(whether or not includible in the transferor's gross estate), see §26.2642–6.

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 entries 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.
* * * * *	
1.1001–1	1545–1902
* * * * *	
26.2642–6	1545–1902
* * * * *	
26.2654–1	1545–1902
* * * * *	

Linda E. Stiff,
Acting Deputy Commissioner for Services and Enforcement.

Approved July 24, 2007.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on August 1, 2007, 8:45 a.m., and published in the issue of the Federal Register for August 2, 2007, 72 F.R. 42291)

Section 4081.—Imposition of Tax

26 CFR 48.4081–1: Taxable fuel; definitions.

T.D. 9346

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 regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the tax on the entry of taxable fuel into the United States. The final regulations affect enterers of taxable fuel, other importers of record, and certain sureties.

DATES: *Effective Date:* These regulations are effective July 27, 2007.

Applicability Dates: For dates of applicability, see §§48.4081–1(f) and 48.4081–3(j).

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

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1897. The collection of information in these final regulations is in §48.4081–3(c)(2)(iii) and (iv). This collection of information allows certain importers of record and sureties to avoid liability for the tax on the entry of taxable fuel into the United States.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

The estimated annual burden per respondent and/or recordkeeper varies from 15 minutes to 2.25 hours, depending on individual circumstances, with an estimated average of 1.25 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224, and the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this 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

This document amends the Manufacturers and Retailers Excise Tax Regulations (26 CFR part 48) to provide rules relating to the tax that section 4081 of the Internal Revenue Code (Code) imposes on the entry of taxable fuel into the United States. On July 30, 2004, a temporary regulation (T.D. 9145, 2004–2 C.B. 464 [69 FR 45587]) relating to this topic was published in the **Federal Register**. A notice of proposed rulemaking (REG–120616–03, 2004–2 C.B. 474 [69 FR 45631]) cross-referencing the temporary regulations was published in the **Federal Register** on the same day. Written

and electronic comments were received and a public hearing was held on January 12, 2005. After considering the written comments and the comments made at the public hearing, the proposed regulations are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed.

The temporary and proposed regulations. Effective September 28, 2004, the temporary regulations provide that the importer of record (under Customs law) of taxable fuel is jointly and severally liable with the enterer for the tax imposed on the entry of taxable fuel if the importer of record is not the enterer (that is, the importer of record is a customs broker engaged by the enterer) and the enterer is not a taxable fuel registrant. Under the law in effect before September 28, 2004, an importer of record's Customs bond could have been charged for any unpaid tax imposed on the entry of fuel imported under the bond. The preamble of the temporary regulations stated, however, that the IRS would not charge the Customs bond for the tax imposed on an entry of fuel occurring before September 28, 2004. In addition, the temporary regulations provide that the Customs bond posted with respect to the importation of fuel will not be charged for the tax imposed on an entry of fuel occurring after September 27, 2004, if the enterer is a taxable fuel registrant or the surety believes, based on the enterer's certification, that the enterer is a taxable fuel registrant.

Public comments. One commentator that represents an association of road builders supported the proposed and temporary regulations, calling them one of a series of important initiatives necessary to combat fuel tax evasion and finance the Highway Trust Fund.

Several commentators that represent tribal interests in the state of New York opposed the regulations. They maintained that the regulations will cause fuel prices to increase at service stations located on tribal reservations. These higher fuel prices will reduce sales and result in the loss of several hundred tribal jobs. In addition, a reduction in sales at these stations would cause a decrease in receipts from the tribal tax on fuel sold on the reservations. This tax funds general tribal government services, including police, health, and welfare programs.

Many of these commentators also suggested that the Treasury Department and the IRS failed to comply with section 5 of Executive Order 13175 (65 FR 6724) and Executive Order 12866 (58 FR 51735), which generally requires each Federal agency to consult with tribal officials before the promulgation of any regulation that "has tribal implications" or that "imposes substantial direct compliance costs on Indian tribal governments."

The final regulations. This Treasury decision adopts the proposed rules as final regulations without substantive change. Because the cross-reference notice of proposed rulemaking referred to the text of temporary rules, the Treasury decision includes the nonsubstantive, clerical changes needed to incorporate the temporary rule text into the final regulations.

The rules in these regulations address the nonpayment of tax on fuel that is entered into the United States. An enterer's failure to pay this tax not only gives it a competitive price advantage over its compliant competitors, but it also deprives the United States Treasury of revenue intended for the Highway Trust Fund. The final regulations do not impose a new tax burden on enterers of taxable fuel. Instead, the regulations simply provide the IRS with an additional enforcement tool to collect the tax that is owed under existing law and give an additional incentive for enterers to be registered.

The imposition of tax on the entry of fuel sold on reservations results not from these regulations but from the statute, which does not provide an exemption from the tax for fuel sold on reservations. The only effect of these regulations is to improve the ability of the IRS to apply the tax consistently and fairly with respect to all taxpayers subject to the tax, without regard to whether or not the fuel is ultimately sold on tribal reservations.

The Treasury Department and IRS determined that these regulations are not subject to Executive Order 13175 (65 FR 67249) which obligates an agency to consult with tribal officials when developing "policies that have tribal implications." This executive order defines "policies that have tribal implications," in part, as regulations that have substantial direct effects on one or more Indian tribes. The regulations do not have tribal implications, as specified in Executive Order 13175, because they do not significantly or uniquely affect the communities of Indian tribal governments, nor do they impose direct compliance costs on them. Any economic effect of the fuel tax on tribal economies is a consequence of the statutory imposition of the tax, not the manner in which the regulations operate to implement the statute. Thus, Executive Order 13175 does not apply to the final or temporary regulations.

Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory 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. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that any burden on taxpayers is minimal. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the regulations 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. Section 48.4081–1 is amended as follows:

1. Paragraph (b) is amended by revising the definition of *Enterer*.

2. The first sentence of paragraph (f)(2) is revised.

The revisions read as follows:

§48.4081–1 Taxable fuel; definitions.

* * * * *

(b) * * *

Enterer generally means 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.

* * * * *

(f) * * *

(2) In paragraph (b) of this section the definition of *aviation gasoline* and the third sentence in the definition of *terminal* are applicable after January 1, 1998, the definition of *kerosene*, *excluded liquid*, and *taxable fuel* are applicable after June 30, 1998, and the definition of *enterer* is applicable to entries of taxable fuel after September 27, 2004. * * *

§48.4081–1T [Removed]

Par. 3. Section 48.4081–1T is removed.

Par. 4. Section 48.4081–3 is amended by revising paragraphs (c)(2)(ii) through (iv), and (j) to read as follows:

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

* * * * *

(c) * * *

(2) * * *

(ii) *Joint and several liability of the importer of record.* The importer of record with respect to the taxable fuel is jointly and severally liable with the enterer for the tax imposed under paragraph (c)(1) of this section 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.* 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 Customs 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.

* * * * *

(j) *Effective/applicability date*: This section is applicable January 1, 1994, except that paragraphs (c)(2)(ii) through (iv) of this section are applicable to entries of taxable fuel after September 27, 2004.

§48.4081–3T [Removed]

Par. 5. Section 48.4081–3T is removed.

§48.4081–5 [Amended]

Par. 6. Section 48.4081–5 is amended by revising paragraph (a) to read as follows:

(a) *Overview.* This section sets forth requirements for the notification certificate under §§48.4081–2(c)(2)(ii), 48.4081–3(c)(2)(iii) and (iv), 48.4081–3(d)(2)(iii), 48.4081–3(e)(2)(iii), 48.4081–3(f)(2)(ii), and 48.4081–4(c) to notify another person of the taxable fuel registrant's registration status.

* * * * *

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 removing the entry for §48.4081–3T, and revising the entry for §48.4081–3 in the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
48.4081–3	1545–1270 1545–1418 1545–1897
* * * * *	

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

Approved July 16, 2007.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on July 26, 2007, 8:45 a.m., and published in the issue of the Federal Register for July 27, 2007, 72 F.R. 41222)

Section 6402.—Authority to Make Credits or Refunds

26 CFR 301.6402–1: Authority to make credits or refunds.
(Also: Section 6411; 1.6411–3.)

Limitations on setoff under sections 6402 and 6411. This ruling holds that the Service may credit an overpayment against unassessed internal revenue tax liabilities that have been determined in a statutory notice of deficiency sent to the taxpayer. It further holds that under section 6411(b) of the Code, the Service may credit a decrease in tax resulting from a tentative carryback adjustment against unassessed liabilities determined in a statutory notice of deficiency. Rev. Rul. 54–378 clarified.

Rev. Rul. 2007–51

ISSUES

(1) Does section 6402(a) of the Code allow the Service to credit an overpayment against unassessed internal revenue tax liabilities determined in a notice of deficiency?

(2) Does section 6411(b) of the Code allow the Service to credit a decrease in tax resulting from a tentative carryback adjustment against unassessed internal revenue tax liabilities determined in a notice of deficiency?

SCOPE

This revenue ruling only applies to internal revenue tax liabilities that are subject to the deficiency procedures of Subchapter B of Chapter 63 of the Code. This revenue ruling does not address the question of the Service's crediting rights prior to issuing a notice of deficiency, in the context of a termination assessment under section 6851 or otherwise. This revenue ruling also does not address the Service's crediting rights when a taxpayer is in bankruptcy (or other insolvency) proceedings. See Rev. Rul. 2007–52 (this Bulletin) for the Service's crediting rights when a taxpayer is in bankruptcy.

FACTS

Situation 1. On March 15, 2005, a corporate taxpayer filed its income tax return for the tax year ending December 31, 2004, claiming a refund of $500,000. On April 15, 2005, the Service sent a notice of deficiency to the taxpayer for tax year 2003 in the amount of $1,000,000. As of April 15, 2005, the Service had not refunded the $500,000 overpayment for tax year 2004 or assessed the $1,000,000 deficiency for tax year 2003.

Situation 2. On March 15, 2005, a corporate taxpayer filed a Form 1139, *Corporation Application for Tentative Refund,* carrying back a net operating loss from tax year 2004 to tax year 2002. The carryback generated a $250,000 decrease in tax for tax year 2002. On April 15, 2005, the Service sent a notice of deficiency to the taxpayer for tax year 2003 in the amount of $1,000,000. As of April 15, 2005, the Service had not assessed the $1,000,000 deficiency for tax year 2003 or tentatively refunded the $250,000 decrease in tax for tax year 2002.

LAW

Authority to Make Credits or Refunds

Section 6402(a) provides that within the applicable period of limitations the Secretary may credit the amount of any overpayment, including interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment. The Secretary shall refund any balance to the person who made the overpayment, subject to further credit against amounts specified in sections 6402(c), (d), and (e). Regulations under section 6402(a) similarly provide that credit may be made against "any outstanding liability." *See* section 301.6402–1 of the Regulations on Procedure and Administration.

Tentative Carryback and Refund Adjustments

Section 6411(a) provides that a taxpayer may file an application for tentative carryback adjustment of the tax for the prior taxable year affected by a net operating loss carryback, a business credit carryback, or a capital loss carryback from any taxable year. The application shall be made on Form 1139 or, in the case of taxpayers other than corporations, on Form 1045, and shall set forth in detail the information required by sections 6411(a)(1) through (a)(6) and by section 1.6411–1 of the Income Tax Regulations.

Section 6411(b) provides, in general, that within a period of 90 days from the date of filing the application for tentative carryback adjustment, the Secretary shall make a limited examination of the application to discover omissions and errors of computation, and shall determine the amount of the decrease in tax attributable to the carryback. *See also* section 1.6411–3(b) of the Income Tax Regulations.

Pursuant to section 6411(b) and section 1.6411–3(d), the decrease in tax attributable to the carryback shall, in the following order:

1. be applied under section 1.6411–3(d)(1) against any unpaid amount of the tax with respect to which such decrease was determined (*i.e.*, unpaid tax for the carryback year);
2. be credited under section 1.6411–3(d)(2) against any unsatisfied amount of any tax for the taxable year immediately preceding the taxable year of the net operating loss carryback, business credit carryback, or capital loss carryback, the time for payment of which was extended under section 6164; and
3. be credited under section 1.6411–3(d)(3) against any tax or installment thereof "then due" from the taxpayer, and, if not so credited, be refunded to the taxpayer.

ANALYSIS

Authority to Make Credits

Section 6402 permits the Service to credit overpayments against "any liability in respect of an internal revenue tax on