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D.C. Circuit: Credit under expired section 45K, for fuel from nonconventional source, landfill gas

The U.S. Court of Appeals for the District of Columbia Circuit today affirmed a decision of the U.S. Tax Court that had upheld the IRS's disallowance of credits under then-applicable section 45K relating to certain landfill gas operations.

The section 45K credit provisions expired in 2007.

The case is: *Green Gas Delaware Statutory Trust v. Commissioner*, No. 17-1025 (D.C. Cir. August 14, 2016). Read the D.C. Circuit's [decision](#) [PDF 107 KB]

Summary

Between 2005 and 2007, the taxpayer trusts claimed \$11.7 million in section 45K credits for selling landfill gas. The IRS disallowed all but \$586,000 of the section 45K credits. Specifically the IRS excluded all claimed credits from venting / flaring landfills and credits for landfill gas vented or flared from gas-to-electricity landfills when the gas-to-electricity equipment was non-operational. The Tax Court upheld the IRS determinations. The Tax Court concluded that:

- Untreated landfill gas is “qualified fuel” under section 45K (which had expired in 2007).
- In the landfill gas industry, to qualify as a “facility for producing qualified fuels” under section 45K(f)(1), a system of wells, pipes, blowers, and equipment for pretreatment and measuring the production of gas—if necessary—must be connected either to a gas-to-energy system or to a system that allows for storage and treatment of landfill gas before it is routed to gas pipelines or otherwise prepared for delivery to a customer.

- For a landfill gas production facility, the “placed in service” date under section 45K is the date when a gas-to-energy system becomes available for its specific function on a regular basis—not the date when the first well is drilled.

The trusts appealed, and the D.C. Circuit today affirmed the Tax Court’s decision.

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