

## The Biofuels Tax Credit

By JANE C. BERGNER\*

THE AMERICAN TAXPAYER RELIEF ACT of 2012 (“Taxpayer Relief Act”)<sup>1</sup> extended various expired federal tax credits for biofuels production<sup>2</sup> and created new federal tax credits for algae fuel production from qualified feedstock. The previously available tax credits for cellulosic ethanol production and accelerated depreciation for cellulosic biofuel refineries for biodiesel production expired on December 31, 2011, and the cellulosic biofuels credits expired on December 31, 2012. Previously, proposed bills including extension packages failed to pass in 2012, but the Taxpayer Relief Act, passed in early January 2013, finally extended these credits for the next year until 2014.

### EXTENSION OF CREDITS

Under the new Taxpayer Relief Act – Sections 404 and 410, the tax credits for cellulosic biofuel production were extended through December 31, 2013, and, under section 405, the expired biodiesel fuels tax credits have been retroactively extended to apply for sale or use of biodiesel fuels after December 31, 2008 and through December 31, 2013. Additionally, section 404 of the Taxpayer Relief Act extends the credits to include cellulosic biofuel production credits for certain algae-based fuels by extending the credit’s availability to production of fuel derived from “qualified feedstock.”

### THE CREDITS AVAILABLE

Under the Internal Revenue Code, a qualifying producer and seller of biofuels is entitled, first, to a credit under section 6426<sup>3</sup> against the excise tax paid.<sup>4</sup> In addition, section 6427 provides for an income credit equal to the *difference* between (i) the amount of the income tax credit specified in section 6427 with respect to the type of fuel sold and (ii) the total amount of the excise tax credits permitted with respect to such fuel under section 6426. In the case of the income tax credit, the Secretary of the Treasury actually writes a refund check equal to the difference between the amount of the excise tax credit and the amount of

the allowable income tax credit, to the extent that the taxpayer is not otherwise made “whole.” Finally, after application of sections 6426 and 6427, a credit is allowed under section 34.

---

\*© Jane C. Bergner. Jane C. Bergner is an attorney in Washington, D.C. who concentrates her practice in Federal taxation. Mrs. Bergner, who is the principal in the Law Offices of Jane C. Bergner, is included in the Best Lawyers of America as well as in Who’s Who in the World and Who’s Who of American Law. A former Chair of the District of Columbia Bar Taxation Section and a member of a number of American Bar Association Section of Taxation Committees, including the Government Relations Committee, Mrs. Bergner is an elected Fellow of the American College of Tax Counsel. Her web site is [www.dctaxlawfirm.com](http://www.dctaxlawfirm.com). During the course of her practice, she has been engaged in tax issues involving the biofuels tax credit. This article expands upon a previous article that was published prior to the enactment of the Taxpayer Relief Act.

<sup>1</sup>H.R. 8 (*as amended*).

<sup>2</sup>Wikipedia defines a “biofuel” as a type of fuel whose energy is derived from biological carbon fixation. Legislation defines biofuels to include alcohol fuels, biodiesel and cellulosic fuels.

<sup>3</sup>Unless otherwise expressly stated herein, all references to “section” are to sections of the Internal Revenue Code of 1986; all references to “Reg. §” are to the Treasury Regulations on Income Tax promulgated thereunder.

<sup>4</sup>“(a) **Allowance of Credits.**

“There shall be allowed as a credit—

“(1) against the tax imposed by section 4081 an amount equal to the sum of the credits described in subsections (b), (c), and (e), and

“(2) against the tax imposed by section 4041 an amount equal to the sum of the credits described in subsection (d).

“No credit shall be allowed in the case of the credits described in subsections (d) and

(e) unless the taxpayer is registered under section 4101.”

Section 6426(b) provides an alcohol fuel mixture credit; section 6426(c) provides a biodiesel mixture credit; and section 6426(e) provides an alternative fuel mixture credit. Section 6426(d) provides an alternative fuel credit. The broad language of section 6426(a)(1) provides an inference that, if a seller were able to classify its fuel product under several of the sections 6426(b), (c) and (e), such seller would be able to avail itself of multiple credits against the tax due on the sale of the same product. However, even though the broad language of the statute itself may support such a conclusion, it is unlikely that the IRS would permit such a result.

By way of example, assuming that a seller sold a fuel that qualified for the credits, if the excise tax credit were 18¢ per gallon and the income tax credit were 50¢ per gallon, then the Secretary of the Treasury would issue a check equal to (i) *the difference* between those two amounts, (ii) *times* the number of gallons sold and subject to the tax, i.e., in the case of this example, 32¢ per gallon.

Section 6427(e) provides, in relevant part, as follows:

**(e) Alcohol, Biodiesel, or Alternative Fuel.—**

Except as provided in subsection (k)—

- (1) Used to Produce a Mixture.—**If any person produces a mixture described in section 6426 in such person's trade or business, the Secretary [of the Treasury] shall pay (without interest) to such person an amount equal to the...biodiesel mixture credit or the alternative fuel mixture credit with respect to such mixture.
- (2) Alternative Fuel.—**If any person sells or uses an alternative fuel (as defined in section 6426(d)(2) for a purpose described in section 6426(d)(1) in such person's trade or business, the Secretary [of the Treasury] shall pay (without interest) to such person an amount equal to the alternative fuel credit with respect to such fuel.
- (3) Coordination with Other Repayment Provisions.—**No amount shall be payable under paragraph (1) or (2) with respect to any mixture or alternative fuel with respect to which an amount is allowed as a credit under section 6426.

- (4) Registration Requirement for Alternative Fuels.—**The Secretary [of the Treasury] shall not make any payment under this subsection to any person with respect to any alternative fuel credit or alternative fuel mixture credit unless the person is registered under section 4101.

These credits originally expired under the statute on September 30, 2009. The biodiesel fuels credits were previously extended through December 31, 2011, and the cellulosic fuels credits were additionally extended through December 31, 2012.<sup>5</sup> The Taxpayer Relief Act has extended both credits through December 31, 2013.

#### FURTHER LEGISLATION NECESSARY TO CREATE LONG-TERM CREDITS

Although producers may consider the Taxpayer Relief Act as a "victory," it must be noted that the credits are only available for a limited time. Biofuel producers will need to lobby again for further extension of the federal tax credits, in order to continue receiving such tax advantages. Congress has passed only limited legislation regarding these credits, but at the same time, it has continued to approve extender packages as the credits expire, so that producers may harbor some hope that extensions will continue in the coming years.

• • •

<sup>5</sup>Pub. Law 110-234 § 15321. 22 May 2008, amending 26 U.S.C. 40.