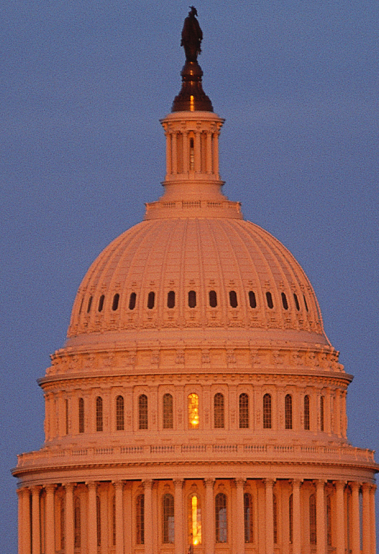




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Fifth Circuit: Butane not eligible for tax credit; tax on exports of domestic crude oil held unconstitutional

The U.S. Court of Appeals for the Fifth Circuit late last week issued judgments in cases concerning issues affecting the oil and gas industry.

Butane is not LPG and not eligible for tax credit under section 6426(e)

In one decision—*Vitol, Inc. v. United States*, No. 20-20237 (5th Cir. March 23, 2022)—the Fifth Circuit in a case of “first impression” held that butane is **not** a liquefied petroleum gas (LPG) for purposes of section 6426(d)(2). Thus, the appeals court concluded that butane is not an “alternative fuel” that can be mixed with a “taxable fuel” to qualify for the tax credit under section 6426(e) and denied the taxpayer’s claim for a refund of \$8.8 million. Read the [decision](#) [PDF 488 KB] that includes a dissenting opinion.

- The Fifth Circuit majority explained that the plain language of the statute does not permit a given substance to be treated as both a taxable fuel and an alternative fuel.
- While the common meaning of LPG includes butane, that statutory term cannot be divorced from its statutory context.
- The consistent, mutually exclusive treatment of taxable and alternative fuels is the reason that the plain language of the statute departs from the common meaning.

The dissenting opinion noted that the term “alternative fuel” includes LPG and that the term “taxable fuel” includes “gasoline.” Thus, if butane is an LPG, the taxpayer deserved a tax credit for mixing butane with gasoline because “alternative fuel plus taxable fuel equals alternative fuel mixture tax credit.” According to the dissent:

As everyone in the oil and gas industry knows, and as the United States readily concedes, butane is an LPG. Indeed, the government’s own witness testified that “butane is always an LPG.” That should be the end of it: [the taxpayer] gets a tax credit.

Tax imposed under section 4611(b) is unconstitutional

In the second case—*Trafigura Trading LLC v. United States*, No. 21-20127 (5th Cir. March 24, 2022)—the Fifth Circuit affirmed a federal district court’s grant of summary judgment to the taxpayer that the levy imposed on exports of domestic crude oil under section 4611(b) is “tax” (and not a fee) and as such was unconstitutional. Read the [decision](#) [PDF 158 KB] that includes a dissenting opinion.

- At issue was section 4611(b)—the provision that imposes a “tax” (at a rate of 8 or 9 cents per barrel, depending on the year) on domestic crude oil, and proceeds from which go to the Oil Spill Liability Trust Fund.
- The taxpayer (a commodity trading company) purchased and exported crude oil from the United States and remitted over \$4 million for exports of U.S. crude oil between 2014 and 2017.
- The taxpayer claimed that section 4611(b) imposes an unconstitutional tax under the Export Clause, and filed a refund claim for the amount it paid under section 4611(b).
- The district court agreed with the taxpayer that section 4611(b) imposes an unconstitutional tax and granted the refund.
- On appeal, the government asserted that the charge operated essentially as a premium for government-provided insurance, in the form of capped liability for oil spills, and was a fee for oil spill-related services, and not an effort to raise general revenue.
- The Fifth Circuit majority found that section 4611(b) finances a broad range of initiatives that are not “services” provided to exporters and affirmed the lower court’s findings in favor of granting the taxpayer’s claim for refund.

KPMG observation

A general observation is that it is uncertain whether the taxpayer in the *Vitol* case intends to request an en banc hearing by the Fifth Circuit. Continued monitoring is appropriate for taxpayers that have filed claims for refund on the issues presented in that case.

Similarly, it is uncertain whether the government will appeal the *Trafigura Trading* decision to the U.S. Supreme Court and if so, whether certiorari would be granted. Taxpayers with tax-paid exports of crude oil may consider filing protective claims for refund for all open periods to preserve the right to refund.

For more information, contact a tax professional with KPMG’s Excise Tax Practice group:

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