices restating its litigation position as "precedential"

The government states that "[t]he Court should disregard Exxon[Mobil]'s citation of non-authoritative written determinations of IRS attorneys, which are not formal positions of the agency." Gov't Mem. at 41. First, ExxonMobil's position does not hinge on the informal guidance that it cited. ExxonMobil merely showed that the IRS has recognized that a federal excise tax credit can pay, rather than reduce, a federal excise tax, which demonstrates that the reasoning and rationale behind its argument is not unprecedented. *See* I.R.S. Priv. Ltr. Rul.

[27] This is the case because when a blender claims an Alcohol Credit in excess of its Fuel Excise Tax on Form 720, that excess is treated as a cash payment to the blender under section 6427(e). *See* I.R.S. Notice 2005-4, § 2, 2005-1 C.B. 289, 290 (Dec. 15, 2004).

201022012 (June 4, 2010); I.R.S. Tech. Adv. Mem. 20021504 (Apr. 12, 2002). Second, the government cites informal guidance of its own, including I.R.S. Notice 2015-56, 2015-35 I.R.B. (Aug. 31, 2015) and I.R.S. Notice 2016-5, 2016-6 I.R.B. 302 (Feb. 8, 2016), and describes each as "precedential guidance." Gov't Mem. at 44-45. But such guidance as a general matter only receives deference from a court to the extent its reasoning is persuasive. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.") (citations omitted). The notices the government cites contain no reasoning or analysis, only conclusions. Further, from the timing of the notices it is apparent that the IRS drafted them to support its litigation position in other cases involving the Alcohol Credit.[28] Accordingly, these notices should be given no weight. *See AMP, Inc. and Consol. Subsidiaries v. United States*, 185 F.3d 1333, 1338-39 (Fed. Cir. 1999) ("A revenue ruling issued at a time when the I.R.S. is preparing to litigate is often self-serving and not generally entitled to deference by the courts.").[29]

[28] *See* Complaint, *Sunoco, Inc. v. United States*, No. 15-cv-00587 (Fed. Cl. June 10, 2015); Complaint, *Growmark, Inc. & Subs. v. Comm'r*, No. 14-23797 (T.C. Oct. 8, 2014).

[29] The IRS used language similar to Notice 2016-5 in Notice 2018-21, 2018 WL 1185223 (March 7, 2018), which states that "[f]or federal income tax purposes, a claimant reduces its § 4081 excise tax liability by the amount of excise tax credit allowable under § 6426(c) and its § 4041 excise tax liability by the amount of excise tax credit allowable under § 6426(d) in determining its deduction for those excise taxes or its cost of goods sold deduction attributable to those excise taxes." *See* I.R.S. Notice 2015-56, 2015-35 I.R.B. 235, and I.R.S. Notice 2016-05, 2016-6 I.R.B. 302. For the same reasons that I.R.S. Notices 2015-56 and I.R.S. Notice 2016-5 should be given no weight, this Court should also disregard I.R.S. Notice 2018-21.

E. The government is wrong that its position does not create an absurd result

The government asserts that ExxonMobil's reference to a "hypothetical" transaction in which a taxpayer could structure its affairs to ensure that the Alcohol Credit is not taxable is irrelevant because "Exxon[Mobil] and Sunoco are not such taxpayers, as this lawsuit and Sunoco's Federal Circuit appeal make clear." Gov't Mem. at 45. This misses the mark. The point is not that ExxonMobil should be treated as though it structured its affairs differently (*see* Gov't Mem. at 46), but rather that the government's position creates an untenable disparity depending on how blenders choose to claim the Alcohol Credit or structure their operations.

ExxonMobil provided an example under which a taxpayer could structure its affairs with relatively minimal effort in order to receive a cash payment of the Alcohol Credit under section 6427(e) that the government agrees is nontaxable. Pl.'s Mem. at 23. The posited example is just one of several methods by which a taxpayer could accomplish this, and it accepts for the sake of argument that a taxpayer does not have the option to receive a section 6427(e) payment of the Alcohol Credit instead of claiming the credit against the Fuel Excise Tax.[30] Accomplishing this does not depend on using members of a consolidated group as the government implies (disregarded entities and nonconsolidated entities would also work), and in any event the government misunderstands how Treas. Reg. § 1.1502-13 operates when it attempts to use that regulation to denigrate the example.[31] The point is simply that if the government were correct

[30] As discussed in section II.E.1, *supra*, the plain language of the statute strongly supports the view that a blender can choose whether to receive the Alcohol Credit as a credit against its Fuel Excise Tax, as a cash payment, or as a refundable income tax credit.

[31] The government asserts that under Treas. Reg. § 1.1502-13(c)(1)(i), "the IRS may redetermine the 'separate entity attributes' of intercompany transactions 'to the extent necessary to produce the same effect on consolidated taxable income (and consolidated tax liability)' as if the two separate subsidiaries 'were divisions of a single corporation, and the intercompany transaction were a transaction between divisions.'" Gov't Mem. at 47 n.22. This is wrong: even if the blender entity and the removal entity were limited liability companies that were disregarded as separate from their corporate parent for federal income tax purposes (and thus divisions of a single corporation), the blender entity would still be able to

about the Alcohol Credit, sophisticated taxpayers could easily avoid the reduction in COGS that the government is now urging, an inequitable result that Congress could not have intended. The far more logical explanation is that the government is not correct, and that the income tax consequences of claiming the Alcohol Credit as a credit against the Fuel Excise Tax and as a cash payment are the same. The government attempts to counter this commonsense proposition with the contention that "[t]ax provisions frequently provide different economic benefits to taxpayers in different circumstances; such provisions are not therefore 'absurd.'" Gov't Mem. at 45. The examples that the government provides, however, do not involve changing the very nature of the taxability of the same government subsidy depending on how a taxpayer chooses to claim it. That is indeed an inequitable and arbitrary result, and this Court should not embrace it.

F. The government is wrong that any doubt must be resolved in its favor

The government argues that its interpretation of the interplay between the Fuel Excise Tax and the Alcohol Credit deserves the benefit of the doubt under a canon of statutory interpretation in which "exemptions from taxation are not to be implied, they must be unambiguously proved." Gov't Mem. at 47 (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)). The feebleness of this argument is reflected by its placement as the seventh-best argument in the government's armament. The government's hesitation to employ this canon is understandable given the dubious nature of its origins and the fact that is often either not mentioned or ignored entirely in many Supreme Court cases on tax exemptions. *See* Antonin

receive the Alcohol Credit as a tax-free cash payment under section 6427(e)(1), and the consolidated group would avoid the reduction to COGS. *See* Treas. Reg. § 301.7701-2(a), (c)(v)(4) (a disregarded entity is generally treated as a division of its owner, but is treated as a separate entity for purposes of the Fuel Excise Tax and "claims of a credit . . . , refund, or payment . . . under section 6426 or section 6427."). Accordingly, Treas. Reg. § 1.1502-13(c)(1)(i) is not relevant.

Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 359 & nn. 5, 6 (2012) (citing cases).

Moreover, the canon is not applicable here. The government supports its position initially by arguing that tax credits are acts of legislative grace and are to be narrowly construed. *Cf*. Gov't Mem. at 47 (citing *United States v. McFerrin,* 570 F.3d 672, 675 (5th Cir. 2009)). But there is no dispute that ExxonMobil was entitled to the Alcohol Credits it received, so there is no question of whether Congress intended to grant those credits to ExxonMobil. The Government's reliance on this line of reasoning is misplaced.

The Government next argues that an exemption such as COGS "cannot rest on mere implication." Gov't Mem. at 47. But ExxonMobil's argument is not based on a "mere implication." There is no dispute that the Fuel Excise Tax is part of a taxpayer's COGS, which is deducted to determine a taxpayer's gross income. The only question is whether ExxonMobil (through EMOC) paid the Fuel Excise Tax. As explained above, ExxonMobil presents the common-sense position that the Alcohol Credit is received tax-free and when used against the Fuel Excise Tax is a payment in satisfaction of that tax. It is the Government, and not ExxonMobil, that is arguing that Congress implied something else in enacting the AJCA—that the Fuel Excise Tax was never incurred and never paid. That position leads to inequitable and arbitrary results, and should be avoided as a matter of statutory interpretation. Pl.'s Mem. at 19-21. Consequently, the Government's position that ExxonMobil has a higher burden to prove its construction of the AJCA is erroneous.

IV. THE COURT SHOULD GRANT EXXONMOBIL PARTIAL SUMMARY JUDGMENT NOW RATHER THAN WAIT UNTIL ITS REFUND CAN BE CALCULATED

The parties agree that "the Court may resolve the disputed legal question on these motions." Gov't Mem. at 48. The Government argues that the actual calculation of any refund

owed to ExxonMobil must await resolution of all relevant issues. ExxonMobil has consistently agreed with this position. *See* Pl.'s Response to Def.'s Motion to Defer at 6, Dec. 21, 2017, ECF No. 63 (noting that the parties, as early as their Rule 26(f) report, agreed to "'present liability issues to the Court, and then subsequently perform computations of any refund due'") (quoting Def.'s Mot. to Defer at 4, Dec. 18, 2017, ECF No. 62). It is common in cases involving disputes resolvable at summary judgment for courts to address the issue of liability on the papers and leave the issue of damages for trial. *See, e.g.*, *Monsanto Co. v. Roman*, No. 1:03-CV-068-C, 2004 WL 1107671, at *10 (N.D. Tex. May 17, 2004) (resolving patent liability question on summary judgment and leaving damages issue for trial). As a result, there is no need for the Court to delay its adjudication of the parties' motions for partial summary judgment on the purely legal issue of whether the Alcohol Credit is a payment in satisfaction of the Fuel Excise Tax.

V. CONCLUSION

ExxonMobil's subsidiary EMOC used its Alcohol Credits to pay its Fuel Excise Tax due in 2008 and 2009. This means that EMOC is entitled to a COGS deduction for these payments. Accordingly, the Court should grant ExxonMobil's motion for partial summary judgment, and deny the government's cross-motion for summary judgment.

Dated: March 29, 2018

Respectfully submitted,

MILLER & CHEVALIER, CHARTERED

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all counsel of record by ECF on the 29th day of March, 2018.

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