



ATR Opposes Retroactive Changes to the Alternative Fuels Mixture Credit

June 24, 2019

Dear Chairman Grassley, Ranking Member Wyden and Members of the Senate Finance Committee Energy Tax Extenders Taskforce:

I write to offer recommendations regarding temporary tax provisions.

Broadly, ATR opposes tax extenders and supports efforts to repeal or make all extenders permanent as part of the broader goal of reducing the number of distortionary credits and deductions in favor of lower tax rates.

ATR also believes that extenders should be dealt with prospectively, rather than retroactively. Taxpayers that have followed the law based upon reasonable statutory interpretations should be afforded certainty and fairness. Retroactivity undermines confidence in the tax system by affecting activity (in this case taxes paid, and credits claimed) that has already occurred.

Based on these two principles, ATR opposes retroactively changing the Alternative Fuel Mixture Credit (AFMC) as proposed in The Tax Extender and Disaster Relief Act of 2019 (S.617). Specifically, this legislation retroactively disallows taxpayers blending butane with gasoline from claiming the AFMC.

This is bad policy that interferes with ongoing litigation, denies taxpayers due process, and creates potentially arbitrary and unfair outcomes. **ATR opposes this change and urges Congress to instead consider changes to the AFMC prospectively.**

Background

Under IRC section 6426(e), taxpayers are permitted to claim a credit for blending specified alternative fuels (such as liquefied petroleum gas (LPG), liquefied hydrogen, and liquefied natural gas) with “taxable fuels” (traditional fuels such as gasoline). The AFMC equals 50 cents per qualifying gallon and is claimed against fuel excise taxes under Section 4081.

Prior to the expiration of the AFMC on December 31, 2017, several taxpayers claimed the credit for blending butane with traditional fuels. These claims have been denied by the IRS and are currently being adjudicated through court.

Retroactively Changing the AFMC is Bad Tax Policy

Tax policy is based on consistency, certainty, and fairness. Taxpayers routinely make decisions based on a reasonable interpretation of the law with the expectation that the future changes to the law will not be applied looking backwards.

Retroactively changing the tax code punishes taxpayers based on activity that has already occurred.

Legislation that retroactively changes the AFMC would violate this principle by affecting claims from past tax years.

This would also set the precedent that Congress can disallow taxpayers from claiming other provisions in the future and undermines confidence in the tax system.

Perversely, the proposed AFMC change could result in discriminatory treatment for similar taxpayers as the retroactive disallowance would be effective as of the date of enactment. This means a taxpayer that is successful in court and is paid the credit before enactment of the bill would not be affected. On the other hand, a taxpayer that has a claim pending in court will not be allowed to claim a credit.

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When Congress has determined the statute of a law is inconsistent with Congressional intent, they have disallowed the provision on a prospective basis. For instance, when paper manufacturers claimed a credit for mixing diesel with alternative biomass fuels, or “black liquor,” Congress disagreed with this outcome and repealed the credit prospectively.

Lawmakers Should Not Interfere in Ongoing Litigation

The proper place for the dispute over whether a taxpayer is able to claim the AFMC for blending butane with gasoline is the courts, not Congress. If Congress disagrees with the outcome of litigation it should change the law prospectively.

In the interim, there is significant ambiguity over whether butane qualifies for the AFMC. While the IRS has ruled that butane-gasoline mixtures do not qualify (Rev. Rul. 2018-2, 2018-2 IRB 277), this ruling is based on the theory that butane is a gasoline blendstock and gasoline blendstocks are considered a “taxable fuel” (IRC Section 4081) and therefore cannot also be an “alternative fuel.”

Nothing in law prohibits butane (or any other fuel) from being considered a taxable fuel under one section of the code and an alternative fuel in another section.

The plain reading of law suggests that butane-gasoline mixtures should qualify for the AFMC. The AFMC explicitly states that “liquefied petroleum gas” qualifies as an “alternative fuel” under Section 6526(d). Butane is considered to be an LPG in science, industry, and other Treasury regulations (reg.section 48.5041-8(f)(1)(i)).

In addition, butane qualifying for the AFMC fits with the objectives of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). This legislation was enacted with several goals including to reduce dependence on foreign oil and incentivize clean fuels.

Incentivizing the blending of butane with gasoline meets both objectives – butane can be produced from crude oil or natural gas – both of which are available in the U.S, and it is generally cleaner than burning unfinished gasoline.

Given this strong case that butane should qualify for the AFMC, Congress should let the dispute be resolved through the courts, rather than through retroactive and preemptive legislation.

Conclusion

As Congress considers the proper treatment of expired and expiring provisions, it is imperative that changes to the tax code are made prospectively, rather than retroactively.

Retroactively changing the Alternative Fuels Mixture Credit is unsound tax policy that denies due process for taxpayers that followed a reasonable interpretation of the law and supersedes ongoing litigation.

If lawmakers decide that Butane should not qualify for the AFMC, they should modify the credit prospectively. More broadly, Congress should take steps to limit the number of distortionary and targeted tax provisions in the code to create a tax system that is fairer, simpler and more equitable.

Thank you for your consideration. If you have any questions, please feel free to contact me or ATR’s Director of Tax Policy Alex Hendrie at 202-785-0266.

Onward,



Grover G. Norquist
President, Americans for Tax Reform