

Rev. Proc. 2001-33

SECTION 1. PURPOSE AND SCOPE

.01 This revenue procedure informs taxpayers how to request an administra-

tive appeal of the penalties imposed by § 6715 of the Internal Revenue Code relating to the misuse of dyed diesel fuel and kerosene (the Dyed Fuel Penalty) and §§ 4083(c)(3) and 7342 relating to the refusal to admit entry for purposes of inspecting facilities and equipment and taking and removing fuel samples (the Refusal Penalty). This revenue procedure also explains how the Office of Appeals (Appeals) resolves these appeals.

.02 An appeal request may be made to Appeals before payment of the Dyed Fuel Penalty or the Refusal Penalty according to the provisions of this revenue procedure. Special rules, which are described in section 7 of this revenue procedure, apply to taxpayers that paid a penalty before June 4, 2001, the date this revenue procedure is published in the Internal Revenue Bulletin.

.03 In all cases, an appeal request made under this revenue procedure is:

- (1) Optional, and
- (2) Initiated by the taxpayer.

SECTION 2. BACKGROUND

.01 *Section 6715.*

(1) Section 6715(a) provides that if any dyed fuel is sold or held for sale by any person for any use which such person knows or has reason to know is not a nontaxable use of such fuel; any dyed fuel is held for use or used by any person for a use other than a nontaxable use and such person knew, or had reason to know, that such fuel was so dyed; or any person willfully alters, or attempts to alter, the strength or composition of any dye or marking done pursuant to § 4082 in any dyed fuel, then such person shall pay a penalty in addition to the tax (if any).

(2) Section 6715(b)(1) provides that the amount of the penalty under § 6715(a) on each act shall be the greater of \$10 for each gallon of dyed fuel involved or \$1,000.

(3) Section 6715(b)(2) provides that in determining the penalty under § 6715(a) on any person, § 6715(b)(1) is applied by increasing the amount in § 6715(b)(1)(A) by the product of the amount and the number of prior penalties (if any) imposed by § 6715 on the person (or a related person or any predecessor of the person or related person).

(4) Section 6715(c) provides that “dyed fuel” means any dyed diesel fuel or

kerosene, whether or not the fuel was dyed pursuant to § 4082. Also, “nontaxable use” has the same meaning given the term by § 4082(b).

(5) Section 6715(d) provides that if a penalty is imposed under § 6715 on any business entity, each officer, employee, or agent of the entity who willfully participated in any act giving rise to the penalty shall be jointly and severally liable with the entity for the penalty.

.02 *Sections 4083, 7606, and 7342.*

(1) Section 4083(a)(1) provides that “taxable fuel” means gasoline, diesel fuel, and kerosene.

(2) Section 4083(c)(1) provides that the Secretary may, in administering compliance with the tax on taxable fuel, enter any place at which taxable fuel is produced or is stored (or may be stored) for purposes of examining the equipment used to determine the amount or composition of such fuel and the equipment used to store such fuel, and taking and removing samples of such fuel; and detain, for those purposes, any container which contains or may contain any taxable fuel.

(3) Section 7606 provides that the Secretary may enter any building or place where any articles subject to tax are made, produced, or kept so far as may be necessary for the purpose of examining the articles.

(4) Section 7342 provides that any owner of a building or place, or person having agency or superintendence of the same, who refuses to admit any officer or employee of the United States Treasury Department acting under authority of § 7606 or refuses to permit the officer or employee to examine the article or articles, shall, for every refusal, forfeit \$500.

(5) Section 4083(c)(3) provides that the Refusal Penalty provided by § 7342 shall apply to any refusal to admit entry or other refusal to permit an action by the Secretary authorized by § 4083(c)(1), except that § 7342 is applied by substituting “\$1,000” for “\$500” for each refusal.

SECTION 3. ACTION BEFORE APPEALS CONSIDERATION

.01 If the Internal Revenue Service (IRS) proposes to assert either the Dyed Fuel Penalty or the Refusal Penalty against a taxpayer, the IRS will notify the taxpayer in writing. If the taxpayer does

not agree with the proposed penalty, the taxpayer will be asked to complete Form 12009, *Request for an Informal Conference and Appeals Review*, and submit it, within 30 days from the date of this notification, to the IRS supervisor responsible for the taxpayer's case. Form 12009 is included as an Appendix to this Revenue Procedure. If the taxpayer does not submit this form to the IRS within this 30 day period, the IRS will, in the case of the Dyed Fuel Penalty, assess the penalty or, in the case of the Refusal Penalty, take appropriate legal action to collect the penalty.

.02 If the taxpayer submits Form 12009 on a timely basis, the IRS supervisor responsible for the case will review the information submitted by the taxpayer on the taxpayer's Form 12009 and will contact the taxpayer to arrange a conference. If, after this conference, the IRS still proposes to assert the penalty, the IRS supervisor will so notify the taxpayer. The taxpayer then has 30 days from the date of this notification to request that the case be reviewed by Appeals. The taxpayer makes this request by contacting the IRS supervisor who will then forward the case to Appeals. An Appeals Officer will then contact the taxpayer and, if necessary, arrange for a conference in Appeals.

SECTION 4. ISSUES FOR APPEALS CONSIDERATION

.01 All issues that remain in dispute between a taxpayer and the IRS involving either the Dyed Fuel Penalty or the Refusal Penalty are appropriate for an administrative appeal.

.02 With respect to the Dyed Fuel Penalty, issues in dispute may include whether (1) the fuel involved in an alleged violation was dyed; (2) the taxpayer knew or had reason to know that the fuel was sold or held for sale for other than a non-taxable use (in a case involving § 6715(a)(1)); (3) the taxpayer knew or had reason to know that the fuel was dyed (in a case involving § 6715(a)(2)); (4) the taxpayer acted willfully (in a case involving § 6715(a)(3)); (5) the officer, employee, or agent of a business entity willfully participated in any act giving rise to the Dyed Fuel Penalty under § 6715(d); or (6) the IRS correctly determined the amount of fuel subject to the Dyed Fuel Penalty.

.03 With respect to the Refusal Penalty, issues in dispute may include whether the IRS had authority to make the inspection in question.

SECTION 5. RESOLVING THE PENALTY

.01 *In general.* Case files transferred to Appeals should include the computation of the penalty; date, location, and type of violation; results of laboratory and field testing of fuel (if applicable); prior warnings and offenses; and statements made by the investigating official, the IRS supervisor, and the taxpayer.

.02 *Collection activity.* Since Appeals jurisdiction and consideration will be afforded to the taxpayer before the final determination of the penalty, collection activity will be suspended until Appeals has determined the penalty amount.

.03 *Appeals determination.* Each case will be reviewed under established Appeals procedures and decided on its own merits.

.04 *New information submitted.*

(1) The IRS should be given the opportunity to timely review and comment on any significant new information or evidence presented by the taxpayer. "Significant new information" is information of a non-routine nature that, in the judgement of the appeals officer, would have had an effect on the IRS's findings or that changes the appeals officer's evaluation of the litigating hazards. If it appears the significant new information or evidence was purposely withheld from the IRS, the entire case should be returned to the IRS and jurisdiction relinquished. See Internal Revenue Manual 8.2.1.2.2.

(2) If evidence submitted in Appeals conflicts with evidence originally submitted to the IRS or shifts responsibility to another taxpayer, and this new evidence was not purposely withheld from the IRS, consideration should be given to retaining jurisdiction but referring the new issues or information to the IRS for timely review and comment.

.05 *If the Dyed Fuel Penalty is upheld.* If the Dyed Fuel Penalty is upheld, Appeals will prepare an Appeals Case Memorandum and forward it along with the case file to the IRS office that proposed the Dyed Fuel Penalty so that the Dyed Fuel Penalty may be assessed and collected.

.06 *If the Dyed Fuel Penalty is not upheld.* If the Dyed Fuel Penalty is not upheld, Appeals will prepare an Appeals Case Memorandum and forward it along with the case file to the IRS office that proposed the penalty to close the Dyed Fuel Penalty case without assessing a penalty.

.07 *If the Refusal Penalty is upheld.* If the Refusal Penalty is upheld, Appeals will forward the case file to District Counsel for advice and direction on penalty enforcement.

.08 *If the Refusal Penalty is not upheld.* If the Refusal Penalty is not upheld, Appeals will prepare an Appeals Case Memorandum and forward it along with the case file to the IRS office that proposed the penalty to close the Refusal Penalty case.

.09 *Subsequent events.* If an excise tax assessment is made in conjunction with the Dyed Fuel Penalty, a copy of the Appeals Case Memorandum on the Dyed Fuel Penalty should be included in the case file. Any redeterminations of the excise tax issue and the Dyed Fuel Penalty will be based on the respective merits of each case.

SECTION 6. USER FEE

There is no user fee for an administrative appeal of the Dyed Fuel Penalty or the Refusal Penalty.

SECTION 7. TAXPAYERS THAT PAID A PENALTY BEFORE JUNE 4, 2001, THE DATE THIS REVENUE PROCEDURE IS PUBLISHED IN THE INTERNAL REVENUE BULLETIN

.01 For purposes of this section, a "prior taxpayer" is a taxpayer that paid the Dyed Fuel Penalty or the Refusal Penalty before June 4, 2001 (the date this revenue procedure is published in the Internal Revenue Bulletin), was denied an administrative appeal, and has not signed a closing agreement with respect to the penalty.

.02 A prior taxpayer that files a timely claim for a refund of a penalty may request an administrative appeal. The refund claim should state that the prior taxpayer desires an administrative appeal under this revenue procedure. Appeals will process this request under the provisions of sections 4, 5.01, 5.03, and 5.04 of this revenue procedure.

SECTION 8. EFFECTIVE DATE

This revenue procedure applies to requests for appeal of the Dyed Fuel Penalty or the Refusal Penalty made on or after June 4, 2001, the date this revenue procedure is published in the Internal Revenue Bulletin.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Theodore J. Cichaski of the National Office of Appeals, Office of Alternative Dispute Resolution and Customer Service Programs, and Mary Burwell of the National Office (Examination) Excise

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