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Mixture Credit Exclusion from Income – Senate Finance Committee Tacitly Takes IRS Approach

On April 3, 2014, the Senate Finance Committee marked-up the "Expiring Provisions Improvement Reform and Efficient (EXPIRE) Act of 2014." This legislation is a package of tax extenders and minor amendments intended to serve as a stop-gap measure while Congress works on a comprehensive tax reform program. Included in the EXPIRE Act is a two-year extension of the biodiesel mixture tax credit, retroactive to January 1, 2014. The proposal is a straight extension of the credit, no amendments. However, the accompanying description of the proposal, penned by the staff of the Senate Finance Committee, includes the following language under the section titled "Present Law – Payments with respect to biodiesel fuel mixtures:"

> *"The biodiesel fuel mixture credit must first be taken against tax liability for taxable fuels. To the extent the biodiesel fuel mixture credit exceeds such tax liability, the excess may be received as a payment. Thus,* ***if the person has no section 4081 liability, the credit is refundable****." (emphasis added)*

The highlighted language suggests (1) that the credit is only refundable to the extent it exceeds section 4081 excise tax liability, and (2) when taken against section 4081 liability it has a different character altogether (it is neither a refundable nor a non-refundable credit therefore must be something else). This language appears to take the approach of the IRS in CCA 201406001, namely that when taken against excise tax liability, the credit is simply a reduction in excise tax expense, and therefore the question of excluding the credit from income does not arise.

The choice of language used by the Senate Finance Committee is notable in so far as in all the extensions enacted to date and the amendment to the statute to close the "splash and dash loophole," this is first time the credit has been described in such manner. Moreover, with the only significant amendment to the legislation since its enactment in 2004 coming in the 2008 closure of the "splash and dash loophole" such language and the inferences that can be drawn are inconsistent with the legislative history of the mixture credit which is that, irrespective of how claimed, it is a refundable credit to be treated as a payment to the taxpayer. This may suggest that, in an attempt to bolster its current position regarding whether the credit is an item of taxable income, the IRS Office of Chief Counsel may have been in discussion with the Senate Finance Committee during the drafting of the legislation and the description of the provisions contained therein.

Also notable is that the House Ways and Means Committee legislation, the "Tax Reform Act of 2014" – which proposes to repeal sections 40, 40A, 6426 and 6427(e) – does not include similar language in its description of the present law. In fact, there is no discussion of payments of the mixture credit. This may suggest that, to the extent the IRS may have been involved in discussion with the Senate Finance Committee, it was either not similarly involved with the House Ways and Means Committee, or the House Ways and Means Committee was unconvinced of the IRS' position.

Consideration should be given to properly structure entities to separate section 4081 liabilities from section 6427 credits. Note that eligibility for the mixture credit requires the filing of the form 637 registration with the IRS.

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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:

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