

STEPTOE & JOHNSON LLP

MEMORANDUM

December 14, 2011

TO: Society of Independent Gasoline
Marketers of America

FROM: Steptoe & Johnson LLP

RE: Termination of the Alcohol Fuel Mixture Credit

EXECUTIVE SUMMARY

As the alcohol fuel mixture and biodiesel tax credits are scheduled to terminate on December 31, 2011, we have been asked to determine whether blenders of alcohol fuel and biodiesel mixtures will be entitled to take the credit if the fuel mixture is blended before December 31, 2011 or whether the fuel must be both blended and sold by that date for the blender to qualify for the credit.

Based on the definitions of both “alcohol fuel mixture” and “biodiesel mixture” and the termination provisions contained in the Internal Revenue Code (IRC), as well as informal discussions with an IRS excise tax agent, we conclude that the alcohol fuel mixture or biodiesel mixture must be both blended and sold by the taxpayer (or used by the taxpayer) before December 31, 2011. Additionally, the credit will not apply to any fuel removed from the blending facility after December 31, 2011.

DISCUSSION

I. Background.

As background, the Alcohol Fuel Mixture and Biodiesel Mixture Credits set forth in IRC §§ 6426(b) and (c) were created by the American Jobs Creation Act of 2004 and provide a per gallon credit for the volume of alcohol or biodiesel used in creating blended fuels that will be sold or used in the trade or business of the taxpayer that produced the blended fuel. IRC §§ 6426(b)(1), 6426(c)(1). The credits were set to expire on December 31, 2010, but were extended for an additional year by the Tax Relief, Unemployment Insurance, and Job Creation Act of 2010.

The current alcohol fuel mixture credit is 45 cents per gallon of ethanol used in blending the fuel; the current biodiesel mixture credit is \$1.00 per gallon of biodiesel used in blending the fuel. The credits must first be claimed against the blenders’ fuel excise tax liability on Schedule C of Form 720. IRS Pub. 510. It should be noted that *only* the person that produced the blended

mixture may claim the credit. In other words, wholesalers and retailers that purchase already-blended fuel mixtures are not eligible for the credit.

II. Fuel must be blended into mixtures and sold before midnight on December 31, 2011 in order to claim the credit.

While the general descriptions of the alcohol fuel mixture and biodiesel mixture credits contained in the IRC focus on “blending” as the critical element for the credit, both the definitions of “alcohol fuel mixture” and “biodiesel mixture” and the termination provisions make clear that the fuel must be both blended and sold by the blender by December 31, 2011 in order to be eligible for the credit.

The credits are measured by the gallons of alcohol or biodiesel used by the taxpayer in producing an “alcohol fuel mixture” or “biodiesel mixture” for sale or use in the producer’s trade or business. §§ 6426(b)(1), 6426(c)(1). However, fuel mixtures only qualify as “alcohol fuel mixtures” or “biodiesel mixtures” if they are: (1) *sold* by the taxpayer that produced the mixture for use as fuel; or (2) if they are *used* as fuel by the taxpayer that produced the mixture. §§ 6426(b)(3), 6426(c)(3). Indeed, current Form 720 and Instructions require the fuel mixture to be both produced and sold (or used by the producer) in order to claim the credit.

The same two requirements apply to the termination of the credit. The termination provisions for both credits state that the credit shall not apply “to any sale, use, *or removal* for any period after December 31, 2011.” §§ 6426(b)(6), 6426(c)(6) (emphasis added). In short, termination provisions expressly require that the fuel be sold and removed from the blender’s facility by December 31, 2011 in order to be eligible for the credit.

If you have question about this memorandum, please contact Pat Derdenger at (602) 257-5209 or Frank Crociata at (602) 257-5261.