

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Gasoline and Diesel Fuel Excise Tax; Dye Injection Systems and Markers; Measurement

PS-6-95

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the gasoline and diesel fuel excise tax. The proposed regulations reflect and implement certain changes made by the Revenue Reconciliation Act of 1990 and the Omnibus Budget Reconciliation Act of 1993 (the 1993 Act). They affect certain enterers, refiners, terminal operators, and throughputters. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written comments and outlines of oral comments to be presented at the public hearing scheduled for June 20, 1996, must be received by June 12, 1996.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (PS-6-95), Room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (PS-6-95), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. The public hearing will be held in the IRS Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Frank Boland, (202) 622-3130; concerning submissions and the hearing, Christina Vasquez at (202) 622-7190; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed

rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224. Comments on the collection of information should be received by May 13, 1996.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information is in §48.4082-1(c). This information is required by the IRS to monitor manual dyeing at terminals. This information will be used to ensure the collection of the proper amount of tax imposed by section 4081. The likely recordkeepers are business or other for-profit institutions and organizations. Responses to this collection of information are required to obtain exemption from the diesel fuel excise tax.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Estimated total annual recordkeeping burden: 200 hours.

Estimated average annual burden per recordkeeper: 1 hour.

Estimated number of recordkeepers: 200.

Background

Section 4081 imposes a tax on certain removals, entries, and sales of diesel fuel. However, under section 4082, the tax is not imposed if, among other conditions, the diesel fuel (1) is indelibly dyed in accordance with regulations that the Secretary shall prescribe, and (2) meets such marking requirements (if any) as may be prescribed by the Secretary in regulations.

The regulations currently provide that the section 4082 exemption applies only to diesel fuel that contains a prescribed type and amount of dye. However, the regulations do not prescribe the time or method for adding the dye to diesel fuel and do not require the use of a marker.

Dye injection systems

Dyeing methods. Diesel fuel is usually dyed at a terminal rack by either manual dyeing or mechanical injection.

At a terminal using a typical manual dyeing technique, a measured amount of dye is manually placed into an empty tank compartment of a transport trailer while the trailer is at the terminal rack. Then, as diesel fuel is pumped into the compartment at the rack, the dye and the fuel are mixed together. Further mixing occurs through the motion of the trailer as it moves on the highway.

At a terminal using a typical mechanical injection system, a measured amount of dye is automatically injected into the diesel fuel as the fuel is delivered into a compartment of a transport trailer at the terminal rack.

Concerns about manual dyeing. The Federal government, State governments, and various segments of the petroleum industry have long been concerned with the problem of diesel fuel tax evasion, and to address this problem Congress changed the law to require that untaxed diesel fuel be indelibly dyed. The IRS is concerned, however, that tax can still be evaded through removals at a terminal of undyed fuel that has been designated as dyed.

Manual dyeing is inherently difficult to monitor. It occurs after diesel fuel has been withdrawn from a terminal storage tank, generally requires the work of several people, is imprecise, and does not automatically create a reliable record.

Mechanical dye injection, on the other hand, occurs while the fuel is still under the control of the terminal operator, is computer regulated, and can automatically create a reliable record of the amount of dye that was injected and fuel that was dyed. Thus, dye injection is the preferred method of combining diesel fuel and dye at a terminal.

Explanation of provisions. Diesel fuel removed from a terminal at the rack may be dyed before the fuel is received at the terminal, while the fuel is in a bulk storage tank at the terminal, or at the terminal rack. Under the proposed regulations, as under existing law, diesel fuel must contain a prescribed type and amount of dye at the time of the removal, entry, or sale that would otherwise be subject to tax. For example, high-sulfur diesel fuel, which is required to be dyed at a refinery under Environmental Protection Agency regulations, must contain the prescribed type and amount of dye at the time of the removal at the terminal rack even if additional dye must be added at that point.

Under the proposed regulations, a terminal operator that dyes diesel fuel at a terminal generally must use a prescribed mechanical injection system or else give a bond to the district director as a condition of retaining its registration. The prescribed system contains calibrated measurement devices, shut-off devices, and locks and similar equipment to secure these devices. If the system malfunctions at a particular terminal, the terminal operator may manually dye the fuel if the operator notifies the district director of the malfunction.

The proposed regulations also prescribe the records that the terminal operator must maintain with respect to any manual dyeing performed at its terminals.

Markers

A marker is a material that is placed in diesel fuel to designate the fuel as untaxed. Unlike dye, a marker does not reveal its presence until the fuel into which it is introduced is subjected to a special test. Markers are effective even if diluted and can be detected even if there is no visual evidence of dye.

The proposed regulations do not require the use of markers. However, the IRS expects to issue a notice of proposed rulemaking with respect to markers within the next year. In the meantime, the IRS is interested in receiving comments relating to the type and concentration of markers, the cost of markers, and whether lower concentrations of dye could be used in conjunction with a marker.

Measurement

Existing regulations provide that gallons of taxable fuel may be measured on the basis of actual volumetric gallons, gallons adjusted to 60 degrees Fahrenheit, or any other temperature adjustment method approved by the Commissioner.

These proposed regulations modify this rule by generally providing that measurement is to be made on the basis of actual volumetric gallons or gallons adjusted to 60 degrees Fahrenheit, whichever is the basis for measurement under the position holder's terminaling agreement with the terminal operator.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Thursday, June 20, 1996, at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments and an outline of

topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by June 12, 1996.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Frank Boland, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 48 is proposed to be amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Paragraph 1. The authority citation for part 48 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 48.4081-8 is revised to read as follows:

§48.4081-8 Taxable fuel; measurement.

(a) *Removals from a terminal.* For purposes of the tax imposed under §§48.4081-2 and 48.4081-3(d), taxable fuel is measured on the basis of actual volumetric gallons or gallons adjusted to 60 degrees Fahrenheit, whichever is the basis for measurement under the position holder's terminaling agreement with the terminal operator.

(b) *Other taxable events.* For purposes of the taxes imposed under §§48.4081-3(b), 48.4081-3(c), 48.4081-3(e), and 48.4082-4, and the tax imposed on the removal of taxable fuel under §48.4081-3(g), taxable fuel is measured on the basis of actual volumetric gallons or gallons adjusted to 60 degrees Fahrenheit. For purposes

of the tax imposed under §48.4081-3(f) and the tax imposed on the sale of taxable fuel under §48.4081-3(g), taxable fuel is measured on the basis of actual volumetric gallons or gallons adjusted to 60 degrees Fahrenheit, whichever basis is used to invoice the buyer.

(c) *Effective date.* This section is applicable as of October 1, 1996.

Par. 3. Section 48.4082-1 is amended as follows:

1. In the introductory text of paragraph (a), the language “if—” is removed and “if, at the time of the removal, entry, or sale—” is added in its place.

2. Paragraph (d) is revised.

The revision reads as follows:

§48.4082-1 Diesel fuel tax; exemption.

* * * * *

(d) *Time for adding the dye and marker—(1) Removals from a terminal at the terminal rack; in general.* With respect to any removal from a terminal at the terminal rack, diesel fuel satisfies the dyeing and marking requirements of this paragraph (d) only if the dye and marker required by paragraphs (b) and (c) of this section are combined with diesel fuel—

(i) Before the fuel is received at the terminal;

(ii) While the fuel is in a bulk storage tank at the terminal; or

(iii) At the terminal rack by means of—

(A) A mechanical injection system described in paragraph (d)(2) of this section; or

(B) Nonconforming dyeing, under the conditions of paragraph (d)(3) of this section.

(2) *Removals from a terminal at the terminal rack; mechanical injection systems.* A mechanical injection system is described in this paragraph (d)(2) only if the district director has determined (and such determination has not been withdrawn) that the system contains—

(i) Features that automatically inject a measured amount of dye and marker into diesel fuel as the fuel is delivered into the transport compartment of a truck, trailer, railroad car, or other means of nonbulk transfer;

(ii) Calibrated devices that accurately measure and record the amount

of dye, marker, and fuel that is dispensed at the rack for each removal;

(iii) Shut-off devices that prevent the removal of more than 50 gallons of undyed diesel fuel in the case of a system malfunction; and

(iv) Locks or similar security equipment that secure the measurement devices and shut-off devices.

(3) *Removals from a terminal at the terminal rack; conditions for nonconforming dyeing.* Nonconforming dyeing meets the conditions of this paragraph (d)(3) only if diesel fuel is dyed and marked in the manner described in paragraph (d)(4) of this section and—

(i) The terminal operator has given a bond as a condition of registration under the provisions of §48.4101-1(f)(4)(i); or

(ii) In the case of a terminal containing a mechanical injection system described in paragraph (d)(2) of this section—

(A) The accurate mechanical injection of dye and marker at the terminal cannot occur because of an equipment malfunction or a shutdown for maintenance purposes;

(B) Before beginning any nonconforming dyeing described in paragraph (d)(4) of this section, the terminal operator notifies the district director of the time, location, and type of malfunction or maintenance shutdown; and

(C) Immediately after correction of the malfunction or completion of the maintenance, the terminal operator notifies the district director that mechanical injection has resumed.

(4) *Removals from a terminal at the terminal rack; description of nonconforming dyeing—(i) In general.* Diesel fuel is dyed and marked in a manner described in this paragraph (d)(4) only if the diesel fuel is dyed and marked by means of a mechanical injection system described in paragraph (d)(4)(ii) of this section or manual dyeing described in paragraph (d)(4)(iii) of this section.

(ii) *Mechanical injection.* Diesel fuel is dyed and marked in a manner described in this paragraph (d)(4)(ii) if the diesel fuel is dyed and marked by means of a mechanical injection system that is not described in paragraph (d)(2) of this section and, with respect to the diesel fuel so dyed and marked, the terminal operator maintains a record of—

(A) The identity and registration number of the position holder;

(B) The identity and taxpayer identification number of the individual that physically receives the fuel at the terminal;

(C) The identity and taxpayer identification number of any individual that physically operates the mechanical injection equipment; and

(D) The volume of the fuel dyed and marked and the date and time of the dyeing.

(iii) *Manual dyeing.* Diesel fuel is dyed and marked in a manner described in this paragraph (d)(4)(iii) if—

(A) The terminal operator places a dye and marker of the type and concentration required by paragraphs (b) and (c) of this section into a compartment of a truck, trailer, railroad car, or other means of nonbulk transfer;

(B) The diesel fuel is removed from the terminal at the rack and is immediately delivered into the compartment described in paragraph (d)(4)(iii)(A) of this section; and

(C) With respect to the diesel fuel so dyed and marked, the terminal operator maintains a record of—

(1) The identity and registration number of the position holder;

(2) The identity and taxpayer identification number of the individual that physically receives the fuel at the terminal;

(3) The identity and taxpayer identification number of the individual that physically places the dye and marker into the compartment described in paragraph (d)(4)(iii)(A) of this section; and

(4) The volume of the fuel dyed and marked and the date and time of the manual dyeing.

(5) *Removals from refineries, sales or entries.* With respect to any removal from a refinery, sale, or entry, diesel fuel satisfies the dyeing and marking requirements of this paragraph (d) only if the dye and marker required by paragraphs (b) and (c) of this section are combined with diesel fuel before the removal, sale, or entry that would otherwise be subject to the tax imposed by section 4081. Thus, for example, diesel fuel that is entered into the United States by means of nonbulk transfer (such as in a railroad car) does not satisfy the requirements of this paragraph (d)(5) if the required dye and marker are combined with the diesel fuel after the fuel has been entered into the United States.

(6) *Cross reference.* For rules allowing inspection of equipment used for the dyeing of fuel, see section 4083.

(7) *Effective date.* This paragraph (d) is applicable as of April 1, 1997.

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Par. 4. Section §48.4101-1 is amended as follows:

1. Paragraph (b)(7) is added.

2. Paragraph (f)(4)(i) is amended by adding a sentence at the end of the paragraph.

3. In the first sentence of paragraph (j)(2) introductory text, the language "A bond" is removed and "Except as provided in the last sentence of paragraph (f)(4)(i) of this section, a bond" is added in its place.

4. Paragraph (l)(4) is added.

The additions read as follows

§48.4101-1 *Registration.*

* * * * *

(b) * * *

(7) *Nonconforming dyeing amount.* The *nonconforming dyeing amount* is the product of—

(i) The rate of tax on diesel fuel provided by section 4081(a)(2); and

(ii) An amount up to the total number of gallons of diesel fuel expected to be dyed by nonconforming dyeing (and removed at terminal racks of the applicant that do not have a mechanical injection system described in §48.4082-1(d)(2)) during a representative one-month period (as determined by the district director).

* * * * *

(f) * * *

(4) * * * (i) * * * An applicant that operates a terminal where diesel fuel is dyed by nonconforming dyeing (and removed at a rack that is not equipped with a mechanical injection system described in §48.4082-1(d)(2)) meets the adequate security test only if the applicant has given a bond (in addition to any bond given under paragraph (j) of this section) equal to the nonconforming dyeing amount.

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(l) * * *

(4) The last sentence of paragraph

(f)(4)(i) of this section is applicable as of April 1, 1997.

Margaret Milner Richardson,
Commissioner of Internal Revenue.

(Filed by the Office of the Federal Register on March 13, 1996, 8:45 a.m., and published in the issue of the Federal Register for March 14, 1996, 61 F.R. 10490)