



New Chemical Excise Taxes Affect Multiple Industries

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Certain chemical excise taxes that last saw the light of day back in the mid-1990s, are back and could apply to many more companies than just chemical manufacturers. These resurrected taxes impose additional tax on the sale of certain chemicals and substances made with chemicals. Due to their expiration almost 30-years ago, let's look at some of the new rules and criteria set forth by the IRS.

The Infrastructure Investment and Jobs Act, signed into law in November 2021, brought back these excise taxes to help fund the Hazardous Substance Superfund. The Superfund is designed to provide resources for cleaning and remediating some of the country's most contaminated land. The Superfund also sets aside funds to help respond to environmental emergencies such as oil spills and natural disasters. In their original incarnation in the 1990s, substances subject to the Superfund excise taxes (Superfund taxes) contained more than 50% of an identified chemical. As we will discuss below, that threshold has been lowered starting in 2022.

It is important to note that two different excise taxes were revived under the Infrastructure Act: 1) a Superfund tax on the sale of 42 specific chemicals listed in Section 4661 of the tax code, ranging from \$0.48 to \$9.47 per ton, depending on the specific chemical, and 2) a Superfund tax on an importer's sale or use of any taxable substance identified under Section 4671 of the tax code.

Superfund Tax Under Section 4661 – Sales or Use of Taxable Chemicals

The first of the two excise taxes specifically identifies 42 "taxable chemicals" and states that the sale or use of these chemicals is subject to an excise tax, per ton, listed in the Code Section. Included in this list are chemicals such as butane, methane, ammonia and mercury, which are each taxed at different rates. The broad scope of this tax would seem to apply to many different companies involved in the manufacture, production or importation of these chemicals. Thankfully, there are some exceptions and exemptions from this tax. These exemptions can apply if the chemicals are for identified uses, derivations or byproducts. For example, methane and butane are exempted if they are used as a fuel. Also, certain chemicals are exempted from the Superfund tax if they are used in the production of fertilizer, motor fuel or a

qualified animal feed use. Manufacturers and producers can also be exempted from the tax if they sell for export or sell to a second purchaser for resale, but they must receive and maintain proof of export or resale for export.

Superfund Tax Under Section 4671 – Sales or Use of Taxable Substances

The second of the two excise taxes imposes a tax on an importer's sale or use of any taxable substance identified under Section 4671. A taxable substance is defined as: 1) any substance specifically identified by the IRS in Code Section 4672 (50 substances) or Notice 2021-66 (101 additional substances), 2) substances that meet or exceed a 20% weight or value threshold that the IRS adds to the list of taxable substances and 3) any substance the IRS adds or removes from the lists of taxable substances at the request of exporters and importers. Note that there are specific procedures to request the IRS to add or remove substances from their list of taxable substances. It has been reported that the IRS is considering potentially hundreds of additions to the list at the time of enactment on July 1, 2022.

There are exemptions from this tax as well, some for similar reasons as the exemptions from the Section 4661 tax. Sales of taxable substances are not taxed under this code section if they are used for fuel or the production of fertilizer or animal feed. They are also not taxed if the substance was previously taxed under code section 4661.

Refunds or Credits for Certain Uses

If a manufacturer or producer pays tax under Section 4661 and then uses that chemical to manufacture or produce any other new substance which is a taxable chemical, they could potentially be eligible for a credit or refund equal to the amount of tax paid on the original taxable chemical. In general, the refund or credit cannot exceed the amount of tax imposed (or would have been imposed except for tax exemptions) on the new manufactured or produced substance. In effect, this could bring the net tax paid on the two products down to zero, but not generate a refund. However, if the new taxable chemical is used for certain stated uses, taxpayers could be eligible for a refund if the original tax paid is greater than what would be paid on the new manufactured substance. Those stated uses include tax paid on certain

chemicals used to produce ammonia, that is then used as a fertilizer, or a qualified animal feed substance, or tax paid on chemicals used as a qualified fuel substance.

Exporters of taxable chemicals may also be eligible for a credit or refund if tax was paid on the original taxable chemical and the chemical was then exported or was used to manufacture or produce a new taxable substance that was then exported. Some exporters may be eligible for a credit or refund even if they did not pay the original assessment of the tax, provided they have certain agreements in place with their customers and suppliers.

How to Calculate and Pay the Superfund Excise Taxes

The calculation of tax differs between the two excise taxes discussed above. For section 4661 taxable chemicals sales or use, the tax rates are provided by the IRS and are calculated following those rates. However, it is the responsibility of the importer to determine the section 4671 taxable substances sales or use tax rate. The IRS has published rates for 121 of the 151 taxable substances under section 4671 but the importer is not required to use the IRS rates and may instead calculate their own rate if they choose. If the importer does not calculate a rate and does not use the IRS rate, the IRS may assess a 10% rate on the appraised value of the substance at the time of import. Therefore, it is important that taxpayers determine a reasonable rate or use the IRS rates.

How to Report the Superfund Excise Taxes

Reporting of the Superfund tax is done quarterly on Form 720, Quarterly Federal Excise Tax Return and Form 6627, Environmental Taxes. Form 6627 is attached to Form 720 and filed at the end of each quarter. Taxpayers with quarterly liabilities greater than \$2,500 will be required to pay the Superfund taxes semi-monthly.

Importantly, the IRS has provided temporary relief for failure-to-deposit penalties of the Superfund taxes for the third and fourth quarters of 2022 and the first quarter of 2023 if taxpayers meet the criteria set out in the notice. This effectively means that if they qualify, companies should be able to pay their liability by the time of the filing of their quarterly excise returns, Form 720, without any additional penalties for these three quarters.

Reporting of credits and refunds of the Superfund taxes have not been addressed at the time of this writing. The

IRS is expected to issue additional guidance in the coming months on how to claim credits and refunds. One possibility is that the tax calculated on Form 6627 will be reported on Part I of the Form 720 and the credits and refunds calculated will be reported on Schedule C (and Part III) of the same Form 720. The first quarterly Excise Tax Return (Form 720) that would report this information is due to be filed no later than October 31, 2022.

Closing Notes

The revival of the Superfund taxes could have considerable impact on many companies, not just those typically involved in the manufacture, production or importation of chemicals. For example, the sales of butane and methane are exempt from the excise tax until they are used for a purpose other than fuel. Companies much farther down the supply chain could become subject to the Superfund taxes if they use those substances for a purpose other than fuel.

With that in mind, it is important that companies look at their information systems now to make sure they are gathering any information needed to determine if they are, or will become, subject to the Superfund taxes. For questions about how these changes may impact you, please contact us.

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