No. _____

In the Supreme Court of the United States

SUNOCO, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts have long held that "[p]ayments of taxes may be made in cash or by credit." *United States v. Piedmont Mfg. Co.*, 89 F.2d 296, 299 (4th Cir. 1937). In the decision below, however, the Federal Circuit held that the more than one billion dollars of tax credits that Petitioner Sunoco, Inc., earned under a federal tax program incentivizing production of environmentally friendly fuels operated to reduce the amount of excise tax liability that Sunoco incurred in the first place, rather than to *pay* that liability. In the process, the Federal Circuit wiped out billions of dollars in tax benefits to which producers like Sunoco would have been entitled if they had been permitted to deduct the excise taxes paid through tax credits from their taxable income. The question presented is:

Whether the Federal Circuit properly held that tax credits operate as a reduction of tax liability rather than as a payment of taxes owed.

RULE 29.6 STATEMENT

The following entities constitute the parent corporations and publicly held companies that own 10% or more of stock in Petitioner Sunoco, Inc. (which is now known as ETC Sunoco Holdings LLC):

Energy Transfer LP

Energy Transfer Operating, L.P.

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Petitioner Sunoco, Inc. (Sunoco) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 908 F.3d 710. The opinion of the Court of Federal Claims granting the government's motion for summary judgment (App. 17a-38a) is reported at 129 Fed. Cl. 322. The order of the court of appeals denying rehearing (App. 39a-40a) is unreported.

JURISDICTION

The court of appeals entered its opinion on November 1, 2018. App. 1a. On January 24, 2019, the court of appeals denied a timely petition for rehearing. *Id.* at 39a-40a. On April 11, 2019, the Chief Justice granted Sunoco's application to extend the time for filing this petition to May 24, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the statutory addendum to this petition (App. 41a-57a).

INTRODUCTION

This case turns on a basic tax question that, under the statutory program at issue, impacts many of the nation's major gasoline producers and, all told, billions of dollars in tax liability. The question is whether a tax credit should be treated as a *payment* of tax liability or, instead, a *reduction* of the amount of tax liability in the first place. That question has important tax consequences because, if a credit

operates as a payment of certain taxes incurred (such as sales, excise, or property taxes), the taxpayer typically is entitled to deduct (or exclude) that payment from its gross income, thus reducing the income subject to taxation. By contrast, if the credit is treated as a reduction in the amount of tax liability incurred, then it *increases* the taxpayer's taxable income and, thus, its income tax.

In this case, the Federal Circuit held that Petitioner Sunoco, Inc., was responsible for hundreds of millions of dollars in federal income taxes under a program that Congress enacted as part of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 ("Jobs Act"), to encourage gasoline producers to utilize environmentally friendly, renewable fuels like ethanol. The Federal Circuit based its decision on the conclusion that the excise tax credits in question operated as a reduction of excise tax incurred rather than a payment of excise tax owed. The Federal Circuit's approach on this issue conflicts with decisions of this Court and of other courts of appeals, which have long recognized that "[p]ayments of taxes may be made in cash *or by credit*." *United States v. Piedmont Mfg. Co.*, 89 F.2d 296, 298-99 (4th Cir. 1937) (emphasis added) (discussing *Graham v. Goodcell*, 282 U.S. 409 (1931)).

The Federal Circuit's decision warrants this Court's review. The proper treatment of tax credits is a recurring question that impacts numerous tax programs. The Federal Circuit's decision in this case not only is at odds with the decisions of this Court and other circuits on this basic tax issue, but creates stark anomalies in the treatment of taxpayers under the program giving rise to this case. Under the court's decision, two taxpayers that both produced the

environmentally friendly fuels encouraged by Congress could receive dramatically different tax benefits for reasons that have nothing to do with the incentivized activity. The Federal Circuit identified no reason to believe Congress intended that disparate treatment. There is none. The Federal Circuit's decision in this case also impacts billions of dollars in federal tax benefits that Congress promised to producers like Sunoco to encourage investment in the production of environmentally friendly fuels that are indisputably in the national—and global—interest.

The petition should be granted.

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

1. Congress has long recognized that the nation's highways are critical to the economy and public good. In 1956, Congress created the Highway Trust Fund to serve as a reliable source of funding for construction and maintenance of those roadways. *See* Federal-Aid Highway Act of 1956, § 209, Pub. L. No. 84-627, 70 Stat. 374, 397-401. Since then, Congress has required that all federal excise taxes collected on fuels be deposited into that fund. *See* 26 U.S.C. § 9503(b). One of those excise taxes—the one at issue here—is imposed on the removal of gasoline from a refinery or terminal; the entry of gasoline into the United States for consumption, use, or warehousing; or sales of gasoline to certain purchasers. *See id.* § 4081(a).

2. In addition to using the excise tax system to generate revenue for highway construction and maintenance, Congress also has long utilized that system to encourage investment in renewable fuels.

In 1978, Congress established a tax *exemption* designed to reward manufacturers that blended gasoline with alcohol. *See* Energy Act of 1978, Pub. L. No. 95-618, § 221(a)(1), 92 Stat. 3174, 3185 (codified at 26 U.S.C. § 4081(c)) ("[N]o tax shall be imposed by this section on the sale of any gasoline—(A) in a mixture with alcohol, if at least 10 percent of the mixture is alcohol, or (B) for use in producing a mixture at least 10 percent of which is alcohol.").

In 1982, Congress replaced the full excise tax exemption in Section 4081(c) with a reduced-rate structure, taxing gasoline for use in eligible alcohol-mixed fuels at lower rates than other gasoline. *See* Highway Improvement Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097. Congress employed this reduced-rate approach, with modest updates and revisions, for the next 20 years. *See, e.g.*, Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

3. In 2004, Congress acted again to revamp its approach to taxation of renewable fuels. By then, it had become clear that the existing reduced-rate structure was unsustainable. As the popularity of alcohol-blended fuels had grown, the proportion of gasoline taxed at a reduced rate had grown too, resulting in a massive reduction in the Highway Trust Fund's revenue stream. Indeed, in the years leading up to 2004, the Highway Trust Fund's year-end balances decreased by more than 50 percent: from $22.5 billion in 2000 to $10.8 billion in 2004.[1]

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[1] *See* U.S. Dep't of Transp., Fed. Highway Admin., *Status of the Federal Highway Trust Fund for the Fiscal Year Ended September 30, 2000* (Oct. 2001), http://www.fhwa.dot.gov/ohim/hs00/pdf/fe10.pdf; U.S. Dep't of Transp., Fed. Highway Admin.,

Congress acted to address these problems in the Jobs Act, §§ 301-03, 118 Stat. at 1459-66. To do so, it jettisoned the tiered, reduced tax rates for alcohol-blended gasoline and replaced them with an across-the-board tax rate of 18.3 cents per gallon for all gasoline.[2] Under the new program, Congress continued to tax gasoline when it was removed from a manufacturing refinery or terminal; brought into the United States for consumption, use, or warehousing; or sold to certain persons. *See* 26 U.S.C. § 4081(a)(1). But unlike under the prior structure, the tax rate on the gasoline no longer depended on whether it would be mixed with alcohol in the future. Instead, under the new program, manufacturers were liable for the 18.3 cents per gallon of excise tax even if the gasoline was blended with alcohol. *See id.* § 4081(a)(2)(A).

This change in excise tax rates addressed the major problem created under the prior regime by greatly increasing the excise taxes flowing into the Highway Trust Fund. As Senator Grassley, a sponsor of the bill, explained in the Senate, "[u]nder the [new excise tax regime] we . . . increase the revenue source for the Highway Trust Fund. This is because the full amount of user excise taxes levied will be collected and remitted to the Highway Trust Fund (HTF). In simplifying the tax collection system, all user excise taxes levied on both gasoline and ethanol blended

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Status of the Federal Highway Trust Fund for the End of Fiscal Year 2004 (Oct. 2005), https://www.fhwa.dot.gov/policy/ohim/hs04/pdf/fe10.pdf.

[2] The rate is sometimes listed as 18.4 cents per gallon. That figure reflects the 18.3-cents-per-gallon excise tax plus the 0.1-cent-per-gallon tax for the Leaking Underground Storage Tank Trust Fund tax. *See* 26 U.S.C. § 4081(a)(2)(B).

fuels would be collected at 18.4 cents per gallon . . . ." 149 Cong. Rec. S10680 (daily ed. July 31, 2003).

But Congress did not want to abandon its promotion of environmentally friendly fuel sources. Accordingly, at the same time that it increased taxes on gasoline intended for use in blended fuels, Congress also created a *new* incentive under which manufacturers could earn separate, valuable tax credits for blending activities. Under Section 6426, for every gallon of alcohol a manufacturer blends with gasoline, the manufacturer earns a corresponding credit of 51 cents—regardless of whether that fuel is subject to excise tax. *See* 26 U.S.C. § 6426(b).

Congress allowed taxpayers to use renewable fuel credits earned through their blending activities in one of two ways. First, producers could use the credits to satisfy excise tax liability they had separately incurred for their refining, manufacturing, and importing activities. *See* 26 U.S.C. § 6426(a) ("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 subsection[] (b) . . . ."). And, second, taxpayers could also request a "tax-free payment" of the outstanding credit amount if they had no excise tax liability, or if their credits exceeded their Section 4081 liability. App. 18a, 24a; *see* 26 U.S.C. § 6427(e)(1) ("If any person produces a mixture described in section 6426 in such person's trade or business, the Secretary shall pay (without interest) to such person an amount equal to the alcohol fuel mixture credit . . . .").

Regardless of whether the credits resulted in tax-free cash payments or satisfaction of existing excise tax liability, Congress specified that the "taxes received" under the revised gasoline excise tax

provision—and thus deposited into Highway Trust Fund—"shall be determined *without reduction* for credits under section 6426." 26 U.S.C. § 9503(b)(1) (emphasis added). This proviso was critical to achieving Congress's objective of increasing the excise taxes flowing into the Highway Trust Fund.

B. THIS CASE

1. Petitioner Sunoco, Inc. is a petroleum and petrochemical company. *See* Appx1003 ¶ 10.[3] Sunoco incurs excise tax liability on gasoline by virtue of its refining and other fuel production activities. *Id.* ¶ 12. As part of its refining and wholesale fuel supply business, Sunoco also blends ethanol with gasoline to create alcohol fuel mixtures, entitling it to a credit under Section 6426. *Id.* ¶ 11.

On its original income tax returns for 2005 through 2008, Sunoco erroneously calculated its cost of goods sold by reducing its excise taxes by the value of its alcohol fuel mixture credits. Appx1003 ¶¶ 14-72. As a result, the taxable income that Sunoco reported on its return was higher than it should have been, resulting in an approximately $306 million income tax overpayment. Upon realizing that error, Sunoco submitted to the Internal Revenue Service ("IRS") informal claims for income tax refunds arising from its miscalculation. Sunoco also submitted formal refund claims for these years (in the form of amended returns on Form 1120X), claiming the additional deductions. Appx1004 ¶ 21, Appx1006-07 ¶¶ 29, 39, Appx1009-11 ¶¶ 49, 59, 69.

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[3] Citations to "Appx___" refer to materials included in the Joint Appendix filed in the Federal Circuit.

Sunoco's refund claims were consistent with the approach to these tax issues laid out in several Congressional Research Service (CRS) reports published in the years following enactment of the Jobs Act, which Congress had before it when it repeatedly extended the Section 6426 credit regime.[4]

Those CRS reports explained that following Congress's creation of a unitary 18-cent tax rate and separate excise tax credit, "income tax deductions are taken at 18.4¢ rather than 13.3¢." Salvatore Lazzari, Cong. Research Serv., CRS Report RL32979, *Alcohol Fuels Tax Incentives* at Summary (July 6, 2005); *see also* Molly F. Sherlock, Cong. Research Serv., CRS Report R41227, *Energy Tax Policy: Historical Perspectives On and Current Status Of Energy Tax Expenditures* 23 n.45 (May 2, 2011) ("Since the taxpayer initially paid the higher excise tax rate, the taxpayer[] is able to deduct that higher excise tax as an expense to offset taxable income.").

2. On March 11, 2015, the IRS nevertheless issued a notice of claim disallowance, denying Sunoco's refund claims. App. 6a. Sunoco sued in the United States Court of Federal Claims to recover its overpayments. *Id.*; *see also* 28 U.S.C. § 1491.

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[4] Congressional extensions of the Section 6426 regime included not only the alcohol fuel mixture credit directly at issue here, which Congress extended through December 31, 2011, *see* 26 U.S.C. § 6426(b)(6), but also other comparable credits, such as a credit for biodiesel fuel mixtures, *see id.* § 6426(c). *See also* Pub. L. No. 113-295, § 160, 128 Stat. 4010, 4022-23 (2014) (enacted on Dec. 19, 2014); Pub. L. No. 112-240, § 405, 126 Stat. 2313, 2340 (2013) (enacted on Jan. 2, 2013); Pub. L. No. 111-312, §§ 701, 708, 124 Stat. 3296, 3310, 3312 (2010) (enacted on Dec. 17, 2010); Pub. L. No. 110-343, § 202, 122 Stat. 3765, 3832-33 (2008) (enacted on Oct. 3, 2008).

The government moved for judgment on the pleadings, arguing that "[t]he alcohol fuel mixture credit under § 6426 of the Code operates to reduce a taxpayer's fuel excise tax under § 4081 and, as a result, a taxpayer may only claim in its cost-of-goods sold its fuel excise-tax liability *after offsetting* the tax credit." Appx1044. Sunoco opposed the government's motion and moved for partial summary judgment. Sunoco argued that it was permitted "to include in its costs of goods sold all of the fuel excise taxes it paid to the federal government without reducing cost of goods sold by the amount of the alcohol fuel mixture credit," because the alcohol fuel mixture credit does not reduce a taxpayer's excise tax liability. Appx1085-86.

The Court of Federal Claims denied Sunoco's motion and granted the government's. App. 17a-38a. It recognized that, "on paper, fuel blenders . . . pay the full amount of the § 4081 excise tax." *Id.* at 26a. But it concluded that, "in reality, the full excise tax rates were *not* imposed." *Id.* In the court's view, Congress had created a "legal fiction" through the combination of Section 4081 and Section 6426, under which it appeared to apply the same excise tax rates to mixed fuels but actually applied a lower rate. *Id.* at 26a-27a.

The Court of Federal Claims attributed this "legal fiction"—which it characterized as an "accounting sleight-of-hand"—to Congress's desire to fully fund the Highway Trust Fund. *Id.* at 27a. Because the court believed the practical effect of Congress's "legal fiction" was that producers "do[] not pay the full amount of [their] excise tax liability," it held that Sunoco could not deduct its full excise tax liability as part of its cost of goods sold. *Id.* at 26a-27a.

3. The Federal Circuit affirmed. In doing so, the court took as a given that tax credits operate "to

reduce the taxpayer's overall tax liability," rather than as a payment of taxes incurred. *Id.* at 10a (citing secondary authorities). It then held that Section 6426(a)(1)—which "provides that the 'credit,' i.e., the Mixture Credit, is applied 'against' the gasoline excise tax imposed under § 4081"—must mean that the credit reduced, rather than paid, tax liability. *Id.* The Federal Circuit then reasoned that the statute "treats 'credits' differently from 'payments,'" because Congress had explicitly provided for the payment of cash rebates to producers of blended fuels that do not also incur excise tax liability. *Id.* at 11a (citing 26 U.S.C. § 6427(e)(1)). Because it believed that "[t]he plain meaning of the statute is clear," the court dismissed legislative history confirming that "'[t]he credit is treated as a payment of the taxpayer's tax liability.'" *Id.* at 13a-14a (alteration in original) (citation omitted).

4. The Federal Circuit denied Sunoco's timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

The proper treatment of tax credits is important to the implementation of the federal tax system. The Federal Circuit's decision in this case rests on the premise that tax credits granted in the Jobs Act to encourage companies to produce environmentally friendly fuels prevent a tax liability from occurring in the first place. But that approach to this basic tax principle conflicts with the treatment given to tax credits by other circuits, as well as with this Court's longstanding treatment of federal tax credits. Unless corrected, the Federal Circuit's decision will deprive Sunoco and other energy companies of the full benefits that Congress offered them in exchange for

their efforts to generate environmentally friendly fuels. All told, the Federal Circuit's decision in this case impacts billions of dollars of federal tax benefits that Congress promised to energy companies like Sunoco. The petition should be granted.

A. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH OTHER AUTHORITIES ON WHETHER A CREDIT OPERATES AS A PAYMENT OF TAX

While the underlying statutory program giving rise to this case is complex, ultimately the case turns on a basic question of tax law that transcends the particular statute at issue: Does a tax credit operate as a *reduction* of tax liability or a *payment* of tax liability? The Federal Circuit's decision is grounded on the premise that a tax credit always reduces a taxpayer's tax liability to begin with. App. 10a. That conclusion conflicts with the decisions of other circuits and this Court itself on this basic issue.

A federal taxpayer's ability to deduct other types of taxes from its taxable income (such as federal excise taxes or state and local property taxes) depends on whether those taxes have been "paid or incurred." *See* 26 U.S.C. § 162 (deduction of excise taxes); *id.* § 164(a)(1) (state and local property taxes). Importantly, however, it does not depend on *how* (i.e., in what form) those taxes are paid. "[T]he source of the funds . . . used to make a payment generally is not relevant." Stephen F. Gertzman, *Federal Tax Accounting* ¶ 3.04[3][a] (2d ed. Apr. 2019 update); *see also id.* n.127 (citing Rev. Rul. 78-173, 1978-1 C.B. 73 (taxpayer permitted to deduct medical payments made by a parent on his behalf); Rev. Rul. 78-38, 1978-1 C.B. 67 (use of credit cards deemed equivalent

of payment of liability with borrowed funds); Rev. Rul. 78-39, 1978-1 C.B. 73 (same)).

Courts have long recognized that one implication of this background rule is that—as the Fourth Circuit put it more than 75 years ago—"[p]ayments of taxes may be made in cash or by credit allowed by the Commissioner of Internal Revenue," and "[a] payment by credit . . . for all purposes of the United States and the taxpayer, is received as equivalent" to "a payment in cash." *United States v. Piedmont Mfg. Co.*, 89 F.2d 296, 299 (4th Cir. 1937) (discussing *Graham v. Goodcell*, 282 U.S. 409 (1931)); *see Graham*, 282 U.S. at 424 (stating that "the application of a [tax] credit against an assessment at a time when collection was barred must be regarded as an erroneous collection").

In *Piedmont Manufacturing Co.* and *Graham*, the principle that credits operate to pay taxes rather than preventing them from ever arising in the first place came up in the context of refund requests for the taxes so paid. *See Graham*, 282 U.S. at 425; *Piedmont Mfg. Co.*, 89 F.2d at 298-99. But the principle applies with the same force in cases about the deductibility of taxes paid with credits. The Second Circuit, for example, applied the principle in such circumstances in *Consolidated Edison Co. of New York, Inc. v. United States*, 10 F.3d 68, 74 (2d Cir. 1993).

In *Consolidated Edison*, the deductible taxes in question were local property taxes. *See id.* at 70. Consolidated Edison had paid a portion of its local property taxes using credits, called "discounts," that the city had offered to taxpayers if they submitted their payments early. *See id.* When Consolidated Edison sought to deduct the full amount of its property taxes—including the amount paid through the credits—on its federal income tax return, the IRS

disallowed the deduction, arguing that "taxes never became 'due' in the amount of the discounts because the City forgave these taxes in exchange for Con Edison's prepayment." *Id.* at 74. Consolidated Edison sued the IRS arguing that it was entitled to the full deduction and, on appeal, the Second Circuit agreed.

The Second Circuit held that Consolidated Edison's use of the discount credits "did not reduce Con Edison's underlying tax liability." *Id.* Rather, the court held, the discount credits were "effectively utilized to *discharge* Con Edison's full tax liability." *Id.* (emphasis added). The city had offered the discount credits as "consideration for the prepayment" in order to incentivize a particular activity, and when Consolidated Edison engaged in that activity to earn the discount credits and then used those credits to satisfy its tax liability, it was paying the *full* amount of the tax. *See id.*

The Federal Circuit's decision in this case is directly at odds with *Consolidated Edison*. The Federal Circuit held that "the Mixture Credit works to reduce the taxpayer's overall excise-tax liability." App. 10a. For that proposition, it pointed to several quotations from a tax practitioner's guide to the effect that a credit "is any amount that is allowable as a *subtraction from tax liability* for the purpose of computing the tax due or refund due." *Id.* (emphasis added) (quoting James Edward Maule, 506-3rd T.M., *Tax Credits: Concepts and Calculation* 43 (BNA 2018)). But the Federal Circuit failed to appreciate what the Second Circuit had understood in *Consolidated Edison*, the Fourth Circuit had understood in *Piedmont Manufacturing Co.*, and this Court articulated in *Graham*—that the way in which the credit reduces the amount of tax due is by

satisfying a portion of the liability. *See Graham*, 282 U.S. at 424; *Piedmont Mfg. Co.*, 89 F.2d at 299; *Consolidated Edison*, 10 F.3d at 74.

This division of authority on an important point of tax law warrants review. Although the Federal Circuit here sought to ground its conclusion in specific statutory provisions, Congress enacted the tax incentive regime at issue here against the backdrop of this general rule and is presumed to have intended it to apply. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988). Nothing in Section 6426, or any other provision of the Jobs Act, displaces this rule or purports to prevent the taxpayer from incurring the liability that arises from Section 4081. To the contrary, as explained below, the statute confirms that Congress intended this background rule to apply.

Ultimately, the Federal Circuit's decision in this case flowed from the premise that a tax credit always operates to reduce tax liability in the first place, rather than to pay it. App. 10a. That premise is irreconcilable with the approach taken in the Second and Fourth Circuits, and with this Court's longstanding position that when a taxpayer utilizes a credit, the result is that its "tax [i]s *paid* by the credit." *Graham*, 282 U.S. at 424 (emphasis added).

B. THE FEDERAL CIRCUIT'S APPROACH IS IRRECONCILABLE WITH KEY PROVISIONS OF THE TAX SYSTEM

The Federal Circuit's approach is not just irreconcilable with the precedent of other courts. It is also untenable in light of the broader federal tax regime. Take, for example, one of the most important tax credits in the Internal Revenue Code—the wage

withholding credit. Using the exact same "against the tax imposed" language of the primary provision on which the Federal Circuit relied here (Section 6426(a)(1)), Section 31 of the Code provides that amounts withheld from an individual's wages are "allowed to the recipient of the income as a credit against the tax imposed." 26 U.S.C. § 31(a)(1). Yet no one would suggest that if an individual's withholdings over the course of the year precisely equal her income tax liability, the withholdings "reduce the taxpayer's overall [income]-tax liability" (App. 10a) to zero. Instead, the wage-withholding credit operates as a *payment* of taxes incurred.

The Federal Circuit's decision is all the more problematic here because Congress made *especially* clear its intention that the excise tax credits be treated as a payment of tax. As discussed above, before 2004, the amount of alcohol manufacturers blended with gasoline directly determined—and reduced—the excise tax rate they paid and, thus, the amount of their excise tax liability. *See, e.g.*, 26 U.S.C. § 4081(a), (c) (2000). Congress abandoned that reduced-rate regime in the Jobs Act because of its adverse impact on the Highway Trust Fund. Instead, it adopted a program under which all gasoline manufacturers would pay the same excise tax rate.

The statutory text is unambiguous on this—after the Jobs Act, the same 18.3 cent per gallon rate applies whenever a manufacturer incurs excise tax liability. *See* 26 U.S.C. § 4081(a); Jobs Act, § 301(c)(7), 118 Stat. at 1461; *see supra* at 5. And the Conference Report that accompanied the Jobs Act said exactly that, explaining that "[t]he [Section 6426] credit is treated as a *payment* of the taxpayer's tax liability received at the time of the taxable event," not

as a reduction of the amount of tax imposed. H.R. Rep. No. 108-755, at 304 (2004) (Conf. Rep.) (emphasis added).

A separate provision, which Congress amended at the same time it altered the excise tax regime by imposing a uniform rate of taxation, confirms Congress's understanding on this point. In Section 9503(b)(1), Congress provided that "[f]or purposes of this paragraph, taxes received under . . . section 4081 shall be determined *without reduction* for credits under section 6426." 26 U.S.C. § 9503(b)(1) (emphasis added). That provision confirms that Congress intended no departure from standard practice here: By acknowledging that taxes would be "received" under Section 4081 without regard to whether they had been satisfied through use of a credit or a cash payment, it signaled its recognition that the credits would *pay* the tax liability, not eliminate it. *Id.*

According to the Federal Circuit's decision, however, taxes are "received" under Section 4081 only if they are paid with cash—not credits. In attempting to reconcile that view with Section 9503(b), the Federal Circuit claimed that "the statute explicitly states that for § 9503(b) purposes only, the amount of funds deposited into the Highway Trust Fund is 'equivalent to the' gasoline excise tax *imposed under § 4081* 'without reduction' for the Mixture Credit, meaning that the funds deposited into the Highway Trust Fund are not diminished by any amount of Mixture Credit that might act against a taxpayer's excise-tax liability." App. 12a (emphasis added). But Section 9503(b) does not refer to the "gasoline excise tax *imposed*," as the Federal Circuit suggested; it refers to the excise tax "received." And the Federal

Circuit offered no explanation for how a tax could be "received" by the Treasury without having been paid.

The government, for its part, argued that Section 9503(b) is irrelevant because of the proviso that its rule applies "[f]or purposes of this paragraph," 26 U.S.C. § 9503(b). *See* U.S. CAFC Br. 33. But that language simply refers to the limited, budget-related function of Section 9503(b), and made clear that for purposes of other budgeting calculations, the taxes the Treasury had received under Section 4081 could be reduced by the amount of tax credits that the Treasury had paid out, thereby reflecting the net budget impact of the excise tax and mixture credit provisions together. That budgeting issue is about how to account for the taxes *after* they are paid and "received." It is beside the point here, where the question is whether the taxes have been paid and received if they have been satisfied with a credit.

If Congress had thought the answer to that question was "No"—as the Federal Circuit did—then it would have framed Section 9503(b) differently, with the amount of taxes received under Section 4081 (i.e., the cash payments received) having to be *increased* by the amount of credits awarded under Section 6426. The fact that Congress did not structure Section 9503(b) in that manner just underscores that it expected the ordinary rule to apply to Section 4081, under which "[a] payment by credit" is "for all purposes of the United States and the taxpayer, . . . received as equivalent" to "a payment in cash." *Piedmont Mfg. Co.*, 89 F.2d at 299.

C. THE FEDERAL CIRCUIT'S DECISION UNDERMINES CONGRESSIONAL EFFORTS TO ENCOURAGE PRODUCTION OF RENEWABLE FUELS

The Federal Circuit's error in this case also negates a core piece of Congress's efforts to encourage energy independence and the use of renewable fuels, and creates arbitrary distinctions in tax treatment that there is no indication Congress intended. This fundamentally alters the bargain that Congress struck with taxpayers in seeking to encourage energy companies to invest the additional resources necessary to make environmentally friendly fuels.

As discussed above, Congress established the credits at issue here to encourage energy companies to engage in an activity—blending of renewable fuels—that it had determined was in the public interest. *See supra* at 3-7. And Congress set the face value of those credits at a level that it believed would incentivize the desired amount of blending; it gave no indication that it intended their actual value to be reduced by offsetting changes in a company's income tax bill. Indeed, Congress expressly provided that companies that engaged in blending activities but that did not have outstanding excise tax liability (e.g., because they did not remove the gasoline from a refinery themselves, but instead purchased it from another company that did so, *see* 26 U.S.C. § 4081(a)(1)(A)) could receive cash payments in the full amount of the credit. *See id.* § 6427(e)(1) ("If any person produces a mixture described in section 6426 in such person's trade or business, the Secretary shall pay (without interest) to such person an amount equal to the alcohol fuel mixture credit or the biodiesel

mixture credit or the alternative fuel mixture credit with respect to such mixture."). The IRS has long conceded, and the Federal Circuit below found, that those payments are not subject to income tax. *See* App. 10a ("The IRS does not tax as income direct payments to taxpayers made under this subsection.").

Under the Federal Circuit's decision, however, the tax credit's value differs from one taxpayer to the next for reasons that have nothing to do with the activity—blending—that Congress intended to incentivize. Two taxpayers might both blend 1,000,000 gallons of ethanol into ethanol-gasoline fuels, entitling each to $510,000 in credits under Section 6426. If the first taxpayer has no excise tax liability, then it will receive a $510,000 payment from the Treasury that will not be subject to income tax. *See* 26 U.S.C. § 6427(e)(1). If the second taxpayer has $510,000 in excise tax, by contrast, it will not receive a cash payment at all, and while it will no longer owe that $510,000 in excise tax, it will also no longer be able to *deduct* that $510,000 in excise tax on its income tax returns. The result (using the 35 percent corporate income tax rate applicable during the tax years in question) will be a $178,500 increase in the second taxpayer's income taxes relative to the first. The two taxpayers will have engaged in the exact same blending activity, but the first will have received a net $510,000 in compensation for that activity, while the second will have received only $331,500.

In the proceedings below, neither the government nor the Federal Circuit ever identified any reason why Congress could possibly have intended that irrational result. *Cf. Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453-54 (1989) (recognizing the need to avoid "absurd results" in construing federal

statutes (citation omitted)). Even the Court of Federal Claims acknowledged that this result was "puzzling." App. 31a. And the result is all the more bizarre because fuel blenders who do not incur excise tax—the big beneficiaries of the Federal Circuit's reading—had received no benefit *at all* under the pre-2004 regime. *See id.* at 31a-32a.

As the Court of Federal Claims put it:

> This result is puzzling because taxpayers without excise tax liability, who previously received no benefit whatsoever under the lowered excise tax rates for alcohol fuel blenders, now receive the Mixture Credit tax-free. On the other hand, taxpayers with excise tax liability (like Sunoco), who did receive tax benefits under the prior tax regime, have their Mixture Credits taxed as income.

Id.

The reality is that no reason for such a glaring disparity exists. As the Conference Report makes clear, and the subsequent CRS reports demonstrate, Congress fully expected the Section 6426 credit to be "treated as a *payment* of the taxpayer's tax liability," H.R. Rep. No. 108-755, at 304 (emphasis added), which would not lead to counteracting effects on the taxpayer's income tax returns. That is how the regime *would* be applied in the Second and Fourth Circuits. The "puzzling" consequences of the Federal Circuit's interpretation here are just one more indication that its interpretation was incorrect.

D. CERTIORARI IS WARRANTED TO ENSURE THAT TAXPAYERS RECEIVE THE FULL BENEFIT OF THE TAX INCENTIVES CONGRESS CREATED

The federal government is of course entitled to structure tax policy as it sees fit to meet the nation's revenue and policy objectives. But what it should not be permitted to do is to hold out a set of tax incentives to encourage certain conduct (here, the investment in and production of environmentally friendly fuels) and then retroactively deny taxpayers that have engaged in such conduct those tax benefits. Yet, that is exactly what has happened here: The taxpayer (Sunoco) was improperly denied hundreds of millions of dollars in tax benefits owed to it under the 2004 Act for engaging in the activity Congress sought to encourage. And, all told, this case impacts billions of dollars in tax benefits owed to energy companies, given the volume of fuel blending activities that Congress's incentive program generated.

The Federal Circuit credited the government's effort to turn this around on the taxpayer and claim that Sunoco was seeking a "windfall." App. 16a. But far from a "windfall," Sunoco simply seeks the full benefit of the tax incentive that Congress promised—and that Sunoco earned through its blending activities. All agree that if a separate entity had engaged in the exact same mixing activities as Sunoco, but had not incurred excise taxes (such as if it had used gasoline purchased from another producer in its mixing activities), that entity would have received tax-free payments in the full amount of the credits. *See id.* at 10a. It would thus be compensated exactly as Congress intended, receiving a dollar-for-

dollar benefit of the credit for its blending activities. All Sunoco seeks is the same dollar-for-dollar credit for undertaking the same blending activities.

If the government had lost below, it undoubtedly would point to the amount of potential tax liability impacted by the question presented in this case—billions of dollars—as a basis for granting review. *Cf., e.g.,* Pet. 23, *Azar v. Allina Health Services*, 139 S. Ct. 51 (2018) (No. 17-1484), 2018 WL 2020170 (emphasizing the "significant financial stakes" of the case, an estimated $3-4 billion, in arguing that certiorari was warranted). The fact that it is taxpayers, instead of the government, that have been improperly saddled with this liability in no way alleviates the need for this Court's review. Especially given the stakes, the important question presented in this case should be resolved by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 24, 2019

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2017-1402

SUNOCO, INC., Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Appeal from United States Court of Federal Claims in No. 1:15-cv-00587-TCW, Judge Thomas C. Wheeler.

Decided: November 1, 2018

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908 F.3d 710

Before REYNA, TARANTO, and HUGHES, Circuit Judges.

REYNA, Circuit Judge.

This case concerns whether, under 26 U.S.C. § 6426, a taxpayer that is entitled to an alcohol fuel mixture credit may treat the credit as a tax-free direct payment regardless of excise-tax liability, or whether a taxpayer must first use the mixture credit to reduce any excise-tax liability before receiving payment for any amount of mixture credit exceeding excise-tax liability. Sunoco, Inc. appeals from the Court of Federal Claims' grant of the United States' motion for judgment on the pleadings and denial of Sunoco, Inc.'s cross-motion for partial summary judgment. The Court of Federal Claims determined that the alcohol fuel mixture credit must first be applied to reduce a

taxpayer's gasoline excise-tax liability, with any remaining credit amount treated as a tax-free payment. We affirm.

BACKGROUND

1. Statutory Framework

Since 1932, the United States has imposed an excise tax on various types of fuel, including gasoline. *See* Revenue Act of 1932, ch. 209, § 617(a), 47 Stat. 169 (1932) (current version at 26 U.S.C. § 4081).[1] Excise taxes are taxes collected on the "manufacture, sale, or use of goods," or "on an occupation or activity." *Excise*, Black's Law Dictionary (10th ed. 2014). Under § 4081, the United States imposes an excise tax upon the occurrence of events involving the removal of gasoline from a refinery or terminal; the entry of gasoline into the United States for consumption, use, or warehousing; and the sale of gasoline to certain purchasers. § 4081(a)(1)(A). In particular, § 4081 imposes an excise tax of 18.3 cents per gallon of gasoline (other than aviation gasoline). § 4081(a)(2)(A)(i).[2]

Pursuant to § 9503, the § 4081 gasoline excise tax is used to fund the Highway Trust Fund, created by the Federal-Aid Highway Act of 1956 ("Highway Revenue Act"), Pub. L. No. 84-627, § 209, 70 Stat. 374,

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[1] Unless otherwise specified, all sections referenced in this opinion are to the Internal Revenue Code set forth in Title 26 of the United States Code.

[2] The 18.3 cents per gallon excise tax for gasoline increases to 18.4 cents per gallon after accounting for the 0.1 cents per gallon amount diverted to the Leaking Underground Storage Tank Trust Fund. § 9503(a)(2)(B). Certain exhibits thus refer to the excise-tax rate under § 4081 as being 18.4 cents per gallon.

397 (codified at 26 U.S.C. § 9503). These funds are used to construct and maintain the nation's highways and other infrastructure.

In 1978, Congress started enacting tax incentives for renewable fuels, such as alcohol fuel blends. *See* Energy Tax Act of 1978, Pub. L. No. 95-618, § 221, 92 Stat. 3174, 3185. One of these tax incentives was a reduced excise-tax rate for alcohol fuel mixtures. *See* Highway Improvement Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097. While these tax incentives popularized the production of alcohol fuel mixtures, the lower excise-tax rate resulted in fewer tax dollars flowing into the Highway Trust Fund. Roberta F. Mann & Mona L. Hymel, *Moonshine to Motorfuel: Tax Incentives for Fuel Ethanol*, 19 Duke Envtl. L. & Pol'y F. 43, 49 (2008). The depletion of funds caught the attention of Congress and triggered a legislative response. H.R. Rep. No. 108-548, pt. 1, at 141–42 (2004) ("Committee Report").

On October 22, 2004, the American Jobs Creation Act of 2004 ("Jobs Act") passed. Pub. L. No. 108-357, 118 Stat. 1418. In the Jobs Act, Congress sought to increase the flow of revenue to the Highway Trust Fund, but did not want to eliminate the monetary incentives for producers to blend alcohol with fuel. Congress thus restructured the relevant statutory framework in three respects: (1) it eliminated the reduced excise-tax rate for alcohol fuel blends under § 4081(c), thus leaving an 18.3 cents per gallon excise tax on all non-aviation gasoline; (2) it enacted an alcohol fuel mixture credit for producers of alcohol fuel blends set forth in § 6426(b) (the "Mixture Credit"); and (3) it amended § 9503 to appropriate all excise taxes imposed under § 4081 to the Highway Trust Fund "without reduction for credits under

section 6426." Jobs Act §§ 301, 853. Congress stated that the Mixture Credit "provide[s] a benefit equivalent to the reduced tax rates, which are being repealed under the provision." Committee Report, at 142.

By amending § 9503 of the Highway Revenue Act to require the 18.3 cents per gallon excise tax be deposited into the Highway Trust Fund in its entirety, and mandating that the new Mixture Credit be given to producers at an amount equivalent to the now-eliminated reduced excise-tax rate, Congress manufactured a way to shift funds from the General Fund at the U.S. Department of the Treasury ("Treasury") to the Highway Trust Fund without affecting revenue. *See* H.R. Rep. No. 108-755, at 305 (2004) (Conf. Rep.) ("Conference Report") ("The provision also authorizes the full amount of fuel taxes to be appropriated to the Highway Trust Fund without reduction for amounts equivalent to the excise-tax credits allowed for alcohol fuel mixtures, and the Trust Fund is not required to reimburse any payments with respect to qualified alcohol fuel mixtures."); *see also* Staff of Joint Committee On Taxation, *Estimated Budget Effects of the Conference Agreement for H.R. 4520, the "American Jobs Creation Act of 2004"* (JCX-69-04) at Provision III.A.1 (listing the "excise tax credit (in lieu of reduced tax rate on gasoline) to certain blenders of alcohol mixtures" as having "No Revenue Effect"). Under this new regime, the Highway Trust Fund would consistently receive 18.3 cents per gallon under § 4081 regardless of whether the excise tax was actually paid by the taxpayer or obtained from the General Fund at Treasury. In return, alcohol fuel producers would

receive the Mixture Credit without impacting the Highway Trust Fund.

The statutory changes to §§ 4081, 6426, and 9503 also led to the creation of § 6427(e)—added to account for the Mixture Credit—which requires the Secretary of the Treasury to pay, interest-free, to an alcohol fuel producer "an amount equal to the alcohol fuel mixture credit." § 6427(e)(1). But "[n]o amount shall be payable . . . with respect to any mixture or alternative fuel with respect to which an amount is allowed as a credit under section 6426." *Id.* § 6427(e)(3).

2. Procedural History

Sunoco, Inc. ("Sunoco"), a petroleum and petrochemical company, blends ethanol with gasoline to create alcohol fuel mixtures. Sunoco filed consolidated tax returns for 2004 through 2009, and claimed the Mixture Credit under § 6426 as a credit against its gasoline excise-tax liability for the years 2005 through 2008.[3]

In 2013, Sunoco changed its tax position by submitting both informal and formal claims with the Internal Revenue Service (IRS) to recover over $300 million based on excise-tax expenses for the years 2005 through 2008. Sunoco claimed that it erroneously reduced its gasoline excise tax by the amount of Mixture Credit it received, which had the effect of including the Mixture Credit in its gross income. In its view, Sunoco was entitled to deduct the

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[3] Sunoco only sought to recover income tax payments for the years 2005 through 2008, but included its claims for years 2004 and 2009 because "changes to the taxable income in those years affect the amount of the refunds for the other years at issue in this case." J.A. 1001–02.

full amount of the gasoline excise tax under § 4081—without regard to the Mixture Credit—and keep the Mixture Credit as tax-free income.[4] On March 11, 2015, the IRS issued a statutory notice of disallowance denying Sunoco's claims.[5] On June 10, 2015, Sunoco filed its refund suit in the United States Court of Federal Claims ("COFC"). *Sunoco, Inc. v. United States*, 129 Fed.Cl. 322, 324 (2016); J.A. 16, 1001–13.

On February 12, 2016, the Government moved for judgment on the pleadings pursuant to Rule 12(c) of the Rules of the Court of Federal Claims,[6] arguing that the Jobs Act requires a two-step, or "bifurcated," approach, in which first, the Mixture Credit reduces any excise-tax liability, and then the taxpayer is compensated for any remaining Mixture Credit via a direct payment pursuant to § 6427. *Sunoco*, 129 Fed.Cl. at 325–26. Under the Government's

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[4] As a taxpayer that sells inventory in its trade or business, a gasoline producer and fuel supplier like Sunoco can recover expenses related to the gasoline excise tax under § 4081 by subtracting, or deducting, the expense from its gross income. These deductions are also known as "cost of goods sold." §§ 162, 263A; Treas. Reg. § 1.61-3(a)("Gross income derived from business."). Applying any such deduction under § 4081, i.e., including the gasoline excise tax in the cost of goods sold, results in a decrease in income tax liability.

[5] The IRS also denied Sunoco's request to increase its 2009 net operating loss for additional deductions based on its claim for an increased gasoline excise-tax deduction. J.A. 1011.

[6] Rule 12(c) of the Rules of the Court of Federal Claims is identical to its counterpart Rule 12(c) of the Federal Rules of Civil Procedure. We apply the same law to these comparable Rules. *Kraft, Inc. v. United States*, 85 F.3d 602, 605 n.6 (Fed. Cir. 1996), *opinion modified on other grounds on denial of reh'g*, 96 F.3d 1428 (Fed. Cir. 1996).

interpretation, applying the Mixture Credit to first reduce the excise-tax liability turns the Mixture Credit into taxable income up to the point in which excise-tax liability is reduced to zero. *Id.* at 329.

Sunoco responded with a cross-motion for partial summary judgment on liability, arguing that the Mixture Credit does not affect its excise-tax liability under § 4081. Sunoco maintained that although the Mixture Credit can be used to offset excise-tax liability, such liability remains constant and does not reduce the cost of goods sold under the statute, therefore making the excise-tax liability fully deductible. *Id.* at 325–26. In Sunoco's view, the entirety of the Mixture Credit is a tax-free payment to the taxpayer under § 6427. *Id.* at 326.

The COFC found the statutory scheme to be ambiguous, but agreed with the Government's interpretation and granted the Government's motion for judgment on the pleadings.[7]

Sunoco appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

We review de novo the COFC's grant of judgment on the pleadings under Rule 12(c). *Xianli Zhang v.*

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[7] During the pendency of this action before the COFC, the IRS published a notice informing claimants that they must apply fuel credits awarded under § 6426 to their § 4081 excise-tax liability, and that a claimant can only receive direct payments for credits under § 6427 for fuel credits exceeding the claimant's § 4081 liability. I.R.S. Notice 2015-56, 2015 WL 4779497 (Aug. 15, 2015). As part of the resolution of a discovery dispute, the COFC determined that the IRS's notice was not entitled to deference under *Skidmore v. Swift*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). *Sunoco, Inc. v. United States*, 128 Fed.Cl. 345, 346 (2016).

United States, 640 F.3d 1358, 1364 (Fed. Cir. 2011). We accept the facts alleged by Sunoco as true and draw all reasonable inferences in its favor. *Id.* (citing *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009)). Statutory interpretation is a legal question that we review de novo. *Id.* (citing *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1108 (Fed. Cir. 2004)); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1345 (Fed. Cir. 2004).

DISCUSSION

Sunoco asks this court to permit it to deduct, as a cost of goods sold, an excise-tax expense that it never incurred or paid. Neither the text of the Jobs Act nor its legislative history supports such a reading of the Internal Revenue Code.

A. Statutory Language

The parties agree there is no dispute as to the material facts in this case. J.A. 1044, 1085. Therefore, to determine the tax treatment of the Mixture Credit, we start with the plain language of the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Our inquiry ends there "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last."). Whether the statutory language is unambiguous is determined by the text itself, the context in which the language is used, and the statutory scheme as a

whole. *Robinson*, 519 U.S. at 341, 117 S.Ct. 843 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992), and *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991)).

Relevant here is the interrelationship among three statutory sections of the Internal Revenue Code: §§ 6426, 6427, and 9503. Section 6426 provides for the Mixture Credit, in relevant part, as follows:

> **(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)[8] . . .
>
> **(b) Alcohol fuel mixture credit.—**
>
> **(1) In general.**—For purposes of this section, the alcohol fuel mixture credit is the product of the applicable amount and the number of gallons of alcohol used by the taxpayer in producing any alcohol fuel mixture for sale or use in a trade or business of the taxpayer.

§ 6426 (a), (b) (emphasis added).

Section 6427(e) grants an interest-free payment to taxpayers of an amount equal to the Mixture Credit, when alcohol, biodiesel, or alternative fuels are used to produce a mixture. Section 6427(e) states in relevant part

> **(e) Alcohol, biodiesel, or alternative fuel.—** Except as provided in subsection (k)—

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[8] Subsections (c) and (e) refer to the biodiesel mixture credit and the alternative fuel mixture credit, respectively.

> **(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 shall pay (without interest) to such person an amount equal to the alcohol fuel mixture credit . . . with respect to such mixture.
>
> . . . .
>
> **(3) coordination with other repayment provisions.**—No amount shall be payable under paragraph (1) or (2)[9] with respect to any mixture or alternative fuel with respect to which an amount is *allowed as a credit* under section 6426.

§ 6427(e)(1), (e)(3) (emphasis added). The IRS does not tax as income direct payments to taxpayers made under this subsection.

Section 6426(a)(1) explicitly provides that the "credit," i.e., the Mixture Credit, is applied "against" the gasoline excise tax imposed under § 4081. In other words, the Mixture Credit works to reduce the taxpayer's overall excise-tax liability. "[A] credit is any amount that is allowable as a subtraction from tax liability for the purpose of computing the tax due or refund due." James Edward Maule, 506-3rd T.M., *Tax Credits: Concepts and Calculation* 43 (BNA 2018); *see also id.* at 1 ("Generally, items that are allowable as credits decrease tax liability by that amount."); *Tax Credit*, Black's Law Dictionary (10th ed. 2014) ("An amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income.—Often shortened to *credit*.").

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9 Subsection (e)(2) refers to alternative fuel.

Sunoco argues that a "credit" under § 6426 is a "payment" of its § 4081 excise-tax liability. We disagree. The Jobs Act treats "credits" differently from "payments," as evidenced by the language in § 6427(e)(1), which grants payment to a taxpayer in the same amount as the Mixture Credit, to the extent the taxpayer's excise-tax liability is zero. Appellant's Br. 10 (stating taxpayer receives "tax-free payment" of the outstanding credit amount when taxpayer has no excise-tax liability or the Mixture Credit amount exceeds excise-tax liability); Appellee's Br. 7–8 (same). That payment, however, is reduced by the amount of Mixture Credit applied to offset the taxpayer's excise-tax liability: "*No amount shall be payable* under paragraph (1) . . . with respect to which an amount is allowed as a credit under section 6426." § 6427(e)(3) (emphasis added). The plain language of § 6427(e)(3) therefore distinguishes the § 6426 "credit" from the "payment" allowable under § 6427(e)(1). *See Randall v. Loftsgaarden*, 478 U.S. 647, 657, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986) (stating benefit of tax credit is the "use [of] tax credits to reduce the taxes otherwise payable"); *Schaeffler v. United States*, 889 F.3d 238, 248–49 (5th Cir. 2018) (rejecting argument that foreign tax credit is a payment under the Internal Revenue Code).

Section 9503 only reinforces this reading of § 6426. Section 9503 directs that the entirety of the 18.3 cents per gallon gasoline excise tax under § 4081 be appropriated to the Highway Trust Fund. In this particular instance—financing the Highway Trust Fund—"taxes received under sections 4041 and 4081 shall be determined *without reduction* for credits under section 6426." § 9503(b)(1) (emphasis added).

Sunoco contends that this language shows Congress did not intend the Mixture Credit to reduce excise-tax liability because the Treasury would not "receive" the amount of tax offset by the Mixture Credit. Sunoco's argument fails for a number of reasons. First, the statute explicitly states that for § 9503(b) purposes only, the amount of funds deposited into the Highway Trust Fund is "equivalent to the" gasoline excise tax imposed under § 4081 "without reduction" for the Mixture Credit, meaning that the funds deposited into the Highway Trust Fund are not diminished by any amount of Mixture Credit that might act against a taxpayer's excise-tax liability. This is a logical reading of the statute given that the Jobs Act was enacted with the intention of maximizing funds deposited into the Highway Trust Fund. Second, to interpret § 9503 as Sunoco proposes would render a portion of the statutory language unnecessary; there would be no reason to explicitly state that the amount to be deposited in to the Highway Trust Fund "shall be determined without reduction for credits under section 6426" if the Mixture Credit were not to serve as an offset of a taxpayer's excise-tax liability imposed under § 4081. Expressed differently, if the Mixture Credit were a tax-free payment regardless of excise-tax liability, rather than a reduction of the 18.3 cents per gallon gasoline excise tax, portions of § 9503 would lack meaning. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

Sunoco contends that where Congress intended a credit to reduce a taxpayer's excise-tax liability, it explicitly said so. Specifically, Sunoco points to §§ 45H and 280C, where a taxpayer's deductions are "reduced by the amount of the credit determined for the taxable year under section 45H(a)." Appellant's Br. 29. Indeed, no such explicit language appears with respect to the Mixture Credit, but §§ 45H and 280C operate differently from §§ 4081 and 6426. Section 45H concerns income tax credit for low sulfur diesel fuel production. § 45H(a). Section 280C, titled "Certain expenses for which credits are allowable," simply prevents the taxpayer from obtaining a double benefit by forbidding a deduction for expenses already contemplated by the § 45H income tax credit. *Cf.* § 162(a) (allowing deduction of business expenses). In contrast, the Mixture Credit described in § 6426 is a credit, not an expense—Sunoco never pays it. *See* 6 William H. Byrnes, IV et al., *Mertens Law of Fed. Income Tax'n* § 25:1 (Sept. 2018) ("Section 162 requires that deductions for a business expense must have been paid or incurred during the taxable year."). Consequently, there is no need to expressly include a provision prohibiting a taxpayer from deducting the Mixture Credit because it is not an expense incurred by the taxpayer.

B. Legislative History

The plain meaning of the statute is clear—the Mixture Credit is a credit, not a payment, which must first be used to decrease a taxpayer's gasoline excise-tax liability before receiving any payment under § 6427(e). To overcome the plain meaning of the statute, Sunoco must show that the legislative history "embodies an '*extraordinary showing* of contrary

intentions.'" *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (quoting *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 396 (Fed. Cir. 1990) (looking at legislative history "only to determine whether a clear intent contrary to the plain meaning exists")). Sunoco has failed to satisfy this heavy burden.

Sunoco relies on a single sentence from the legislative history to show that Congress intended the Mixture Credit to be a payment of excise-tax liability, as opposed to a reduction in that liability: "[t]he credit is treated as a payment of the taxpayer's tax liability received at the time of the taxable event." Conference Report, at 304. But other relevant portions of the Conference Report belie Sunoco's position: "In lieu of the reduced excise tax rates, the provision provides that the alcohol mixture credit provided under section 40 may be applied against section 4081 excise tax liability." *Id.* (describing the Mixture Credit as "a benefit equivalent to the reduced tax rates"); *see also id.* at 308 ("These payments are intended to provide an *equivalent benefit* to replace the partial exemption for fuels to be blended with alcohol and alcohol fuels being repealed by this provision." (emphasis added)). Thus, the tax benefit of the Mixture Credit is a reduction in excise-tax liability intended to match the excise-tax rate reduction in place prior to the enactment of the Jobs Act.

In addition, the only payments contemplated by Congress refer to those made to the taxpayer under § 6427(e):

> *Payments with respect to qualified alcohol fuel mixtures*

> To the extent the alcohol fuel mixture credit exceeds any section 4081 liability of a person, the Secretary is to pay such person an amount equal to the alcohol fuel mixture credit with respect to such mixture. These payments are intended to provide an equivalent benefit to replace the partial exemption for fuels to be blended with alcohol and alcohol fuels being repealed by the provision.

Id. at 304; *see also id.* at 308. The Conference Report further states that "if the person has no section 4081 liability, the credit is totally refundable." *Id.* at 308; *see also id.* at 303. Thus, Congress intended for any payment of the Mixture Credit to go to the taxpayer only if the taxpayer's excise-tax liability is zero. The legislative history is therefore at odds with Sunoco's position and supports the plain reading of the statute—that the Mixture Credit must first be applied to reduce any § 4081 excise-tax liability, with any remaining Mixture Credit paid to the taxpayer under § 6427(e).

The reason for this is simple: a taxpayer can claim either an excise-tax benefit, i.e., the Mixture Credit, or an income tax benefit, but not both. *See id.* at 304 ("The benefit obtained from the excise tax credit is coordinated with the alcohol fuels income tax credit."); § 40(c); J.A. 1003. In Sunoco's case, it wishes both to pocket the Mixture Credit as a tax-free refundable payment and to claim an income tax benefit by including in full its gasoline excise-tax liability in its cost of goods sold, thereby reducing its total taxable income. But such double-dipping was not intended by Congress. *Cf.* Conference Report at 305–06 (stating biodiesel fuel credit, which is similar to the Mixture Credit, "cannot be claimed for both

income and excise tax purposes"). Indeed, while not probative of congressional intent in 2004, in 2009, members of the Joint Committee on Taxation read § 6426 the same way as this court does: "[t]he alcohol fuel mixture credit must first be taken to reduce excise tax liability for gasoline, diesel fuel or kerosene. Any excess credit may be taken as a payment or income tax credit." Joint Committee on Taxation, *Tax Expenditures for Energy Production & Conservation*, JCX-25-09R at 24 (2009).

Sunoco wishes to treat the Mixture Credit as a deductible expense because it considers the Mixture Credit as a payment of its tax liability. But Sunoco never incurs a cost equal to the Mixture Credit. Such a method of accounting would result in an overall lower taxable income, resulting in a windfall to Sunoco. We have already established that Congress does not generally allow taxpayers to receive a tax benefit twice. Nor has Sunoco shown that Congress intended the Jobs Act to increase excise-tax subsidies for fuel blenders. Sunoco has failed to show that the legislative history extraordinarily contradicts the plain reading of the Jobs Act.

CONCLUSION

In light of the plain language of the Jobs Act, we conclude that the § 6426(a) Mixture Credit is a reduction of § 4081 excise-tax liability, with any credit amount exceeding said excise-tax liability to be paid to the taxpayer under § 6427(e).

AFFIRMED

COSTS

No costs.

UNITED STATES COURT OF FEDERAL CLAIMS

SUNOCO, INC., Plaintiff,

v.

The UNITED STATES, Defendant.

No. 15–587T

Filed: November 22, 2016

129 Fed. Cl. 322

OPINION AND ORDER

WHEELER, Judge.

Plaintiff Sunoco, Inc. brought this action against the Government to recover federal income tax refunds totaling over $300 million. Pending before the Court are (1) the Government's motion for judgment on the pleadings pursuant to Rule 12(c) of the Court of Federal Claims ("RCFC"), and (2) Sunoco's cross-motion for partial summary judgment pursuant to RCFC 56.

This is a case of first impression, and Sunoco's argument turns exclusively on statutory interpretation. As a fuel producer that blends ethanol into its fuel, Sunoco was entitled to claim the Alcohol Fuel Mixture Credit ("Mixture Credit"), set out in § 6426(a)–(b),[1] against its excise tax liability under § 4081. Sunoco therefore paid less in excise tax than it otherwise would have been required to pay under § 4081 in the tax years 2005–2008. Excise tax

[1] Unless otherwise indicated, all references to sections herein refer to the Internal Revenue Code of 1986, as amended (Title 26 of the U.S. Code).

payments are includable in a taxpayer's cost of goods sold, and the cost of goods sold reduces the taxpayer's gross income—and, consequently, the taxpayer's income tax liability. Sunoco's interpretation of the Mixture Credit would result in an increased cost of goods sold, which would result in a decreased gross income and lower income tax liability.

The question central to this case is whether a taxpayer like Sunoco must include its net excise tax liability in its cost of goods sold—with a reduction for the Mixture Credit—or whether the taxpayer may include its gross excise tax liability in its cost of goods sold. The latter interpretation (Sunoco's argument) treats the Mixture Credit as a tax-free payment of Sunoco's excise tax liability, and would significantly reduce Sunoco's income tax liability because it would increase Sunoco's cost of goods sold.

The Government argues that Sunoco's interpretation would result in a windfall that Congress did not intend. It cites the Mixture Credit's plain language and legislative history to show that Congress intended to replace the previous excise tax exemption for alcohol mixtures with an "equivalent benefit," rather than a significantly larger combined excise and income tax incentive. Sunoco reads the same statutory language and legislative history to reach the opposite conclusion.

Though the statutes at issue are not crystal clear, the Court ultimately finds the Government's interpretation more persuasive. The Court holds that the Mixture Credit must be treated first as a reduction of the taxpayer's excise tax liability, with any remaining Mixture Credit amount treated as tax-free payment. Had Congress intended, as Sunoco argues, to drastically increase the tax incentives fuel

producers receive from blending alcohol into their fuels, one would expect to see at least some inkling of this intent in the legislative history or the Internal Revenue Code. No such inkling appears. Therefore, Sunoco cannot claim that it overpaid its income taxes because it correctly used its net excise taxes paid in calculating its cost of goods sold. The Government's motion for judgment on the pleadings is GRANTED, and Sunoco's cross-motion for partial summary judgment is DENIED.

Background

The few material facts in this case are not in dispute. Sunoco filed its complaint on June 10, 2015, seeking a tax refund of over $300 million for the tax years 2005–2008. See Compl., Dkt. No. 1. In all of the tax years at issue, Sunoco blended ethanol into its fuel and thereby qualified for the Mixture Credit. Compl. ¶ 11. Sunoco thus paid a reduced excise tax and reduced its cost of goods sold by the amount of the Mixture Credit for all of the tax years at issue. Sunoco deducted its cost of goods sold from its gross income, and paid income taxes accordingly.

On February 12, 2016, the Government moved for judgment on the pleadings pursuant to RCFC 12(c), arguing that the correct tax treatment of the Mixture Credit means Sunoco's claims must fail as a matter of law. See Dkt. No. 18. Sunoco responded on April 13, 2016, with a cross-motion for partial summary judgment under RCFC 56 as to the Government's liability. Dkt. No. 22. On June 20, 2016, the Government filed its response in opposition to Sunoco's cross-motion, see Dkt. No. 27, and Sunoco filed its reply on July 19, 2016. See Dkt. No. 33. The

Court heard oral argument on the parties' motions on November 3, 2016.

Additionally, the Court already has decided that the IRS interpretation of the Mixture Credit's tax treatment, as shown in IRS Notice 2015–56, is not entitled to Skidmore deference for purposes of resolving the parties' motions. See Sunoco, Inc. v. United States, 128 Fed.Cl. 345, 347–48 (2016). The Court found that no deference was appropriate because (1) the IRS issued Notice 2015–56 after litigation in this case had begun, (2) the Notice cited no authority for its interpretation of the Mixture Credit's tax treatment, and (3) the Notice was inconsistent with prior unofficial IRS advice. Id. Therefore, while the Court will consider the Government's interpretation of the Mixture Credit's tax treatment, the Court will not give deference to that interpretation

Discussion

A. Standard of Review

A party may move for judgment on the pleadings pursuant to RCFC 12(c) "after the pleadings are closed[,] but early enough not to delay trial." If a party presents and the Court accepts materials outside the pleadings, then the Court must decide the motion as a motion for summary judgment under RCFC 56. RCFC 12(d). Sunoco has presented materials outside the pleadings here; however, as shown below, the Court finds that it is possible to resolve the single legal issue on the face of Sunoco's complaint without resorting to factual materials outside the pleadings. Therefore, the court will decide the pending cross-motions under RCFC 12(c) rather than RCFC 56.

When deciding a motion for judgment on the pleadings under RCFC 12(c), the Court applies substantially the same test that it would on a motion to dismiss for failure to state a claim under RCFC 12(b)(6). Sikorsky Aircraft Corp. v. United States, 122 Fed.Cl. 711, 719 (2015). Under RCFC 12(b)(6), a complaint fails to state a claim upon which relief may be granted "when the facts asserted by the claimant do not entitle [the claimant] to a legal remedy." Briseno v. United States, 83 Fed.Cl. 630, 632 (2008) (citation omitted). The Court also must construe allegations in the complaint favorably to the plaintiff. See Extreme Coatings, Inc. v. United States, 109 Fed.Cl. 450, 453 (2013). Still, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted)).

B. Sunoco's Refund Claims Fail as a Matter of Law.

The tax treatment of the Mixture Credit is the sole legal question in this case. To that end, it is helpful to keep a few basic principles of tax law in mind while analyzing Sunoco's claims. First, Sunoco was required to pay excise taxes during the relevant period. Excise taxes are imposed on sellers of commodities like fuel, see Cook v. United States, 86 F.3d 1095, 1098 (Fed. Cir. 1996), cert. denied, 519 U.S. 932, 117 S.Ct. 304, 136 L.Ed.2d 221 (1996), and are set out in § 4081. When a taxpayer like Sunoco pays its excise taxes, those tax receipts go into the Highway Trust Fund. § 9503(b)(1)(D). The Government uses the Highway Trust Fund to maintain the nation's highways and related infrastructure. See § 9503(c)(1).

Second, a taxpayer's excise taxes under § 4081 also directly impact a taxpayer's gross income (which is defined in § 61) because excise taxes become part of the taxpayer's cost of goods sold. See Mohawk Liqueur Corp. v. United States, 324 F.2d 241, 244 (6th Cir. 1963). The taxpayer excludes its cost of goods sold from gross income. Id. With lower gross income comes lower income tax liability. Therefore, one could compare the relationship between excise tax liability and income tax liability to two people on a seesaw: when excise tax liability goes up, income tax liability goes down, and vice versa.

So, if the Mixture Credit is interpreted as a reduction of excise tax liability, then the taxpayer's income tax liability would increase as a result of that reduction. The Government interprets the Mixture Credit in this way. However, if the Mixture Credit does not affect the taxpayer's excise tax liability—as Sunoco argues—then the taxpayer's income tax liability would decrease. Both parties cite the relevant statutes' language, the tax exemption that preceded the Mixture Credit, legislative history, and case law to support their positions. All of these pieces are necessary to evaluate the Mixture Credit's tax treatment, and the Court will address each piece in turn.

1. The Language of the Mixture Credit Statutes Does not Resolve the Parties' Dispute.

The Court first must examine the text of the relevant statutes themselves, and "must construe [the] statute[s], if at all possible, to give effect and meaning to all [their] terms." Splane v. West, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (citation omitted). The dispute in this case centers on §§ 6426(a) and 6427(e).

Section 6426(a) states, in relevant part: "There shall be allowed as a credit . . . against the tax imposed by section 4081 an amount equal to the sum of the credits described in subsections (b), (c), and (e) . . . ." Subsection (b) is the Mixture Credit relevant here, and (as noted above) the parties do not dispute that Sunoco qualified for the Mixture Credit.

When a taxpayer's Mixture Credit amount is higher than the taxpayer's § 4081 excise tax liability, the Government pays the difference directly to the taxpayer. This payment mechanism is set out in § 6427(e):

> (1) If any person produces a mixture described in section 6426 in such person's trade or business, the Secretary shall pay (without interest) to such person an amount equal to the alcohol fuel mixture credit . . . with respect to such mixture.
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> * * *
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> (3) 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.

Under the Government's interpretation, § 6426(a) describes the Mixture Credit, and §§ 6427(e)(1) and (e)(3) address a situation in which the taxpayer may claim a payment for any Mixture Credit amount that is not first used to offset the taxpayer's excise tax liability. Taken together, the Government argues, these statutes first give the taxpayer a credit against its excise tax liability that operates as a "dollar-for-dollar reduction in the relevant tax liability." Def. Mot. at 11, Dkt. No. 18. Section 6427(e)(1) then directs the Secretary of the Treasury to pay the

taxpayer "an amount equal to the [Mixture Credit]," but not, according to Section 6427(e)(3), for any amount that the taxpayer was "allowed as a credit under section 6426." Therefore, the Government agrees that part of the Mixture Credit is a refundable tax-free payment, but only to the extent that the Mixture Credit amount under § 6426(a) exceeds the taxpayer's excise tax liability under § 4081. To summarize, the Government's approach bifurcates the Mixture Credit into (1) a reduction of excise tax liability, and (2) a tax-free cash payment after the taxpayer's entire excise tax liability is reduced to zero by the Mixture Credit.

Sunoco rejects the Government's bifurcation approach to the Mixture Credit. It contends that these statutes, taken together, mean that the Mixture Credit can only be construed as a single tax-free payment of the taxpayer's excise tax liability. It cites the "payment" language in § 6427(e)(1), and argues that § 6427(e)(3) merely describes a "process" by which the taxpayer's excise tax liability and the Government's obligation to pay the credit first offset each other before resulting in a cash payment to the taxpayer. See Pl. Cross–Mot. at 28–30, Dkt. No. 22.

The statute's language supports both parties' interpretations. First, the phrase "credit against the tax imposed" is not talismanic. Neither party has pointed to a clear definition of the phrase, and the Court is unaware of any such definition. The treatise the Government cites makes clear that the Internal Revenue Code "does not contain a general definition of credit." J.E. Maule, 506–3rd: Tax Credits: Concepts and Calculation, § II.B (BNA 2015). Rather, Congress seems to use the term "credit" to mean either a "subtraction in tax liability" or "amounts that are not

subtracted from tax liability, but that instead resemble deductions or that are credits in an accounting sense." Id.

The specific reference to § 4081 as the section against which the Credit is imposed also is not dispositive. The Government argues that the reference means the Mixture Credit must be a reduction in excise tax liability or else the reference would be superfluous; however, as noted below, Congress also could have included this language to make clear that the full excise tax was to be credited to the Highway Trust Fund. Put simply, the phrase "credit against the tax imposed under section 4081" could fit either the Government's or Sunoco's interpretation.

Second, both parties have advanced plausible arguments as to the payment mechanism described in § 6427(e). The language in the statute could describe either (1) a a substantive bifurcation of the Mixture Credit into an excise tax reduction and a cash payment (the Government's view), or (2) a process by which the Mixture Credit first is applied to offset the taxpayer's excise tax liability, with the balance paid out in cash to the taxpayer (Sunoco's view). In sum, the language in the two sections above is unclear, and the Court must use other tools to interpret the Mixture Credit's tax treatment.

2. The Legislative History Favors the Government's Position.

a. Congress Created the Mixture Credit to Replenish the Highway Trust Fund.

A clearer picture of the Mixture Credit's tax treatment begins to emerge in its legislative history. Congress enacted the Mixture Credit as part of the

American Jobs Creation Act of 2004 ("AJCA"), Pub. L. 108–357, 118 Stat. 1418, 1469, § 301. In doing so, Congress created a new tax incentive that replaced a preexisting excise tax exemption for alcohol fuel mixtures. Before the Mixture Credit, two linked tax incentives existed for fuel producers that blended alcohol into their fuel. First, § 40(a) provided an income tax credit for alcohol fuel blenders (this income tax credit still exists today). Second, § 4081 taxed alcohol fuel mixtures at a lower rate than regular fuels. See H.R. Rep. No. 108–755, at 300 (2004) (Conf. Rep.). A taxpayer was permitted to claim either the income tax credit or the lower excise tax for alcohol fuel mixtures, but not both. See id.; § 40(c) (2004). If a taxpayer claimed the income tax credit under § 40(a), the Code specifically included the credit in the taxpayer's gross income (this also is still true today). § 87(1).

The AJCA replaced the reduced excise tax rates for alcohol fuel mixtures in § 4081 with a credit to be applied against the excise tax. In other words, on paper, fuel blenders now pay the full amount of the § 4081 excise tax. The legislative history confirms that the AJCA "eliminate[d] reduced rates of excise tax on most alcohol-blended fuels and impose[d] the full rate of excise tax." H.R. Rep. No. 108–755, at 306 (2004) (Conf. Rep.).

And therein lies a key issue in interpreting the Mixture Credit: in reality, the full tax rates were *not* imposed. In § 6426, Congress created two new credits against the § 4081 excise tax; namely, the Mixture Credit and a credit for biodiesel fuels. H.R. Rep. No. 108–755, at 306 (2004) (Conf. Rep.). Under both Sunoco's and the Government's interpretations, the Mixture Credit means the taxpayer itself does not pay

the full amount of its excise tax liability; rather, it pays excise taxes that are reduced by the amount of the Mixture Credit. If the legislative history and the Mixture Credit's practical effect seem contradictory, they are. In essence, the Mixture Credit amounts to accounting sleight-of-hand. Congress can say the full excise tax is imposed on fuel blenders, but can nevertheless reduce the blenders' tax liability in much the same way it did before.

Why would Congress go to such lengths to create this legal fiction? As the Government notes, Congress primarily wanted to replenish the Highway Trust Fund. See Def. Mot. at 14, Dkt. No. 18. Excise taxes go into the Highway Trust Fund, which is used to maintain the nation's infrastructure. See H.R. Rep. No. 108–755, at 305 (2004) (Conf. Rep.); § 9503(b)(1). The Highway Trust Fund understandably became depleted when more of the nation's fuel began to contain ethanol. More ethanol blends meant that the Government could collect fewer excise taxes on fuel. Still, cars that use ethanol blends cause the same wear and tear on highways that purely gasoline-powered cars cause. See H.R. Rep. 108–548, Part I, at 141 (2004). Therefore, Congress found it appropriate to replenish the Fund by imposing, on paper, the full excise tax rates on fuel blenders. In reality, however, the Government itself pays part of fuel blenders' excise taxes from the Treasury General Fund in the form of the Mixture Credit. In other words, the Mixture Credit created an accounting backdoor that allows Congress to shift money from the Treasury General Fund to the Highway Trust Fund. See H.R. Rep. No. 108–755, at 305 (2004) (Conf. Rep.) ("The provision also authorizes the full amount of fuel taxes to be appropriated to the

Highway Trust Fund without reduction for amounts equivalent to the excise tax credits allowed for alcohol fuel mixtures . . . ."). Therefore, it seems clear that Congress's main aim in passing the Mixture Credit to replace the preexisting lower tax rates for alcohol blends was to replenish the Highway Trust Fund.[2]

Taxpayers like Sunoco are construed as having paid their full excise taxes for purposes of the Highway Trust Fund; however, the legislative history is silent on the Mixture Credit's income tax implications. At first blush, there are two passages that could support Sunoco's reading of the statute. First, the Conference Report states:

> In lieu of the reduced excise tax rates, the provision provides that the alcohol mixture credit provided under section 40 may be applied against section 4081 excise tax liability . . . The credit is treated as a payment of the taxpayer's tax liability received at the time of the taxable event.

H.R. Rep. No. 108–755, at 304 (2004) (Conf. Rep.). Sunoco argues that the "payment" language shows congressional intent to treat the Mixture Credit as a non-taxable payment, rather than a reduction in excise tax liability. This is certainly the case from the vantage point of the Highway Trust Fund because of the legal fiction described above; however, the passage also states that the credit must be "applied against" the section 4081 excise tax liability. At most, then, this passage is neutral on the Mixture Credit's

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[2] Congress also had other subsidiary aims. It hoped to reduce fraud by the fuel blenders that took advantage of the lower tax rates, and also hoped to simplify the existing law. See H.R. Rep. 108–548, Part I, at 141–42 (2004).

tax treatment because it uses language similar to § 6426(a). As a result, the Court is inclined to believe that Congress did not attempt to use terms of art when it used phrases such as "applied against" and "payment."

Both Sunoco and the Government also point to a second passage:

> To the extent the alcohol fuel mixture credit exceeds any section 4081 liability of a person, the Secretary is to pay such person an amount equal to the alcohol fuel mixture credit with respect to such mixture. Thus, if the person has no section 4081 liability, the credit is totally refundable. These payments are intended to provide an equivalent benefit to replace the partial exemption for fuels to be blended with alcohol and alcohol fuels being repealed by the provision. Similar rules apply to the biodiesel fuel mixture credit.
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> If claims for payment are not paid within 45 days, the claim is to be paid with interest. The provision also provides that in the case of an electronic claim, if such claim is not paid within 20 days, the claim is to be paid with interest. If claims are filed electronically, the claimant may make a claim for less than $200. The Secretary is to describe the electronic format for filing claims by December 31, 2004.

H.R. Rep. No. 108–755, at 308 (2004) (Conf. Rep.).

This passage is neutral on the issue in this case at best, and nonsensical at worst. The Government cites the "equivalent benefit" language in this and other similar passages to show that Congress wanted to create a benefit in the Mixture Credit that was

essentially the same as the preexisting lower excise tax rates for alcohol fuel mixtures. If this is what Congress meant, then the passage defies common sense. The Mixture Credit and the prior lower excise taxes undeniably create different benefits. Under the prior tax regime, a taxpayer could only claim the lowered excise tax rates if (1) it had excise tax liability, and (2) it satisfied the alcohol fuel mixture requirements in § 4081. In contrast, a taxpayer today may claim the Mixture Credit as long as it satisfies the requirements in § 6426(b). In other words, the current tax regime does not require the taxpayer to have excise tax liability to receive a benefit, but the prior tax regime did. The benefits cannot be "equivalent."[3]

Construing the passage more generously—as Sunoco does—the Court is more inclined to believe Congress meant that payments under § 6427(e)(1) would be made as quickly as refund payments were made under the prior excise tax regime. Under that regime, "[i]f fully taxed gasoline (or other taxable fuel) [was] used to produce a qualified alcohol mixture, the Code permit[ted] the blender to file a claim for a quick excise tax refund." H.R. Rep. No. 108–755, at 302 (2004) (Conf. Rep.) (describing existing law at the time of the Mixture Credit's enactment). Indeed, the above passage contains an entire paragraph that concerns the timing of § 6427(e)(1) payments.

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[3] The Government also cites the conditional phrase in the above passage—"if the person has no section 4081 liability, the credit is totally refundable"—to show that Congress envisioned a tax-free payment only if the taxpayer's excise tax liability was lower than the amount of the Mixture Credit. The Court is not convinced. This language essentially restates § 6427(e)(1) and (e)(3), and it suffers from the same ambiguity.

Therefore, it is more reasonable to assume Congress meant that taxpayers should receive their cash payments under § 6427(e)(1) with a similarly quick turnaround time.

To summarize, the legislative history shows that, to replenish the Highway Trust Fund, Congress chose to upend the preexisting reduced excise tax rates and replace them with a legal fiction through which the full rates were imposed. However, the legislative history does not make the logical leap Sunoco asks of it because it does not carry the legal fiction applicable to the Highway Trust Fund over to individual alcohol fuel blenders' income tax deductions.

b. The Legislative History Does not Support the Increased Subsidy Called For by Sunoco's Interpretation.

The Conference Report is silent on the—to put it mildly—interesting side-effects that either interpretation of the Mixture Credit creates. Under the Government's bifurcation approach, any Mixture Credit amount that is used to reduce a taxpayer's excise tax liability becomes subject to income tax, but any Mixture Credit amount that exceeds the taxpayer's excise tax liability is not subject to income tax. If this seems odd, remember the see-saw described above: any decrease in excise tax liability is mirrored by a corresponding increase in gross income, which is subject to income tax. This result is puzzling because taxpayers without excise tax liability, who previously received no benefit whatsoever under the lowered excise tax rates for alcohol fuel blenders, now receive the Mixture Credit tax-free. On the other hand, taxpayers with excise tax liability (like Sunoco), who did receive tax benefits

under the prior tax regime, have their Mixture Credits taxed as income.

Sunoco's approach also has consequences. It would increase the subsidy to alcohol fuel blenders by about thirty-five percent over the subsidy that the preexisting lower excise tax rates conferred. See Def. Resp. Br. at 10, Dkt. No. 27. Such a drastic increase would have drastic effects. Sunoco is only one major alcohol fuel blender in the United States, and it is claiming a refund of over $300 million for four tax years. Therefore, if Sunoco were entitled to this subsidy, then similarly situated blenders could claim refunds totaling billions of dollars.

Though the Conference Report addresses neither of these effects, the Joint Committee on Taxation computed the Mixture Credit's budgetary effects. It found that the "excise tax credit (in lieu of reduced tax rate on gasoline) to certain blenders of alcohol fuel mixtures" would produce "No Revenue Effect." Staff of Joint Comm. on Taxation, Estimated Budget Effects of the Conference Agreement for H.R. 5250, the "American Jobs Creation Act of 2004" (JCX–69–04) at Provision III.A.1 (Comm. Print 2004). Therefore, while either of the parties' approaches to the Mixture Credit produces an unappetizing outcome, it seems clear that Congress did not believe when it passed the AJCA that it was giving a drastically increased subsidy to alcohol fuel blenders. Congress also likely did not believe it was giving a benefit to taxpayers who did not qualify for any benefits under the previous tax regime, as this presumably also would have a "net revenue effect." Still, Sunoco does not contend that the benefits conferred via tax-free payments under § 6427(e) in any way approach the magnitude of a thirty-five

percent subsidy to alcohol fuel blenders. Therefore, the legislative history favors the Government's position.[4]

3. Analogous Cases Favor the Government's Interpretation.

First, the Court agrees with the Government's argument that the Mixture Credit's effect on a taxpayer's cost of goods sold should resemble the effect of a manufacturer's rebate. A manufacturer's rebate "that a taxpayer receives on goods that it purchased for resale is not, itself, an item of gross income but, instead, is treated as a reduction in the cost of goods sold." Affiliated Foods, Inc. v. Comm'r, 128 T.C. 62, 80 (2007). For example, the IRS once found that "a cash rebate paid to an automobile dealer should be treated as a reduction in the cost of the automobile purchased;" in other words, the automobile dealer could not claim the full cost of the automobile in its cost of goods sold. Rev. Rul. 84–41, 1984–1 C.B. 130 (1984). The Mixture Credit is like a manufacturer's rebate in that it reduces the amount of money the taxpayer actually is required to pay out of its own pocket. This reduction happens in the real world (despite the legal fiction applicable to the Highway Trust Fund), so it logically follows that the reduction should be reflected in the taxpayer's cost of goods sold. Thus, the Mixture Credit, like a manufacturer's rebate, should reduce a taxpayer's

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[4] The Court declines to consider Congressional Research Service ("CRS") reports that were issued after Congress enacted the AJCA. The CRS reports are not legislative history; rather, they simply interpret enacted legislation. The Court does not require the CRS reports to ascertain that reasonable people have come to opposite conclusions on the merits of this case.

cost of goods sold and increase the taxpayer's gross income.

Second, while no case addresses a tax credit identical to the Mixture Credit, cases acknowledge that tax credits may be bifurcated as the Government suggests.[5] For example, in Maines v. Commissioner, 144 T.C. 123 (2015), the Tax Court found that a state's tax credit first reduced the taxpayer's state tax liability before it generated a payment to the taxpayer. See id. at 136. The portion of the credit that reduced the taxpayer's liability was not subject to federal income tax, but the portion the state paid in cash as a refund to the taxpayer was. Id. Similarly, the IRS previously has bifurcated a tax credit according to the credit's function. In Revenue Ruling 79–315, the state tax refund at issue was treated as gross income to the extent it was not "credited against unpaid 1978 tax." 1979–2 C.B. 27 (1979). Functionally, this approach also divides a tax credit into two distinct parts: a reduction of state tax liability (nontaxable) and a cash payment (taxable).

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[5] The Government cites several cases that analyze the deduction a taxpayer may take for state and local taxes. See Def. Mot. at 21–24, Dkt. No. 18; Snyder v. Comm'r, 894 F.2d 1337 (Table) (6th Cir. 1990); Cummings v. United States, 866 F.Supp.2d 42, 46–49 (D. Mass. 2011). While the Court agrees that these cases illustrate a functional approach to income tax deductions, they are not entirely dispositive. State and local governments impose these taxes, so courts naturally are skeptical when taxpayers try to deduct a portion of state taxes they never actually had to pay. Allowing taxpayers to do this would be to allow a state government to directly manipulate federal income taxation. The situation in this case is different because the same sovereign—the federal government—is responsible for setting out both the relevant taxes and the credits taken against those taxes.

Sunoco rightly notes that these cases involve state law tax credits. Further, the Mixture Credit produces the opposite of the results in both cases: the refundable part of the Mixture Credit is not taxed, and the part that reduces the taxpayer's excise tax liability is. Still, Maines and Revenue Ruling 79–315 show that the Tax Court and the IRS have no qualms about bifurcating credits into two parts if the credits' function demands such treatment. This is a unique case, and no authority cited by either party definitively shows how the Mixture Credit should be treated for tax purposes; however, the above cases involving manufacturers' rebates and bifurcated credits are sufficiently similar to this case to be persuasive.

4. Canons of Statutory Construction do not Support Sunoco's Argument.

Sunoco cites the well-established construction canon of *expressio unius est exclusio alterius*, or "the expression of the one is the exclusion of the other," to support its case. This maxim means that if Congress includes certain related items in a statute but does not include other items in the same category, it intentionally excludes those other items. See Ventas, Inc. v. United States, 381 F.3d 1156, 1161 (Fed. Cir. 2004). This canon, Sunoco argues, applies here because § 87 expressly includes in gross income the income tax credit in § 40(a)—which, like the Mixture Credit, incentivizes blending alcohol into fuel. Section 87 does not include the Mixture Credit in gross income. Sunoco argues that Congress intentionally included the § 40(a) income tax credit in gross income, which means that it intentionally excluded the Mixture Credit.

While this argument at first appears persuasive, the Government correctly notes that there was a good reason for Congress to include the § 40(a) income tax credit in gross income. As shown above, the prior tax regime before the Mixture Credit allowed a taxpayer to take either an income tax credit or reduced excise tax rates, but not both. Lower excise tax rates meant that a taxpayer's income tax liability would rise if a taxpayer took the excise tax route instead of the income tax credit route. Therefore, if the income tax credit were not included in gross income, it would have been a better tax incentive than the lower excise tax rates because it would not have increased the taxpayer's income tax liability. The legislative history clearly states that Congress did not intend this result; rather, it was "necessary to have an amount equivalent to the income tax credit (or refund) includable in income to produce the same net tax effect" as the excise tax rates. S. Rep. No. 96–394, at 94 & n.16 (1979). Furthermore, there was no reason for Congress to include the Mixture Credit in § 87 expressly as gross income because any reduction in a taxpayer's excise tax liability necessarily results in an increase in gross income. Therefore, the Court finds that Congress did not intentionally exclude the

Mixture Credit from gross income by not including it in § 87.[6]

5. The Ambiguity in the Relevant Statutes Counsels Against Allowing Sunoco to Deduct its Gross Excise Tax Liability from Gross Income.

On a fundamental level, courts expect Congress to speak unequivocally when it intends to confer tax benefits on the scale Sunoco suggests. Tax credits like the Mixture Credit "are a matter of legislative grace, and taxpayers bear the burden of clearly showing that they are entitled to them." Schumacher v. United States, 931 F.2d 650, 652 (10th Cir. 1991) (citing New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934)). In fact, when the Supreme Court has considered exemptions from taxation, it has used the "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved." United States v. Wells Fargo Bank, 485 U.S. 351, 354, 108 S.Ct. 1179, 99 L.Ed.2d 368 (1988) (citations omitted); see also Bank of Commerce v. Tennessee, 161 U.S. 134, 146, 16 S.Ct. 456, 40 L.Ed. 645 (1896) ("Taxes being the sole means by which sovereignties can maintain their existence, any claim [by a person] to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined

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[6] Sunoco also argues that Congress intentionally excluded the Mixture Credit from gross income by not including it in § 280C. Section 280C requires a taxpayer to reduce certain deductions by the amount of certain tax credits. The problem with Sunoco's argument is that § 280C appears in the income tax portion of the Internal Revenue Code, so all of the credits included therein are income tax credits. There was no reason for Congress to include the Mixture Credit (an excise tax credit) there.

and founded upon plain language."). Exemptions and tax credits are different, but the real-world effect Sunoco seeks is similar to that of an exemption. Sunoco wishes to exempt from gross income a portion of its cost of goods sold that it never was required to pay. There is nothing preventing Congress from conferring such a benefit on Sunoco; however, one would expect Congress to expressly state, either in the legislative history or by statute, that it intended to convey this benefit. Congress has not done so here.

Conclusion

Congress created the Mixture Credit because it wanted to replenish the Highway Trust Fund. The ambiguity at the center of this case is the collateral damage of that effort. While Sunoco can be forgiven for seeing in that ambiguity an opportunity for a large tax incentive, the Mixture Credit's legislative history, related case law, and policy considerations counsel against accepting Sunoco's interpretation. Therefore, the Government's motion for judgment on the pleadings is GRANTED, and Sunoco's cross-motion for partial summary judgment is DENIED. The Clerk is directed to dismiss this case with prejudice under RCFC 12(c).[7] No costs.

IT IS SO ORDERED.

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[7] Dismissal with prejudice is appropriate here because Sunoco's claims rest purely on statutory interpretation, and the Court disagrees with Sunoco's interpretation. Therefore, Sunoco could not amend its complaint to plead facts that would entitle it to a tax refund. See Thales Visionix, Inc. v. United States, 122 Fed.Cl. 245, 256 (2015) (dismissing complaint with prejudice on Rule 12(c) motion where Plaintiff's patent claims failed as a matter of law).

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUNOCO, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2017-1402

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00587-TCW, Judge Thomas C. Wheeler.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES and STOLL, *Circuit Judges*[*].

PER CURIAM.

O R D E R

Appellant Sunoco, Inc. filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en

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[*] Circuit Judge Moore did not participate.

banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on January 31, 2019.

FOR THE COURT

January 24, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

26 U.S.C. § 4081

Title 26. Internal Revenue Code
Subtitle D. Miscellaneous Excise Taxes
Chapter 32. Manufacturers Excise Taxes
Subchapter A. Automotive and Related Items
Part III. Petroleum Products
Subpart A. Motor and Aviation Fuels

§ 4081. Imposition of tax

(a) Tax imposed

(1) Tax on removal, entry, or sale

(A) In general

There is hereby imposed a tax at the rate specified in paragraph (2) on—

(i) the removal of a taxable fuel from any refinery,

(ii) the removal of a taxable fuel from any terminal,

(iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing, and

(iv) the sale of a taxable fuel to any person who is not registered under section 4101 unless there was a prior taxable removal or entry of such fuel under clause (i), (ii), or (iii).

(B) Exemption for bulk transfers to registered terminals or refineries

(i) In general

The tax imposed by this paragraph shall not apply to any removal or entry of a taxable fuel transferred in bulk by pipeline or vessel to a terminal or refinery if the person removing or

entering the taxable fuel, the operator of such pipeline or vessel (except as provided in clause (ii)), and the operator of such terminal or refinery are registered under section 4101.

(ii) Nonapplication of registration to vessel operators entering by deep-draft vessel

For purposes of clause (i), a vessel operator is not required to be registered with respect to the entry of a taxable fuel transferred in bulk by a vessel described in section 4042(c)(1).

(2) Rates of tax

(A) In general

The rate of the tax imposed by this section is—

(i) in the case of gasoline other than aviation gasoline, 18.3 cents per gallon,

(ii) in the case of aviation gasoline, 19.3 cents per gallon, and

(iii) in the case of diesel fuel or kerosene, 24.3 cents per gallon.

(B) Leaking Underground Storage Tank Trust Fund tax

The rates of tax specified in subparagraph (A) shall each be increased by 0.1 cent per gallon. The increase in tax under this subparagraph shall in this title be referred to as the Leaking Underground Storage Tank Trust Fund financing rate.

* * *

(b) Treatment of removal or subsequent sale by blender

(1) In general

There is hereby imposed a tax at the rate determined under subsection (a) on taxable fuel removed or sold by the blender thereof.

(2) Credit for tax previously paid

If—

(A) tax is imposed on the removal or sale of a taxable fuel by reason of paragraph (1), and

(B) the blender establishes the amount of the tax paid with respect to such fuel by reason of subsection (a),

the amount of the tax so paid shall be allowed as a credit against the tax imposed by reason of paragraph (1).

* * *

(e) Refunds in certain cases.

Under regulations prescribed by the Secretary, if any person who paid the tax imposed by this section with respect to any taxable fuel establishes to the satisfaction of the Secretary that a prior tax was paid (and not credited or refunded) with respect to such taxable fuel, then an amount equal to the tax paid by such person shall be allowed as a refund (without interest) to such person in the same manner as if it were an overpayment of tax imposed by this section.

26 U.S.C. § 6426

Title 26. Internal Revenue Code
Subtitle F. Procedure and Administration
Chapter 65. Abatements, Credits, and Refunds
Subchapter B. Rules of Special Application

§ 6426. Credit for alcohol fuel, biodiesel, and alternative fuel mixtures

(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.

(b) Alcohol fuel mixture credit

(1) In general

For purposes of this section, the alcohol fuel mixture credit is the product of the applicable amount and the number of gallons of alcohol used by the taxpayer in producing any alcohol fuel mixture for sale or use in a trade or business of the taxpayer.

(2) Applicable amount

For purposes of this subsection—

(A) In general

Except as provided in subparagraphs (B) and

(C), the applicable amount is—

(i) in the case of calendar years beginning before 2009, 51 cents, and

(ii) in the case of calendar years beginning after 2008, 45 cents.

(B) Mixtures not containing ethanol

In the case of an alcohol fuel mixture in which none of the alcohol consists of ethanol, the applicable amount is 60 cents.

(C) Reduction delayed until annual production or importation of 7,500,000,000 gallons.

In the case of any calendar year beginning after 2008, if the Secretary makes a determination described in section 40(h)(3)(B) with respect to all preceding calendar years beginning after 2007, subparagraph (A)(ii) shall be applied by substituting "51 cents" for "45 cents".

(3) Alcohol fuel mixture

For purposes of this subsection, the term "alcohol fuel mixture" means a mixture of alcohol and a taxable fuel which—

(A) is sold by the taxpayer producing such mixture to any person for use as a fuel, or

(B) is used as a fuel by the taxpayer producing such mixture.

For purposes of subparagraph (A), a mixture produced by any person at a refinery prior to a taxable event which includes ethyl tertiary butyl ether or other ethers produced from alcohol shall be treated as sold at the time of its removal from the

refinery (and only at such time) to another person for use as a fuel.

(4) Other definitions

For purposes of this subsection—

(A) Alcohol

The term "alcohol" includes methanol and ethanol but does not include—

(i) alcohol produced from petroleum, natural gas, or coal (including peat), or

(ii) alcohol with a proof of less than 190 (determined without regard to any added denaturants).

Such term also includes an alcohol gallon equivalent of ethyl tertiary butyl ether or other ethers produced from such alcohol.

(B) Taxable fuel

The term "taxable fuel" has the meaning given such term by section 4083(a)(1).

(5) Volume of alcohol

For purposes of determining under subsection (a) the number of gallons of alcohol with respect to which a credit is allowable under subsection (a), the volume of alcohol shall include the volume of any denaturant (including gasoline) which is added under any formulas approved by the Secretary to the extent that such denaturants do not exceed 2 percent of the volume of such alcohol (including denaturants).

(6) Termination

This subsection shall not apply to any sale, use, or removal for any period after December 31, 2011.

(c) Biodiesel mixture credit

(1) In general

For purposes of this section, the biodiesel mixture credit is the product of the applicable amount and the number of gallons of biodiesel used by the taxpayer in producing any biodiesel mixture for sale or use in a trade or business of the taxpayer.

(2) Applicable amount

For purposes of this subsection, the applicable amount is $1.00.

(3) Biodiesel mixture

For purposes of this section, the term "biodiesel mixture" means a mixture of biodiesel and diesel fuel (as defined in section 4083(a)(3)), determined without regard to any use of kerosene, which—

(A) is sold by the taxpayer producing such mixture to any person for use as a fuel, or

(B) is used as a fuel by the taxpayer producing such mixture.

(4) Certification for biodiesel

No credit shall be allowed under this subsection unless the taxpayer obtains a certification (in such form and manner as prescribed by the Secretary) from the producer of the biodiesel which identifies the product produced and the percentage of biodiesel and agri-biodiesel in the product.

(5) Other definitions

Any term used in this subsection which is also used in section 40A shall have the meaning given such term by section 40A.

(6) Termination

This subsection shall not apply to any sale, use, or removal for any period after December 31, 2016.

(d) Alternative fuel credit

(1) In general

For purposes of this section, the alternative fuel credit is the product of 50 cents and the number of gallons of an alternative fuel or gasoline gallon equivalents of a nonliquid alternative fuel sold by the taxpayer for use as a fuel in a motor vehicle or motorboat, sold by the taxpayer for use as a fuel in aviation, or so used by the taxpayer.

(2) Alternative fuel

For purposes of this section, the term "alternative fuel" means—

(A) liquefied petroleum gas,

(B) P Series Fuels (as defined by the Secretary of Energy under section 13211(2) of title 42, United States Code),

(C) compressed or liquefied natural gas,

(D) liquefied hydrogen,

(E) any liquid fuel which meets the requirements of paragraph (4) and which is derived from coal (including peat) through the Fischer-Tropsch process,

(F) compressed or liquefied gas derived from biomass (as defined in section 45K(c)(3)), and

(G) liquid fuel derived from biomass (as defined in section 45K(c)(3)).

Such term does not include ethanol, methanol, biodiesel, or any fuel (including lignin, wood

residues, or spent pulping liquors) derived from the production of paper or pulp.

(3) Gasoline gallon equivalent

For purposes of this subsection, the term "gasoline gallon equivalent" means, with respect to any nonliquid alternative fuel, the amount of such fuel having a Btu content of 124,800 (higher heating value).

(4) Carbon capture requirement

(A) In general

The requirements of this paragraph are met if the fuel is certified, under such procedures as required by the Secretary, as having been derived from coal produced at a gasification facility which separates and sequesters not less than the applicable percentage of such facility's total carbon dioxide emissions.

(B) Applicable percentage

For purposes of subparagraph (A), the applicable percentage is—

(i) 50 percent in the case of fuel produced after September 30, 2009, and on or before December 30, 2009, and

(ii) 75 percent in the case of fuel produced after December 30, 2009.

(5) Termination

This subsection shall not apply to any sale or use for any period after December 31, 2017.

(e) Alternative fuel mixture credit

(1) In general

For purposes of this section, the alternative fuel

mixture credit is the product of 50 cents and the number of gallons of alternative fuel used by the taxpayer in producing any alternative fuel mixture for sale or use in a trade or business of the taxpayer.

(2) Alternative fuel mixture

For purposes of this section, the term "alternative fuel mixture" means a mixture of alternative fuel and taxable fuel (as defined in subparagraph (A), (B), or (C) of section 4083(a)(1)) which—

(A) is sold by the taxpayer producing such mixture to any person for use as fuel, or

(B) is used as a fuel by the taxpayer producing such mixture.

(3) Termination

This subsection shall not apply to any sale or use for any period after December 31, 2017.

(f) Mixture not used as a fuel, etc.—

(1) Imposition of tax

If—

(A) any credit was determined under this section with respect to alcohol or biodiesel used in the production of any alcohol fuel mixture or biodiesel mixture, respectively, and

(B) any person—

(i) separates the alcohol or biodiesel from the mixture, or

(ii) without separation, uses the mixture other than as a fuel,

then there is hereby imposed on such person a tax equal to the product of the applicable amount and the number of gallons of such alcohol or biodiesel.

(2) Applicable laws

All provisions of law, including penalties, shall, insofar as applicable and not inconsistent with this section, apply in respect of any tax imposed under paragraph (1) as if such tax were imposed by section 4081 and not by this section.

(g) Coordination with exemption from excise tax

Rules similar to the rules under section 40(c) shall apply for purposes of this section.

(h) Denial of double benefit

No credit shall be determined under subsection (d) or (e) with respect to any fuel with respect to which credit may be determined under subsection (b) or (c) or under section 40 or 40A.

(i) Limitation to fuels with connection to the United States

(1) Alcohol

No credit shall be determined under this section with respect to any alcohol which is produced outside the United States for use as a fuel outside the United States.

(2) Biodiesel and alternative fuels

No credit shall be determined under this section with respect to any biodiesel or alternative fuel which is produced outside the United States for use as a fuel outside the United States.

For purposes of this subsection, the term "United States" includes any possession of the United States.

(j) Energy equivalency determinations for liquefied petroleum gas and liquefied natural gas

For purposes of determining any credit under this section, any reference to the number of gallons of an alternative fuel or the gasoline gallon equivalent of such a fuel shall be treated as a reference to—

(1) in the case of liquefied petroleum gas, the energy equivalent of a gallon of gasoline, as defined in section 4041(a)(2)(C), and

(2) in the case of liquefied natural gas, the energy equivalent of a gallon of diesel, as defined in section 4041(a)(2)(D).

26 U.S.C. § 6427

Title 26. Internal Revenue Code
Subtitle F. Procedure and Administration
Chapter 65. Abatements, Credits, and Refunds
Subchapter B. Rules of Special Application

§ 6427. Fuels not used for taxable purposes

(a) Nontaxable uses

Except as provided in subsection (k), if tax has been imposed under paragraph (2) or (3) of section 4041(a) or section 4041(c) on the sale of any fuel and the purchaser uses such fuel other than for the use for which sold, or resells such fuel, the Secretary shall pay (without interest) to him an amount equal to—

(1) the amount of tax imposed on the sale of the fuel to him, reduced by

(2) if he uses the fuel, the amount of tax which would have been imposed under section 4041 on such use if no tax under section 4041 had been imposed on the sale of the fuel.

* * *

(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 shall pay (without interest) to such person an amount equal to the alcohol fuel mixture credit or 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 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 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.

(5) Limitation to fuels with connection to the United States

No amount shall be payable under paragraph (1) or (2) with respect to any mixture or alternative fuel if credit is not allowed with respect to such mixture or alternative fuel by reason of section 6426(i).

(6) Termination

This subsection shall not apply with respect to—

(A) any alcohol fuel mixture (as defined in section 6426(b)(3)) sold or used after December 31, 2011,

(B) any biodiesel mixture (as defined in section

6426(c)(3)) sold or used after December 31, 2016,

(C) any alternative fuel (as defined in section 6426(d)(2)) sold or used after December 31, 2016, and

(D) any alternative fuel mixture (as defined in section 6426(e)(2)) sold or used after December 31, 2011.

* * *

26 U.S.C. § 9503

Title 26. Internal Revenue Code
Subtitle I. Trust Fund Code
Chapter 98. Trust Fund Code
Subchapter A. Establishment of Trust Funds

§ 9503. Highway Trust Fund

(a) Creation of Trust Fund.—There is established in the Treasury of the United States a trust fund to be known as the "Highway Trust Fund", consisting of such amounts as may be appropriated or credited to the Highway Trust Fund as provided in this section or section 9602(b).

(b) Transfer to Highway Trust Fund of amounts equivalent to certain taxes and penalties.—

(1) Certain taxes.—There are hereby appropriated to the Highway Trust Fund amounts equivalent to the taxes received in the Treasury before October 1, 2022, under the following provisions—

(A) section 4041 (relating to taxes on diesel fuels and special motor fuels),

(B) section 4051 (relating to retail tax on heavy trucks and trailers),

(C) section 4071 (relating to tax on tires),

(D) section 4081 (relating to tax on gasoline, diesel fuel, and kerosene), and

(E) section 4481 (relating to tax on use of certain vehicles).

For purposes of this paragraph, taxes received under sections 4041 and 4081 shall be determined

without reduction for credits under section 6426 and taxes received under section 4081 shall be determined without regard to tax receipts attributable to the rate specified in section 4081(a)(2)(C).

* * *