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[Third Party Communication:

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**From:**

**Sent:** Friday, January 27, 2023 12:02:41 PM

**To:**

**Cc:**

**Bcc:**

**Subject:** POSTF-119732-22 - RESPONSE TO TAM INQUIRY

Hi [REDACTED],

You asked whether the Technical Advice Memorandum 200504034 (“TAM”) issued to [REDACTED] on November 1, 2004, binds the Service to allowing exemptions from the excise tax imposed under I.R.C. § 4051(a) for the sales of its so-called [REDACTED] within tax periods in 2017, 2018, and 2019. The TAM addressed whether [REDACTED]’s sales of its [REDACTED] were subject to excise tax under § 4051(a) for periods in 2001 and 2002, and no other periods. The Service is not bound by the TAM because it was operatively revoked by the enactment of I.R.C. § 7701(a)(48), which statutorily redefined which vehicle sales were exempt from § 4051(a). Section 7701(a)(48) was added to the Code by the American Jobs Creation Act of 2004 (Pub. L. 108-357) (the “Act”) on October 22, 2004.

[REDACTED] maintains that the manner of reporting and paying its excise taxes constitutes a *continuing action*, and thus continued to be covered by the TAM for the tax periods after the ones for which the TAM was issued. Under the pertinent revenue procedure, a TAM applies to a ‘continuing action’ until it is specifically withdrawn, modified, or revoked (including by the enactment of legislation). Rev. Proc. 2004-2 § 15.04. [REDACTED] asserts that its TAM was not operatively revoked by the Act becoming law because the Service issued the TAM on November 1, 2004, eleven days after the Act’s effective date. Consequently, [REDACTED] believes it correctly relied on the TAM for purposes of not paying excise taxes on the sale of its [REDACTED] under § 4051(a) in periods following October 2004.

As we understand it, the parties do not dispute that the reporting and paying of excise taxes, as prescribed by the TAM, constitute a continuing action for purpose of the revenue procedures. Nevertheless, as noted above, Revenue Procedure 2004-2 clearly states that, with respect to a continuing action, a TAM will no longer apply if it is revoked by the enactment of legislation. Rev. Proc. 2004-2 § 15.04 (the current Revenue Procedure, Rev. Proc. 2023-2 § 13.03 contains similar language). Even though the Service issued the TAM after the effective date of the Act, the TAM addressed periods only in 2001 and 2002. As such, the Service applied the law and regulations applicable only to those periods. Section 7701(a)(48) would not have applied. Further, despite [REDACTED]’s assertion that the enactment of legislation must occur prior to the issuance of technical advice for a revocation to occur, neither the revenue procedures nor the Treasury regulation cited by [REDACTED], including Treas. Reg. § 601.201(1)(7), set forth this requirement.

To support the claim that the Service is bound the TAM, [redacted] cites NetJets Large Aircraft, Inc. v. United States, 80 F. Supp. 3d 743, 756-59 (S.D. Ohio 2015). NetJets held that a taxpayer was entitled to rely on a TAM providing favorable but ambiguous instruction regarding its collection and payment of excise tax liabilities. 80 F. Supp. 3d at 757. The court held that the taxpayer was entitled to rely on the technical advice, including in instances of a continuing action, until that advice was “withdrawn, revoked, or modified.” Id. at 758-59.

NetJets is distinct from the instant case for two reasons. First, the taxpayer in NetJets immediately sought clarification from the Service on whether it could rely on the TAM and received confirmation on several occasions; the Service later attempted to contradict its instruction. 80 F. Supp. 3d at 758. In this case, [redacted] made no attempt to clarify whether the TAM was applicable following the change in law and the IRS made no representations that the TAM applied notwithstanding the change in law. Second, the court in NetJets found there was no legal basis to revoke the previously-issued advice. Here, as discussed above, a change in the law occurred that revoked the TAM for purposes of a continuing action.

For all the reasons stated here, the TAM does not apply to the tax imposed under § 4051(a) for the sale of [redacted]’s [redacted] in tax periods in 2017, 2018, or 2019.

Sincerely,

[redacted signature block]