

Section 4081.—Imposition of Tax

26 CFR 48.4081-1: Taxable fuel; definitions.

T.D. 9145

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Parts 48 and 602

Entry of Taxable Fuel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to the tax on the entry of taxable fuel into the United States. These regulations affect enterers of taxable fuel, other importers of record, and certain sureties. The text of the temporary regulations also serves as the text of the proposed regulations (REG-120616-03) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on September 28, 2004.

Applicability Dates: For dates of applicability, see §§48.4081-1T(b) and 48.4081-3T(c)(2)(ii) and (iv).

FOR FURTHER INFORMATION CONTACT: Celia Gabrysh (202) 622-3130 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1897. Responses to this collection of information are required to obtain a tax benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in this issue of the Bulletin.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Present Law

Section 4081(a)(1)(A)(iii) of the Internal Revenue Code (Code) imposes a tax on the entry into the United States of taxable fuel. Taxable fuel means gasoline, diesel fuel, and kerosene. Existing regulations provide that the enterer is liable for the tax imposed on the entry of taxable fuel.

The regulations currently define the term *enterer* as generally meaning the importer of record (under customs law) with respect to the taxable fuel. However, if the importer of record is acting as an agent (for example, the importer of record is a customs broker engaged by the owner of the taxable fuel), the person for whom the agent is acting is the enterer.

The regulations require an enterer to be registered by the IRS. The IRS will register an applicant only if the IRS determines that the applicant meets several tests, including the adequate security test. An applicant meets the adequate security test only if the IRS determines that the applicant has both adequate financial resources and a satisfactory tax history, or the applicant gives the IRS a bond.

Section 142.4 of the Customs regulations (19 CFR) provides that merchandise shall not be released from Customs custody unless a bond on Customs Form 301, Customs Bond, has been filed. This bond, which is filed by the importer of record,

secures the payment of any duty, tax, or charge, and compliance with Customs laws and regulations. Section 141.3 of the Customs regulations provides that the importer's liability for duties includes liability for any internal revenue taxes which attach upon the importation of merchandise, unless otherwise provided by law or regulation. Also, §113.62(a)(1)(ii) of the Customs regulations provides, in part, that if merchandise is imported and released from Customs custody, the obligors on a Customs bond (principal and surety, jointly and severally) agree to pay, as demanded by Customs, all additional duties, taxes, and charges subsequently found due, legally fixed, and imposed on any entry secured by the bond.

Reason for Change

The IRS has found that abusive situations exist with regard to the entry of taxable fuel into the United States. For example, some enterers are not registered and are not paying the tax on their fuel entries. This not only gives noncompliant enterers a competitive advantage over their compliant competitors, but it also deprives the United States Treasury of revenue intended for the Highway Trust Fund.

When Congress enacted the present fuel tax regime, it noted that the Treasury Department is permitted "to prescribe rules and administrative procedures for determining liability for payment of tax." H.R. Conf. Rep. No. 101-964, at 1052 (1990).

Explanation of Provisions

Pursuant to these temporary regulations, the importer of record (under Customs law) is jointly and severally liable with the enterer for the tax if the importer of record is not the enterer of the taxable fuel (that is, the importer of record is a customs broker engaged by the enterer) and the enterer is not a taxable fuel registrant. Thus, an importer of record engaged by an enterer and seeking assurance that it will not be jointly and severally liable for the enterer's tax liability should verify that the enterer is registered by the IRS. This temporary regulation is similar to §48.4081-2(c)(2) of the regulations, which provides that a terminal operator generally is jointly and severally liable for the tax imposed on the removal of taxable fuel from the rack if the terminal operator

allows an unregistered position holder to operate in its terminal.

Customs laws and regulations provide that the importer of record is liable for any duties or taxes that attach upon the importation of merchandise. Therefore, an importer of record's Customs bond secures not only the payment of duties, but also the payment of taxes that are imposed on the entry of merchandise, including taxable fuel. Consequently, under existing law, a surety could be compelled to meet a demand on a Customs bond if the excise tax on the entry of taxable fuel is not paid when due. However, the IRS will not charge a surety bond for this tax until the effective date of these temporary regulations. It should be noted, however, that under these temporary regulations the Customs bond posted for the entry of taxable fuel will not be charged for the section 4081 tax if the enterer is a taxable fuel registrant.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory flexibility assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Celia Gabrysh, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS, the Treasury Department, and the Bureau of Customs and Border Protection, Department of Homeland Security, participated in their development.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 48 and 602 are amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Paragraph 1. The authority citation for part 48 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In §48.4081-1, paragraph (b) is amended by adding a new sentence to the end of the definition of enterer to read as follows:

§48.4081-1 Taxable fuel; definitions.

* * * * *

(b) * * * This definition of enterer does not apply with respect to an entry if the definition of enterer in §48.4081-1T(b) is applicable with respect to that entry.

* * * * *

Par. 3. Section 48.4081-1T is added to read as follows:

§48.4081-1T Taxable fuel; definitions (temporary).

(a) [Reserved]. For further guidance, see §48.4081-1(a).

(b) *Definitions.*

Definitions of approved terminal or refinery through diesel-powered train [Reserved].

Enterer generally means, in the case of an entry of taxable fuel on or after September 28, 2004, the importer of record (under customs law) with respect to the taxable fuel, except that—

(1) If the importer of record is a customs broker engaged by the owner of the taxable fuel, the person for whom the broker is acting is the enterer; and

(2) If there is no importer of record for taxable fuel entered into the United States, the owner of the taxable fuel at the time it is brought into the United States is the enterer.

Definition of entry through (f)(2) [Reserved]. For further guidance, see §48.4081-1(b) definition of entry through (f)(2).

Par. 4. In §48.4081-3, paragraph (c) is amended by revising paragraph (c)(2) to read as follows:

§48.4081-3 Taxable fuel; taxable events other than removal at the terminal rack.

* * * * *

(c) * * *

(2) *Liability for tax*—(i) *In general.* The enterer is liable for the tax imposed under paragraph (c)(1) of this section.

(ii) through (iv) For further guidance, see §48.4081-3T(c)(2)(ii) through (iv).

* * * * *

Par. 5. Section 48.4081-3T is added to read as follows:

§48.4081-3T Taxable fuel; taxable events other than removal at the terminal rack (temporary).

(a) through (c)(2)(i) [Reserved]. For further guidance, see §48.4081-3(a) through (c)(2)(i).

(c)(2)(ii) *Joint and several liability of the importer of record.* In the case of an entry of taxable fuel on or after September 28, 2004, the importer of record with respect to the taxable fuel is jointly and severally liable with the enterer for the tax imposed under §48.4081-3(c)(1) if—

(A) The importer of record is not the enterer of the taxable fuel; and

(B) The enterer is not a taxable fuel registrant.

(iii) *Conditions for avoidance of liability.* The importer of record is not liable for the tax under paragraph (c)(2)(ii) of this section if, at the time of the entry, the importer of record—

(A) Has an unexpired notification certificate (as described in §48.4081-5) from the enterer; and

(B) Has no reason to believe that any information in the notification certificate is false.

(iv) *Customs bond.* In the case of an entry of taxable fuel on or after September 28, 2004, the Customs bond posted with respect to the importation of the fuel will not be charged for the tax imposed on the entry of the fuel if the enterer is a taxable fuel registrant. A surety bond will not be charged for the tax imposed on the entry of the fuel covered by the bond, if at the time of entry, the surety—

(A) Has an unexpired notification certificate (as described in §48.4081-5) from the enterer; and

(B) Has no reason to believe that any information in the notification certificate is false.

(d) through (j) [Reserved]. For further guidance, see §48.4081-3(d) through (j).

§48.4081-5 [Amended]

Par. 6. Section 48.4081-5 is amended as follows:

a. Paragraph (a) is amended by removing the language “48.4081-2(c)(3),” and by adding “48.4081-2(c)(2)(ii),

48.4081-3T(c)(2)(iii) and (iv),” in its place.

b. Paragraph (b)(2) is amended by removing the language “gasoline registrant” and adding “taxable fuel registrant” in its place.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT.

Par. 7. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 8. In §602.101, paragraph (b) is amended by adding an entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
48.4081-3T * * * * *	1545-1897

Mark E. Matthews,
Deputy Commissioner for Services and Enforcement.

Approved July 14, 2004.

Gregory Jenner,
Acting Assistant Secretary of the Treasury.