OSCAR L. GARZA & ASSOCIATES P.C.

1 Greenway Plaza, Suite 330
Houston TX 77046
713.572.1996
713.572.1997

Legal Alert – More on the Mixture Credits: IRS Issues Guidance on the Scope of the § 6426 Offsetting Provision

The IRS this week publicly released a Program Manager Technical Assistance Memorandum (POSTN-133706-13) discussing the scope of the § 6426 offset with respect to the alternative fuel mixture credit. The taxpayer had queried whether it could offset its alternative fuel mixture credits against its § 4081 excise tax liability (such as that incurred for selling gasoline across the terminal rack) that is unrelated to the production of the alternative fuel mixture, or whether the offset was limited to excise tax liability incurred upon the sale of the alternative fuel mixtures to which the credit relates. The IRS Office of Chief Counsel stated that, in accordance with guidance in IRS Notice 2005-62 – wherein the IRS states "[S]ection 6426 generally allows a biodiesel mixture credit against ***any*** tax imposed by § 4081, including those taxes unrelated to biodiesel mixtures or alcohol mixtures" (emphasis added) – the alternative fuel mixture credit could be offset against any excise tax liability incurred under § 4081.

The IRS in its guidance states that "a taxpayer that meets the conditions for the allowance of the alternative fuel mixture excise tax credit ***may*** apply the credit against its section 4081 liability, regardless of the basis for the liability," (emphasis added). Note the use of the word "may;" the IRS does not say that a taxpayer is required to offset the credit against the totality of his § 4081 liability. Consequently, it would seem that a taxpayer has the option to offset his mixture credits against all his excise tax liability or to offset against only that portion which is related to production of the mixture, taking the balance under either § 6427(e) or § 34. The language also suggests that a taxpayer need not claim the credit against any excise tax liability (though this contradicted in the explanation of how to claim the credits in Publication 510). Furthermore, the conditional language may also signify that a taxpayer is not required to take the credit at all, a proposition which has support in the statute where there is no definitive language requiring that the credit be taken. Indeed, § 6426(a) states that a credit shall be "allowed."

With the IRS having already offered its opinion on this issue in IRS Notice 2005-62 the result is not surprising and while it does not directly impact other current questions relating to the mixture credits, including whether or not they are subject to federal income tax, the guidance does have a tangential effect. With the IRS seemingly taking the view that a taxpayer is not required to offset his mixture credits against all his § 4081 liability, the proposition that the § 6426 offset is merely one of several mechanisms to claim the same credit is furthered as is the position that the mixture credit is not subject to federal income tax, however taken. With the IRS and Congress having agreed that the credit is not taxable when taken under § 6427(e) it follows that it would not be taxable under § 6426.

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Oscar L. Garza & Associates, P.C. is a Houston-based boutique law firm specializing in transactional tax and trade matters surrounding all aspects of the oil and petroleum industry. With over 20 years of experience counseling clients operating in all aspects of the oil and petroleum sector our lawyers have an in-depth knowledge of the industry, enabling us to provide quality service and creative solutions to our clients. Please visit our website at www.olgarza.com. For more information please contact:

Oscar L. Garza	832.758.9084	olgarza@olgarza.com
Leanne Sobel	720.282.9165	lsobel@olgarza.com