

Budget deal extends fuel excise tax incentives and reinstates federal oil spill fee

Overview

On February 9, 2018, President Trump signed into law the Bipartisan Budget Act of 2018 (“H.R. 1892”),¹ which includes the following modifications to current law:

- A one-year retroactive extension of the federal alternative fuel credit for 2017;
- A one-year retroactive extension of the federal alternative fuel mixture credit for 2017;
- A one-year retroactive extension of the federal biodiesel mixture credit for 2017;
- A one-time filing of all 2017 alternative fuel and biodiesel claims;
- An extension of second generation biofuel incentives; and
- Reinstatement of the Oil Spill Liability Trust Fund (“OSLTF”) tax effective March 1, 2018.

This tax alert summarizes these federal excise tax changes as well as offers some taxpayer considerations.

Extension of the alternative fuel, alternative fuel mixture, and biodiesel incentives

H.R. 1892 section 40415 retroactively extends from December 31, 2016, to December 31, 2017, the termination dates applicable to the \$0.50 per gallon alternative fuel (e.g., CNG, LNG, and LPG)² excise tax credit under Internal Revenue Code (“IRC”) §6426(d)(1) and the alternative fuel mixture excise tax credit under IRC §6426(e)(1).³

In addition, H.R. 1892 section 40407 retroactively extends from December 31, 2016, to December 31, 2017, the termination dates applicable to the \$1.00 per gallon biodiesel mixture excise tax credit available under IRC §6426(c)(1) and the \$1.00 per gallon biodiesel income tax credit available under IRC §40A(g).⁴

H.R. 1892 also extends from December 31, 2016, to December 31, 2017, the termination dates applicable to the provisions under IRC §6427(e) that afford payments for claims that are in excess of the alternative fuel, alternative fuel mixture, and biodiesel excise tax credits.⁵

Procedure for claiming energy incentives

H.R. 1892 provides for a one-time filing of all 2017 alternative fuel and biodiesel claims and a 180-day filing period for claimants to submit a one-time claim for companies with an existing Form 637 (*Application for Registration (For Certain Excise Tax Activities)*) registration.⁶ H.R. 1892 mandates that the Secretary of the Treasury issue guidance within 30 days of the H.R. 1892 enactment date for the submission of the one-time claim.⁷ Following Congress’ most

¹ P.L. 115-123; H.R. 1892 115th Cong. (Feb. 9, 2018).

² See IRC §6426(d)(2) (identifying the products included in the definition of “alternative fuel”).

³ H.R. 1892 Sec 40415(a).

⁴ H.R. 1892 Sec 40407(a)-(b).

⁵ H.R. 1892 Sec 40415(a)(2), amending IRC §6427(e)(6)(C) (extending the alternative fuel and alternative fuel mixture payments); H.R. 1892 Sec 40407(b)(2), amending IRC §6427(e)(6)(B) (extending the biodiesel mixture payment).

⁶ H.R. 1892 Sec 40415(b); H.R. 1892 Sec 40407(b)(4).

⁷ H.R. 1892 Sec 40415(b); H.R. 1892 Sec 40407(b)(4).

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recent retroactive extension of the same federal excise tax incentives in December 2015, the IRS issued Notice 2016-05, which provided guidance for issuing a one-time refund claim for all eligible 2015 purchases.⁸ It is, therefore, conceivable that the IRS may issue a similar notice that provides guidance regarding how to file a one-time refund claim for all eligible 2017 purchases.

Tax incentives applicable to second generation biofuel

The Food, Conservation, and Energy Act of 2008⁹ (more commonly known as the "2008 U.S. Farm Bill") created a production tax credit of \$1.01 per gallon¹⁰ for facilities involved in the production of second generation biofuel.¹¹ H.R. 1892 extends from January 1, 2017 to January 1, 2018, the termination date applicable to this income tax credit for qualified second generation biofuel production after December 31, 2016.¹² The second generation biofuel producer credit and alternative fuel credit under IRC §6426 cannot be claimed for the same gallons.¹³ H.R. 1892 also extends from January 1, 2017 to January 1, 2018 the termination date applicable to the special depreciation allowance for second generation biofuel plant property placed in service after December 31, 2016.¹⁴

Reinstatement of OSLTF tax

In the Omnibus Budget Reconciliation Act of 1986¹⁵ Congress established the Oil Spill Liability Trust Fund.¹⁶ To provide the needed funding, Congress imposed the OSLTF tax pursuant to IRC §4611 at a rate of nine cents per barrel on crude oil received at a refinery and petroleum products entered into the United States.¹⁷

Prior to the passage of H.R. 1892, the OSLTF tax had terminated on December 31, 2017.¹⁸ H.R. 1892 reinstates the OSLTF tax "beginning on the first day of the first calendar month beginning after the date of enactment."¹⁹ As the enactment month for H.R. 1892 is February 2018, the OSLTF tax will recommence on March 1, 2018.

Considerations

A taxpayer must register with the IRS by submitting Form 637 to be eligible to claim the alternative fuel credit, the biodiesel credit, or the second generation biofuel credit.²⁰ Additionally, OSLTF taxpayers and taxpayer customers should proactively address invoice timing issues regarding the OSLTF tax and the fuel distribution process (e.g., when to include the OSLTF tax on invoices for refined petroleum products).

⁸ IRS Notice 2016-05, 2016-06 IRB 1 (Feb 8, 2016).

⁹ H.R. 2419 110th Cong. (May 22, 2008).

¹⁰ The applicable amount of the credit may be reduced as specified in IRC §40(b)(6)(B).

¹¹ IRC §40(b)(6); *See also*, IRC §168(l)(2)(a) (providing for a six-part test for a product to meet the definition of a "second generation biofuel").

¹² H.R. 1892 Sec 40406(b).

¹³ Chief Counsel Memorandum AM 2010-002 (released on July 9, 2010) (citing IRC §6426(h)).

¹⁴ H.R. 40412, amending IRC §168(l)(2)(D).

¹⁵ Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874.

¹⁶ Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484; RAMSEUR, JONATHAN, L., CONG. RESEARCH SERV., R43128, OIL SANDS AND THE OIL SPILL LIABILITY TRUST FUND: THE DEFINITION OF "OIL" AND RELATED ISSUES FOR CONGRESS (Jan. 22, 2015) (noting that the Oil Spill Liability Trust Fund was created in 1986, however, Congress did not authorize its use or provide its funding until the passage of the Oil Pollution Act of 1990).

¹⁷ IRC §4611(a) (providing the incidence of the OSLTF tax); IRC §4611(c)(2)(B)(ii) (providing the OSLTF tax rate per barrel).

¹⁸ IRC §4611(f)(2) (prior to the amendments enacted by H.R. 1892).

¹⁹ H.R. 1892 Sec 40416.

²⁰ *See* IRC §6426(a); (alternative fuel credit and biodiesel credit); IRC §40(b)(6)(I) (second generation biofuel credit); *See also* IRC §4101(a)(1).

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