

UNITED STATES TAX COURT
WASHINGTON, DC 20217

GREEN GAS DELAWARE STATUTORY)
TRUST, METHANE BIO, LLC, TAX)
MATTERS PARTNER, ET AL.,)

Petitioner(s),)

v.)

Docket No. 26965-09, 13698-10,
14409-10.

COMMISSIONER OF INTERNAL REVENUE,)

Respondent)

ORDER

These cases are calendared for trial at a Special Session of the Court commencing on November 16, 2015, in Chicago, Illinois.

On October 6, 2015, respondent filed a motion to modify admission pursuant to Rule 90(f), requesting the Court to grant leave to respondent to modify his answer as filed on February 7, 2014, to petitioners' Request for Admission No. 10.

By Order dated October 7, 2015, the Court directed petitioners to file a response to respondent's motion to withdraw or modify the deemed admitted admissions pursuant to Rule 90(f). On October 19, 2015, petitioners filed a response to respondent's motion to withdraw or modify the deemed admitted admissions pursuant to Rule 90(f).

Rule 90(f) provides that the Court may permit withdrawal or modification of the admission when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the court that the withdrawal or modification will prejudice such party in prosecuting such party's case or defense on the merits. See also Hadley v. United States, 45 F.3d 1345 (9th Cir. 1995) (allowing taxpayer to withdraw a deemed admission when that would preclude a resolution of the case on the merits); Morrison v. Commissioner, 81 T.C. 644, 649 (1983) (stating that a party will be prejudiced by withdrawal of

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admissions if he has relied on them and will suffer delay, added expense, and additional effort because of the withdrawal).

Respondent wants to modify his response to Admission10 on Petitioners' First Request for Admission: "Landfill gas produced from biomass, also known as methane gas, is a 'qualified fuel' for purposes of I.R.C. Sec. 45K." Respondent initially admitted this statement, but now argues in its Memorandum of Issues filed on October 2, 2015, that because landfill gas only partially consists of methane, it may not be "qualified fuel" for purposes of Section 45K. Because the issue of what constitutes qualified fuel for purposes of Section 45K is novel and important to the resolution of the case on the merits, granting respondent's motion would satisfy the first prong of Rule 90(f) and will subserve the presentation of the merits of the case.

The party relying on an admission has the burden of proving that such admission will cause prejudice. Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 652 (2d Cir. 1983) rejected on other grounds by McLaughlin v. Richland Shoe Co., 486 U.S. 128, 134 (1988). Petitioners' response alleges that petitioners will be prejudiced if the Court grants respondent's motion because respondent kept changing the theories of what constitutes "qualified fuel" for the purposes of Section 45K in different filings made in the case and because petitioners would have to incur additional expenses in litigating this issue. Pursuant to the order of the Court dated November 17, 2014, the parties are bound by the theories and positions they advance in their respective memoranda of issues. Both parties filed their memoranda of issues on October 2, 2015. Under the circumstances, there is no danger that respondent will further change his litigation position or advance new theories. As to the issue of additional expense in litigating the issue, petitioners in their memorandum of issues raise the question of whether methane produced from landfill gas is a "qualified fuel" for purposes of Section 45K. Thus, granting respondent's motion to modify the admission will not result in additional effort or expense to petitioners and satisfies the second prong of Rule 90(f).

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Given due consideration of the foregoing, it is hereby

ORDERED that respondent's motion to modify admission pursuant to Rule 90(f), filed October 6, 2015, is granted in that the admission made by respondent by reason of the application of Rule 90(f) is modified as follows:

Admission No. 10. Admits that the methane from landfill gas is qualified fuel after the landfill gas has been treated to remove non-methane components and the remaining methane has been made suitable for use as fuel. Denies that landfill gas is the same thing as, or is also known as, methane gas. Denies that landfill gas, in its raw state, is qualified fuel.

**(Signed) David Laro
Judge**

Dated: Washington, D.C.
October 20, 2015