IPT 2015 Sales Tax Symposium
Industry Issues – Oil & Gas

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AGENDA

Taxability of Corporate Aircraft Transactions
  Leasing Transactions
  Capital Contribution

Recent Cases, Ruling, and Legislation affecting Oil & Gas Industry

Excise and Motor Fuels Tax Issues
Taxability of Corporate Aircraft Transactions

Applicable taxes:
Sales tax, Use Tax, Property Tax
Sales and use taxes generally apply to all sales of tangible personal property within a state, or property purchased out of state and brought into state for use.
Property tax generally applies to aircraft maintained or hangared in the state

Common Exemptions
Sale-for-resale
Occasional/Casual Sale
“Flyaway” exemptions

Application of Federal Law for SALT Purposes
Economic Substance Doctrine

Structured Transactions for Aircraft Purchases
Two most common structures are:
Purchase for Lease Transactions
Capital Contribution
Leasing Transactions – Texas

Goal:
Taxpayers seek to qualify for sale-for-resale exemption to purchase aircraft tax-free.

Traditional “Sale-for-resale”:
Sale of tangible personal property ... to a purchaser who acquires the property ... for the purpose of reselling it ... in the normal course of business. Tex. Tax Code § 151.006(a)(1).
Sale of tangible personal property to a purchaser for the sole purpose of the purchaser’s leasing or renting it ... in the normal course of business to another person. Tex. Tax Code § 151.006(a)(2).
Aircraft specific “sale for resale”:
For purposes of § 151.006, “sale for resale” includes the sale of an aircraft to a purchaser who acquires the aircraft for the purpose of leasing, renting, or reselling ... to another person ... in the form or condition in which it is acquired. Tex. Tax Code § 163.002(a) (effective September 1, 2015).

“Leasing or renting” of an aircraft ... includes the transfer of operational control ... to one or more lessees pursuant to ... written agreements. Tex. Tax Code § 163.002(b) (effective September 1, 2015).

“Operational control” has the meaning assigned under FAA regulations (i.e. exercise of authority over initiating, conducting, or terminating a flight). Id.
Leasing Transactions – Third Party Leasing

**Structure:**
- Taxpayer purchases aircraft;
- Taxpayer leases aircraft to charter and management company with FAA Part 135 Certification.

**Texas Cases:**
- *Caledon Aviation, LLC v. Combs* (state prevailed in district court)
Leasing Transactions – Related Entity

**Structure:**
Taxpayer purchases aircraft;
Taxpayer then leases aircraft to related entity;
Related entity manages and operates the aircraft by leasing it to Taxpayer and/or third parties.

**Recent Texas Cases:**

*EWC Aviation Corp. v. Combs* (oral lease) (Cause No. D-1-GN-13-003554) (settled)
*TJ Leasing, LLC v. Combs* (Cause No. D-1-GN-13-03999) (settled)
*Cantu Enterprises, LLC v. Hegar* (Cause No. D-1-GN-13-004369) (state prevailed in trial court; taxpayer plans to appeal)
Leasing Transactions – Tax Consequences

**Initial Purchase:**
Out-of-state → sales tax doesn’t apply; look to use tax statutes.

*Who is purchasing entity? Leasing company or entity that plans to use the aircraft in State?*

If purchaser is entity bringing aircraft into state for use, use tax may apply.

**Transfer to leasing entity:**
Taxability generally depends on leasing entity status.

*Does the state exempt certified or licensed air carriers? For example, Texas exempts sales of aircraft to Part 135 carriers.*

**Subsequent Use:**
Some state taxing authorities, including the Texas Comptroller, often urge courts to look through the form of the sale and subsequent lease to the underlying economic realities.
Leasing Transactions – Economic Substance Issues

States are increasingly, but inconsistently, relying on federal economic substance concepts to impose tax on transactions that – at face value – meet the plain language of state tax statutes. This creates tension.

On one hand, if a tax statute is unambiguous, courts typically look to the plain meaning of the statutory language to discern legislative intent. On the other hand, a common law economic substance analysis purports to override the statute to apply the *true* legislative intent.
Federal common law doctrines allowing courts to look beyond a transaction’s form:

**Economic substance doctrine** – whether a transaction has, apart from the tax benefits, a business purpose and/or economic substance – meaning the taxpayer’s economic position changes in some meaningful way.

*A sham transaction is one without economic substance.*

**Step transaction doctrine** – collapses or rearranges the steps of a transaction to disregard steps taken solely for their tax consequences.

**Alter ego doctrine** – disregards the corporate fiction to treat the corporation’s owners as the parties engaging in the transaction.
Underlying policy behind economic substance doctrines is that taxpayers cannot avoid tax by structuring transactions in a manner that conforms to a literal reading of a statute but does not conform to what Congress intended when the statute was enacted.

In other words, economic substance is used to enforce legislative intent.

Some states have codified economic substance doctrine:
- Massachusetts
- New Hampshire
- Ohio
- Washington
Leasing Transactions – Economic Substance Issues (cont’d)

Judicial acceptance of economic substance in other states varies

**Illinois** – In *Hartney Fuel Oil Co. v. Hamer* the Illinois Supreme Court refused to find a sham transaction where the taxpayer structured its sales contracts to come within the plain language of a regulation and thereby avoided incurring sales tax in a high-tax jurisdiction.

**Indiana** – In a letter ruling, the Indiana Department of Revenue applied the sham transaction, economic substance, and “legitimate corporate business purpose” analysis to disregard the LLC form and impose tax on the LLC’s sole member for vehicles owned by the LLC and stored in Indiana.

**Kentucky** – In *Ohio Valley Aluminum Co. v. Dep’t of Revenue*, the court applied substance over form to collapse a parent and subsidiary structure for parent’s transfer of metal purchasing/selling business to subsidiary when parent retained scrap metal processing portion of business. Court attributed subsidiary’s raw material costs to parent’s cost of production for purposes of sales and use tax exemption for fuels used in manufacturing.

**Louisiana** – In *Thomas v. Bridges*, the Supreme Court refused to pierce the corporate veil of a Montana LLC formed solely for the purpose of avoiding Louisiana sales tax on the purchase of a recreational vehicle. The court found that avoiding taxes is a common legal practice for an LLC that can be formed for any lawful purpose.

**Michigan** – In *Free Enterprises LLC v. Dep’t of Treasury*, the court refused to impose tax on the purchase of an RV by a single-member LLC that fell within the plain meaning of a use tax exemption. The court concluded that it was irrelevant that the LLC was formed for the purpose of minimizing or avoiding tax.

**Wisconsin** – *Sullivan Bros., Inc. v. Dep’t of Revenue* the court applied economic substance and business purpose analysis to collapse a corporate structure designed to obtain a sales tax exemption.
Capital Contribution Structure

**Step 1:** Company A purchases and takes delivery of aircraft outside State it is intended for use within.

**Step 2:** Company A contributes aircraft to Company B, a wholly-owned subsidiary, but does not receive additional ownership interest in exchange (i.e. title transfers without consideration).

*Note:* FAA regulations prescribe special requirements for LLC ownership of aircraft.

**Step 3:** Company B brings aircraft into State for use, either by Company A or Company B.
Capital Contribution

Tax Consequences

Out of state purchase $\rightarrow$ sales tax doesn’t apply.

Be careful to research the state of delivery sales tax application to the transaction. 

*Even if the purchase is taxable in the state of delivery, there may be a “flyaway” exemptions:*

AK, AR, AZ, CA, CO, CT, GA, IA, ID, IL, IN, KS, LA, MA, ME, MI, MN, MO, MT, NE, NJ, OK, OR, SD, TN, TX, WA, WI

*Note:* Individual states may limit the flyaway exemption or require specific documentation in order for the exemption to apply.

Capital contribution to subsidiary $\rightarrow$ generally not taxable because it is not a “sale” or “purchase”

Sale has two elements:

Transfer of title or possession; and

Consideration.

If there is no consideration (i.e. additional ownership interest) received in exchange for contributed aircraft, there is no sale.

Subsidiary brings aircraft to State $\rightarrow$ is there a taxable event?

Sales and use tax statutes generally apply to “sales” or “purchases”

A capital contribution is not a sale or purchase when no consideration is exchanged for the contribution.
Capital Contribution
Tax Consequences (cont’d)

Advantage is that the aircraft can be acquired without causing a taxable event that will trigger sales or use tax in the state where the aircraft will be used.

The capital contribution structure may not work as smoothly in states that have codified economic substance doctrine or other similar laws that allow them to look through the form of a transaction.
Texas Tax Code Chapter 163: Sales & Use Taxation of Aircraft

S.B. 1396

Version introduced was not helpful for taxpayers.

- Started as a bill that severely limited leasing and capital contribution transactions.

Emerged from committee as a taxpayer friendly bill.

- Effectively blesses structured transactions by applying plain meaning of existing statutes.

Effective September 1, 2015.

*Ch. 163 does not impose tax. It only clarifies application of existing sales & use tax statutes to sales or purchases of aircraft.
Helpful Provisions in Chapter 163

§ 163.002 – Resale of Aircraft
Clarifies that a sale-for-resale includes the purchase of an aircraft for the purpose of renting or leasing it.
“Lease” and “rental” include transfer of operational control (i.e. authority over initiating, conducting, or terminating a flight)
Lessor may use the aircraft without losing sale-for-resale exemption, subject to certain limitations.

No longer requires “sole purpose” of purchase to be lease or rental to qualify as resale.
Limit on Lessor Use: More than 50% of departures must be under operational control of a lessee during first year of use for exemption to apply.
Effectively removes aircraft sales-for-resale from divergent use provision previously used by the Comptroller as a basis to deny the exemption.
Helpful Provisions in Chapter 163 (cont’d)

§ 163.004 – No Presumption of Use
Eliminates general presumption under Chapter 151 that tangible personal property brought into Texas by a purchaser is purchased for use, storage, or other consumption in the state.
Presumption of use only applies if person bringing aircraft into Texas directly purchased it from a seller.

§ 163.006 – Certain Transactions between Related Persons
Transactions between related entities that would otherwise be exempt if they had occurred between unrelated entities are also exempt.
No tax is due simply because an owner, member, or affiliate of the purchasing entity uses the aircraft.

Exception: If the purchase was exempt as a sale-for-resale or an occasional sale, the use by an owner, member, or affiliate may be taxable. It’s unclear at this stage how the Comptroller intends to apply this statute.
AGENDA

Taxability of Corporate Aircraft Transactions
Leasing Transactions
Capital Contribution

Recent Cases, Ruling, and Legislation affecting Oil & Gas Industry
Excise and Motor Fuels Tax Issues
Arkansas Oil & Gas Update:

Recent Legislation
L. 2015, SB802 (Act 1126)
Specifies that taxable solid waste services does not include: saltwater, drilling fluids, hydraulic fracturing fluids, produced water, pit water, pit mud, and similar materials produced or generated from oil, gas, or other natural resource exploration and development activities.

L. 2015, SB802 (Act 1125)
Amends Ark. Code Ann. § 26-52-402(c)(2)(B), regarding a manufacturing exemption, to exempt from tax “[s]and and other proppants used to complete a new oil or gas well or to re-complete, redrill, or expand an existing oil or gas well.” The exemption language was re-inserted into the statute while litigation regarding the taxability of proppants was pending before the Arkansas Supreme Court. That case has since been resolved in favor of the taxpayer claiming the manufacturing exemption. See Walther v. Weatherford Artificial Lift Systems, Inc., 2015 Ark 255 (June 4, 2015).
**Walther v. Weatherford Artificial Lift Sys., Inc.**
**2015 Ark. 255 (Jun. 4, 2015)**

**Issue:** Whether proppants are equipment used directly in manufacturing, and not subject to tax pursuant to the manufacturing exemption

**Facts:** Proppants are granular substances used in extracting natural gas from unconventional natural gas reservoirs, preventing rock fractures from collapsing when used in connection with hydraulic fracturing of new natural gas wells.
Walther v. Weatherford Artificial Lift Sys., Inc. (cont’d)

**Analysis:** In 2015, Arkansas amended its manufacturing exemption statute to expressly include proppants as exempt manufacturing equipment. During the periods at issue (2006-2009) proppants were treated as nonexempt equipment pursuant to an administrative regulation.

Supreme Court of Arkansas affirmed lower court’s ruling that proppants used in hydraulic fracturing are used directly in manufacturing and are exempt. Proppants are used for the life of the well and are engaged in physical/mechanical action by directing the flow of gas and preventing wells from closing.

The Court also affirmed the determination that the administrative regulation characterizing proppants as nonexempt is invalid and unenforceable.
Louisiana Oil & Gas Update:

Recent Legislation

La. HCR 8 - Sales Tax

Suspends 1% of the exemption for business utilities. Including electricity, natural gas, steam, water

Revenue Information Bulletin No. 15-016

The Louisiana Chemical Association (LCA) has filed suit to declare the suspension of the exemption illegal.

Taxpayers should file under protest.

Procedures for filing under protest vary depending on whether the Taxpayer remits the tax directly to the State or if it pay the tax to the vendor.

Tax paid directly to the state - if filed electronically, see the website. The protested amount must be separately stated based on current instructions.

Also send a certified letter, stating the amount, (will likely have to be done monthly) explaining your intent to file suit for refund in District Court or with the Board of Tax Appeals (BTA). File suit within 30 days of paying under protest.

Another option is to enter in to an agreement to abide with the outcome of the LCA suit, but you still have to file under protest each month and submit a certified letter with the amounts and reference to the agreement to abide. Taxes paid under protest on a paper should follow similar procedures.

Tax paid to the vendor - by the 20th day of the month following the date when tax was billed by the vendor, send a certified letter to the State with the amounts listed, and the intent to file suit in District Court or with the BTA. Again the suit must be filed within 30 days.

You can enter into an agreement to abide with the State. Find out the specific requirements for notifying the state of future protested amounts.
Louisiana Oil and Gas Update:

**Enterprise Zone - HB 466**


Reduces exemption for oil and natural gas production from horizontally drilled wells

**Case:**


Pot-O-Gold rented portable toilets and provides waste removal services. Customers had the option to rent the toilet with and without waste removal services, and vice versa. The City assessed tax on the rental and the related waste removal services. Waste removal services are not taxable in Louisiana. The court held that the waste removal service was not taxable without regard to who rented the customer the toilet.
North Dakota Oil & Gas Update:

**Recent Legislation**

New section added to chapter 57-39.2 of the North Dakota Century Code regarding exemption for materials used to construct fertilizer or chemical processing plants.

The term “fertilizer and chemical processing plants” includes a plant that produces for retail or wholesale a fertilizer, chemical, or chemical derivative from natural gas, LNG, or crude oil components.

Gross receipts from sales of tangible personal property used to construct such plants are exempt if:

- *Incorporated into the structure of the facility; or*
- *Used in the construction process to the point of having no residual value*
Texas Update:

**Cases**

   - SCOTX requested full briefing on merits 6/19/15 (SWR’s brief filed 8/__/15; currently awaiting Comptroller’s reply)
*Ryan Directional Services, Inc. v. Hegar*, Original Petition filed 8/7/15
   - Protest suit arising from adverse ruling in Comptroller Hearing No. 107,578.

**Rulings**

Comptroller Decision No. 107,598
   - Regarding exemption for component parts of drilling equipment built in TX and used outside the state.

**Legislation**

Proposed Rule 3.88 – Moveable Specialized Equipment
   - Published in Texas Register 8/7/15

**Policy**

Texas Managed Compliance Audits
   - Agency may decide to not assess deficiency

Texas auditors are inconsistent in applying rules around new construction used by various offices
**Southwest Royalties, Inc. v. Hegar**
2014 WL 4058950 (Tex. App.—Austin 2014)

**Issue**: Whether oil and gas well equipment qualifies for manufacturing exemption

**Facts**: Southwest is a producer and processor of oil and natural gas. Southwest brought suit to recover taxes paid on purchases of equipment made for and used in its oil and gas production and processing operations.

**Analysis**: Trial court found that Southwest’s purchases did not qualify for the manufacturing exemption because the equipment was “merely an indirect cause of the changes [that occur as the oil and gas are removed from the ocean floor and brought to the surface],” not directly causing physical changes to the hydrocarbon products, as required by the statute.
TX Court of Appeals determined that manufacturing includes each operation beginning with the first stage of production of tangible personal property ending with the completion of tangible personal property, and the extraction of oil and gas does not appear to qualify as manufacturing. The Court of Appeals deferred to the Comptroller’s interpretation of the manufacturing exemption.

Texas Supreme Court granted Southwest’s petition for review and has requested full briefing on the merits.
**Issue**: Whether drilling equipment exemption applies to component parts to drilling equipment temporarily stored in Texas and used outside the state.

**Facts**: Taxpayer provided horizontal and directional drilling measurement services at various oil and gas well sites. Taxpayer’s HQ was in Texas, but purchased component parts of “measurement while drilling” and “mud motor” tools from out-of-state vendors and assembled them at its HQ in Texas. The tools were then put into service. Taxpayer did not know where the assembled tool would be used at the time it purchased the component parts. The Taxpayer tracked the usage of the assembled tools. About 27% were used outside Texas.

**Analysis**: Drilling equipment exemption (Tex. Tax Code § 151.324(b)) by definition applies to drilling equipment that is built for exclusive use outside Texas. The ALJ determined that the statute does not create a use tax exemption; the use tax and the exemption are mutually exclusive.
Drilling equipment that is built for exclusive use outside Texas is not subject to the use tax. The use tax applies to “use, storage, or other consumption ... in this state.” If drilling equipment is used in Texas (and thus subject to use tax), then it was not sold for exclusive use outside the state. The exemption applies when the equipment is sold for exclusive use outside the state; i.e. it is a sales tax exemption. Since the products at issue were not sold exclusively for use outside Texas, the ALJ held the exemption inapplicable to the Taxpayer’s purchases of component parts.

The taxpayer filed a protest suit in Travis County District Court. 

*Ryan Directional Services, Inc. v. Hegar*, Original Petition filed 8/7/15.
Proposed Rule 3.88*
(to be codified at 34 Tex. Admin Code 3.88)

Response to issues concerning taxation of moveable oil and gas drilling equipment

Intended to clarify agency policy concerning what is and is not a motor vehicle.

Moveable specialized equipment is subject to sales and use tax under Tax Code Ch. 151.
Motor vehicles are not subject to sales and use tax, but are taxed under Ch. 152

*Both are transactional taxes.*

Proposed rule provides that classification will be determined at time of sale – to be a motor vehicle, there must have been a “modification of the design” of a trailer. Merely attaching an item of TPP (e.g., towable cranes or well-servicing units) to a trailer will not be sufficient to treat it as an integral part of the trailer.

*Sale of unmodified trailer → subject to Motor Vehicle Tax.*
Subsequent sale of trailer w/ equipment attached → subject to Sales and Use Tax.

*Comment period on proposed rule is still open.*
Colorado Oil & Gas Update

Cases:


Rulings:

Pioneer Natural Resources USA, Inc. v. Colorado Dep’t of Revenue
2014 WL 3955010 (Colo. App. 2014)

**Issue**: Whether pipelines and fittings purchased for a gas gathering system to extract natural gas are machinery used in manufacturing

**Facts**: Pioneer has system of 2000 wells and 10 compressor sites utilizing the pipelines and fittings to maintain pressure and extract natural gas from each well, moving the natural gas to compressor/processing stations for final processing before commercial distribution.
Pioneer Natural Resources USA, Inc. v. Colorado Dep’t of Revenue (cont’d)

**Analysis**: Court of Appeals affirmed trial court’s finding that pipelines and fittings qualified for enterprise zone sales tax exemption as machinery “in direct use in the manufacturing of natural gas.” Although the statute did not include “gathering” in its definition of manufacturing, it included “extracting” and “processing.”

The Court affirmed the finding that natural gas underwent a manufacturing process through the extraction and processing of the gas through the gathering system, which was used to move material from wells to processing facilities in a continuous flow.

*This case has not been published in the permanent reporters. A motion for rehearing in the court of appeals or a petition for certiorari in the supreme court may be pending.*
**Issue**: Whether bulk water sales are subject to Colorado sales and use tax.

**Facts**: Company operating a water well in Colorado sold water in bulk to unrelated parties primarily in the oil and gas industry for hydraulic fracturing purposes. Water is delivered in one of two ways: (1) by filling customer owned tankers at Company’s wellhead pump station; or (2) by customer owned and operated pipeline that ties-in at Company’s wellhead pump station. Under both methods, the sale occurs at the pump station where title to and possession of the water passes to the customer.

**Analysis**: Colorado regulations state that the sale of water in “wagons, tanks, or containers” constitutes a taxable sale of tangible personal property because water is tangible personal property once it is severed from the real estate. Therefore the sale of water in tankers is taxable.
**Analysis:** Colorado regulations state that the sale of water in “wagons, tanks, or containers” constitutes a taxable sale of tangible personal property because water is tangible personal property once it is severed from the real estate. Therefore, the sale of water in tankers is taxable.

The question of whether water delivered via pipeline is not directly addressed by statute or regulations. However, one regulation provides that “the term tangible personal property does not include water in pipes, conduits, ditches, or reservoirs.” The regulation generally applies to situations where the seller owns the pipeline and title to the water passes to the customer at the end of the pipeline.

The Colorado PLR concluded that in the absence of this regulation, it would be inclined to treat the sale of water delivered via customer-owned pipelines as a taxable sale. Since the regulation does not make a distinction between seller-owned and customer-owned pipelines, the Colorado Department of Revenue determined the sales of water via customer-owned pipeline are not subject to sales tax.
Business Operations

Contracts/Procurement
  Flash Sales in Various States
  Purchasing – Contractor now making purchases directly with vendors vs. vendor being paid by XOM

Business Service Centers
  Process driven
  High turnover
  KPI focused
Agenda

Excise / Fuels Tax
- Recent Legislation and IRS Releases
- Pending Legislation
- Gross Income Inclusion / Exclusion

Fuel Credits
- What to do, and what not to do when working with tax agencies
Recent Legislation and IRS Releases
On December 19, 2014, H.R. 5771, the “Tax Increase Prevention Act of 2014,” was enacted. Significant elements of this extenders legislation include the following:

– Sec. 152. Extension of second generation biofuel producer credit.

– Sec. 153. Extension of incentives for biodiesel and renewable diesel.

– Sec. 155. Extension of credits with respect to facilities producing energy from certain renewable resources.

– Sec. 157. Extension of special allowance for second generation biofuel plant property.

– Sec. 160. Extension of excise tax credits relating to certain fuels.

– Sec. 161. Extension of credit for alternative fuel vehicle refueling property.

Most provisions were only extended to December 31, 2014.
IRS Notice 2015-3

– IRS Notice 2015-3 was released by the IRS on January 16, 2015 and outlined procedures for filing a one-time claim for refund for alternative fuel and biodiesel mixtures sold and used during the 2014 calendar year.

– A single Form 8849 must be submitted using Schedule 3 for all biodiesel and alternative fuel incentives for 2014.

– Claims may be filed only between 1/16/2015 and 8/8/2015.


– Alternative fuel mixture claims must be made on Form 720X.

– Notice 2015-3 does not affect the claims for refundable income tax credit for biodiesel mixtures and alternative fuel under IRC section 35, which are claimed on Form 4136.

– Notice 2015-3 does not affect 2nd generation biofuel producer credit, which is claimed on Form 6478.
Keystone Pipeline Resolution & the Oil Spill Liability Trust Fund Tax

**Keystone Pipeline**

- The Keystone XL Pipeline Approval Act (S. 1) passed the House on February 11, 2015, and included a nonbinding resolution that Congress should subject oil derived from tar sands to the excise tax on crude oil that funds the federal Oil Spill Liability Trust Fund.

- President Obama has vetoed and Senate was unable to override.

**Tar Sands Loophole Elimination Act**

- The Tar Sands Loophole Elimination Act was introduced in the House on January 8, 2015 and is currently in the House Ways and Means Committee.

- Related Senate Bill 187 was introduced in the Senate on January 16, 2015 and is currently in the Finance Committee.

- Both bills will alter the definition of crude oil within IRC section 4612 to include oil derived from tar sands, and therefore these products will be subject to the Oil Spill Tax within IRC section 4611.

**PMTA 2014-10**

- The IRS issued guidance on January 26, 2015 that it considers “tight oil” to be subject to the Federal Oil Spill Liability Trust Fund tax.

- Tight Oil (AKA shale oil) is oil produced from petroleum-bearing formations with low permeability such as the Eagle Ford, the Bakken, and other formations that must be hydraulically fractured to produce oil at commercial rates.
IRSCCA 201421017 on Diesel Particulate Filters (DPF’s)

Highlights

– The IRS concluded that diesel fuel consumed in diesel particulate filters is a nontaxable use of fuel because the fuel is used in a manner other than propulsion of an engine of a diesel-powered highway vehicle.

– DPFs are devices that reduce diesel emissions and have been required to be affixed to all diesel-powered vehicles manufactured since 2007.

Substantiating Refund Claims

– Companies are using data available on the truck’s Engine Control Module (“ECM”) to substantiate DPF refund claims.

– The ECM is a built in computer system that tracks all sorts of engine data, including fuel consumption.

– All recently manufactured trucks (at least since 2008) have an ECM, as do cars.

– Company mechanics (or truck dealers) typically have the ability to pull this data.
IRS PMTA 2014-03 on Heavy Highway Vehicles

Heavy highway vehicles are eligible for a prorated refund of the heavy highway use tax when sold, destroyed, or stolen during the taxable year.

– State replacement incentive programs are aimed at exchanging older, high-polluting vehicles with a voucher award to use toward a newer, lower-emission vehicle. The older vehicle must be dismantled and completely destroyed.

– The IRS concluded that the transfer of a high-polluting vehicle to a dealer under a state replacement incentive program constitutes a “sale” and is eligible for a prorated refund of the heavy highway use tax depending on the month of the transfer.
Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (“H.R. 3626”)

On July 31, 2015, President Obama signed into law the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (“H.R. 3626”). One part of the bill equalized the excise tax treatment of liquefied natural gas (“LNG”), liquefied petroleum gas (“LPG”), and compressed natural gas (“CNG”).

- The bill provides a gasoline energy equivalency for LPG of 115,400 Btu. One gallon of LPG is approximately 72% the energy content of one gallon of gasoline. Therefore, the new equivalency effectively decreased the federal excise tax on LPG to 13.2 cents per gallon.

- The bill also provides for a diesel fuel energy equivalency for LNG of 128,700 Btu. One gallon of LNG is approximately 58% the energy content of one gallon of diesel fuel. Therefore, the new equivalency effectively decreased the federal excise tax on LNG to 14.1 cents per gallon.

- The bill also provides for a gasoline gallon equivalency for CNG of 5.66 pounds.

- Effective January 1, 2016
Pending Federal Legislation
H.R. 680 – Update, Promote, and Develop America’s Transportation Essentials Act of 2015

– On February 3, 2015, Representative Blumenauer introduced a bill to amend the Internal Revenue Code which would increase the excise tax on gasoline, diesel, and kerosene fuels.

– If enacted, the new gasoline and diesel tax rates will increase as follows:

» January 1, 2016 – December 31, 2016: upon gasoline, will increase to 26.3 cents per gallon; upon diesel, will increase to 32.3 cents per gallon

» January 1, 2017 – December 31, 2017: upon gasoline, will increase to 30.3 cents per gallon; upon diesel, will increase to 36.3 cents per gallon

» January 1, 2018 – December 31, 2028: upon gasoline, will increase to 33.3 cents per gallon; upon diesel, will increase to 39.3 cents per gallon

– The bill is currently in the Committee on Ways and Means.

– Effective for sales or uses of fuel after December 31, 2015.
TRAFFIC Relief Act

– On August 6, 2015, Senator Tom Carper (D-Del.) introduced the TRAFFIC Relief Act, which would raise the country’s gasoline and diesel taxes, and also extend and expand tax credits affecting American families.

– If enacted, the following would occur:

  » January 1, 2016 - increase gasoline and diesel taxes by four cents each year for four years.

  » January 1, 2020 - tax rates would subsequently be indexed to inflation.

  » Extend and expand the earned income (EITC) and child (CTC) tax credits.
On February 4, 2015, Representative Jose Serrano introduced a bill to provide a business credit relating to the use of clean-fuel and fuel efficient vehicles by businesses within areas designated as “nonattainment areas.”

“Nonattainment area” is an area considered to have air quality below the national standards.

Credit is equal to the clean-fuel property credit plus the clean-burning fuel use credit.

Clean-burning fuel includes natural gas, CNG, LNG, LPG, hydrogen, electricity, and biodiesel.

Clean-fuel property credit is equal to the sum of:

- Amounts paid by an eligible business for clean-fuel vehicle property used in the nonattainment area, subject to limitation based on gross vehicle weight, plus
- Amounts paid by an eligible business for property that stores or dispenses clean-burning fuel into another vehicle’s fuel tank, but not exceeding $150,000.

Clean-burning fuel use credit is equal to $0.50 per GGE of clean-burning fuel used by an eligible business to propel clean-fuel vehicle property.

The credit would be in addition to the current $.50 per gallon alternative fuel tax credit and would be claimed by the company that uses the clean-burning fuel to propel a clean-burning vehicle.

The bill is currently in the Committee on Ways and Means.

Effective for property placed in service after December 31, 2014.
On March 4, 2015, Representative Roger Williams introduced a bill to provide a Mileage-Based User Fee for Mobile Mounted Concrete Boom Pumps

- A per mile fee for each mile traveled in the United States
  1. $0.05 per mile for vehicles less than 60,000 GVW, and
  2. $0.07 per mile for vehicles greater than 60,000 GVW

- Paid by owner of the vehicle

- Allows for a credit against the fee the amount of tax imposed by 4053, 4081, and 4481. The credit is in lieu of a payment under section 6427.

- Provides $5,000,000 to develop a system for administration and compliance.

- Effective January 1, 2016.
The Repeal and Rebuild Act of 2014 was introduced on June 11, 2014 by OR Rep. DeFazio but was not enacted during the second session of the 113th session that ended 1/3/2015.

The Repeal and Rebuild Act, had it been enacted, would have:

- Repealed the excise tax on gasoline and tires after 2014;
- Imposed an additional $6.75 per barrel on crude oil and petroleum products;
- Provided for double indexation of the diesel fuel tax rate; and
- Transferred revenue from the increased petroleum tax to the Highway Trust Fund.
Gross Income
Inclusion/Exclusion of Fuel Credits
Gross Income Inclusion/Exclusion

How is your company treating fuel tax credits and related refund payments for federal income tax purposes?

– Credits and refund payments for non-taxable (e.g., off-highway) use of fuel are generally includable in gross income by operation of the tax-benefit rule.
  » See, e.g., Rev. Rul. 67-2; IRS instructions to Form 720

– IRC § 87 specifically provides that § 40 and § 40A credits must be included in gross income in the year the credit is determined, regardless of when credit is utilized.

– CCA 201342010 (release date 10/18/13) concludes that IRC § 6426 incentive credits, and related § 6427(e) payments, are not items of gross income.

– But CCA 201406001 (release date 2/7/14) concludes that no deduction is allowed for excise taxes imposed to the extent the taxes are offset by IRC § 6426 credits.
  » Some taxpayers are challenging the IRS’s conclusion, arguing that refundable § 6426 credits are a means of “satisfying” (not reducing) their deductible excise tax liability under § 4081 or § 4041.
  » Depending on facts, there may be an opportunity to exclude § 6426 credits from being directly or indirectly included in claimant’s taxable income.
What to do, and what *not* to do when working with tax agencies
What to do, and what not to do when working with Tax Agencies

**Licensing, Permits and IRS Form 637**

- Apply for all licenses, permits, and registrations for every legal entity (disregarded entities).

- Reapply before acquisitions, or before actual startup.

- *Don’t wait to apply*, and don’t expect approval in a couple weeks.

- Provide all the requested information (yes, the officers’ SSN).

- Be prepared for a site visit and possible sample collection of fuels.

- Get any outstanding tax liabilities resolved before you apply.
What to do, and what not to do when working with tax agencies (Cont.)

**Tax Returns, Claims, etc.**

- Make timely deposits and filings. Do not delay!
- Obtain all biodiesel producer and reseller certificates
- For tax exempt transactions confirm you have all the proper certificates in your files. Do not presume the tax authority will permit you to go back and obtain them after the fact.
- Maintain proof of mailing and copies of all correspondence.
- Don’t delay providing request for additional information, but do question request that are out of scope.
- Stay in contact with the auditor to keep the audit moving.
- If unable to resolve issue, ask to speak with the auditor’s manager.
Q&A
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