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Questions Remain After “Superfund” Year of Superfund Excise Tax Compliance, Despite IRS Guidance

An IRS public hearing, scheduled for October 25, 2023, provides the opportunity to raise additional questions

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Taxpayers affected by the Superfund excise taxes have had a steep learning curve since their reinstatement. Treasury and the IRS have worked quickly to issue guidance, including proposed regulations, on the various moving parts of these environmental excise taxes. However, both the IRS and taxpayers still have questions on the application of the tax in many circumstances. In the proposed regulations, the IRS requested comments on various specific topics that are addressed in this article. In addition, taxpayers have submitted comments to the IRS and recent developments have raised further questions.¹ This article highlights several open questions as a preview to the hearings scheduled for October 25, 2023.

Historical Background

The “Superfund” excise tax regime was enacted in 1980 as part of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² to fund the Hazardous Substances Superfund, a trust fund dedicated to the cleanup of hazardous waste sites.³ CERCLA included two so-called Superfund excise taxes.

- Section 4611 of the Code⁴ imposed a per-barrel Petroleum tax on crude oil and imported petroleum products (the “Petroleum tax”).⁵

¹ Comments can be accessed via the Federal eRulemaking Portal at <https://www.regulations.gov> searchable under “IRS-2021-0018” or “Notice 2021-66.”

² Pub. L. No. 96-510, 94 Stat. 2767 (Dec. 11, 1980).

³ 42 U.S.C. § 9601 *et seq.*

⁴ Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the “Code”) or the applicable regulations promulgated pursuant to the Code (the “regulations”).

⁵ Added by CERCLA, Pub. L. No. 96-510, § 211(a). A separate tax rate under section 4611 funds the Oil Spill Liability Trust Fund.

- Section 4661 of the Code imposed a per-ton Chemicals tax on manufacturers and importers of a statutory list of 42 specific feedstock chemicals (“taxable chemicals”) (the “Chemicals tax”).⁶

In the Superfund Amendments and Reauthorization Act of 1986,⁷ Congress added a third Superfund excise tax “to assure that the tax burden is shared by a broader class of chemical producers and consumers, and ...[avoid] placing domestic manufacturers of chemicals and chemical products at a competitive disadvantage with respect to foreign companies.”⁸

- Section 4671 of the Code imposed a per-ton Hazardous Substances tax on a statutory list of 50 specific raw materials derived from taxable chemicals (“taxable substances”) and authorized the IRS to add new taxable substances to the list if the substances met certain weight or value thresholds (the “Hazardous Substances tax”).⁹

Over time, the IRS added about 100 additional substances to the taxable substances list.¹⁰ In addition, the IRS issued guidance to provide taxpayers with definitions¹¹ as well as technical advice and private letter rulings¹² to address various specific taxpayer scenarios. Treasury and the IRS issued proposed regulations interpreting the Superfund excise taxes in 1983; however, the proposed regulations were withdrawn in 1987, resulting in a lack of clarity about the Superfund excise taxes.¹³

In 1995, the Superfund excise taxes expired and sat dormant in the Code for almost thirty years.

In 2021, the Infrastructure Investment and Jobs Act was enacted. It reinstated the section 4661 and 4671 per-ton Chemicals and Hazardous Substances excise taxes, doubled the tax rates, and decreased the weight and value thresholds required to add a substance to the list of taxable substances.¹⁴ The effective date of the reinstated taxes was July 1, 2022.

In 2022, the Inflation Reduction Act¹⁵ was enacted. It reinstated the section 4611 per-barrel Petroleum tax and increased the rate of tax to 16.4 cents per barrel. The effective date of this reinstated tax was January 1, 2023.

October 31, 2022, was the due date for the first Form 720, *Quarterly Federal Excise Tax Return*, for reporting the section 4661 and 4671 Superfund excise taxes. April 30, 2023, was the due date for the first Form 720 on which all three reinstated Superfund excise taxes were reported.

⁶ Added by CERCLA, Pub. L. No. 96-510, § 211(a).

⁷ Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986).

⁸ S. Rep. No. 98-631, at 42.

⁹ Added by Pub. L. No. 99-499, § 515(a).

¹⁰ See, e.g., Notice 90-48, 1990-28 I.R.B. 13 (adding polyethylene terephthalate pellets to the taxable substances list); Notice 90-256, 1990-30 I.R.B. 17 (adding various acetates to the taxable substance list).

¹¹ Notice 89-61, 1989-21 I.R.B. 25, modified by Notice 95-39, 1995-26 I.R.B. 10, superseded by Rev. Proc. 2022-26, 2022-29 I.R.B. 90.

¹² See, e.g., TAM 9601005 (Aug. 29, 1996) (concerning the treatment of lead oxide); TAM 8503001 (July 3, 1984) (concerning the treatment of chlorine).

¹³ 48 Fed. Reg. 48839 (Oct. 21, 1983), withdrawn by 52 Fed. Reg. 2724 (Jan. 26, 1987).

¹⁴ Pub. L. No. 117-58, Div. H, Title II, § 80201(a)(1), (b)(1), 135 Stat. 429, 1328 (Nov. 15, 2021).

¹⁵ To provide for reconciliation pursuant to title II of S. Con. Res. 14, Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022) (commonly called the “Inflation Reduction Act”).

IRS Issued Guidance for the Reinstated Superfund Excise Taxes

Treasury and the IRS have issued the following guidance for the reinstated Superfund excise taxes:

- Notice 2021-66 provided a list of taxable substances, including the 50 statutory substances and all previously added substances.¹⁶
- Notice 2022-15 provided temporary relief for the failure to deposit penalty in certain cases.¹⁷
- Revenue Procedure 2022-26 provided definitions and a process to petition to add or remove a substance from the taxable substance list.¹⁸
- FAQs posted on the IRS website included a list of frequently asked Superfund excise tax questions.
- A partial list of tax rates for imported taxable substances was also posted on the IRS website and incorporated into the Instructions to Form 6627, *Environmental Taxes*.¹⁹
- Notice 2023-28 extended penalty relief and revised the petition procedure to add taxable substances.²⁰
- Proposed regulations were issued March 29, 2023.²¹ In the preamble to the proposed regulations, the IRS requested comments on several topics, discussed below. The proposed regulations revoked much of the guidance issued by the IRS when the Superfund excise taxes were previously in effect.
- Notice of the October 25, 2023 public hearing was published in the *Federal Register*.²²

IRS Requested Comments in the Proposed Regulations on Several Topics

In the proposed regulations, the IRS requested comments on the following issues:

- **Chemical mixtures and chemical compounds.** Section 4661 is imposed on taxable chemicals, but the statute is not clear regarding the treatment of chemical mixtures and chemical compounds. The proposed regulations define a chemical mixture as two or more physically combined components that are not chemically bonded, such as alloys, solutions, suspensions, and colloids.²³ Further, when a chemical mixture containing one or more taxable chemicals is imported into the United States, the tax is imposed on the actual weight of each taxable chemical within the mixture. The preamble contrasts the treatment of chemical compounds, which are composed of identical molecules, each of which consists of two or more atoms of the same or different elements held together by chemical bonds.²⁴ Because the individual chemicals used in the production of a chemical compound do not retain their individual identities and are no longer separable, the preamble concludes that an imported chemical compound is taxable only if it is a taxable substance.

¹⁶ Notice 2021-66, 2021-52 I.R.B. 901.

¹⁷ Notice 2022-15, 2022-18 I.R.B. 1043.

¹⁸ Rev. Proc. 2022-26, 2022-29 I.R.B. 90.

¹⁹ Internal Revenue Service, Superfund Chemical Excise Taxes, *available at* <https://www.irs.gov/businesses/small-businesses-self-employed/superfund-chemical-excise-taxes>.

²⁰ Notice 2023-28, 2023-15 I.R.B. 635; Rev. Proc. 2023-20, 2023-15 I.R.B. 636.

²¹ REG-105954-22, 88 Fed. Reg. 18446 (Mar. 29, 2023).

²² 88 Fed. Reg. 65887 (Sept. 26, 2023).

²³ Proposed section 52.4662-1, 88 Fed. Reg. at 18459.

²⁴ 88 Fed. Reg. at 18469.

However, tax would attach to the use of taxable chemicals in the United States to produce a chemical compound.

IRS Request: Because of the disadvantage to domestic manufacturers resulting from the proposed regulations, the IRS has requested comments on possible ways to mitigate the issue.

- **Metals and unprocessed ores.** The section 4661 list of taxable chemicals includes hydrocarbons, metals, metalloids, minerals, and an ore (chromite). Except for chromite, a taxable chemical within unprocessed ore must first be removed or refined through extraction, smelting, or another process. The proposed regulations provide that the tax attaches to the first sale or use after extraction of the taxable chemical from the ore. However, because chromite is itself a taxable chemical, the tax attaches after the first sale or use after the chromite is mined.

IRS Request: The IRS has requested comments on whether an additional or alternative rule for metals would be appropriate.

- **Measurement and documentation of tonnage.** Section 4661 is imposed on a per-ton basis, using a short ton, or 2,000 pounds. The proposed regulations provide that for purposes of calculating the 4661 tax, the weight of a taxable chemical is the actual weight of the taxable chemical when the tax attaches.²⁵

IRS Request: The IRS has requested comments on any other appropriate methods that could be used to measure tonnage with specificity and without artificially reducing the tax base, as well as the types of documentation available in the industry that could be used as records to support a weight measurement.

- **Exemption for sulfuric acid in certain cases.** Section 4662 provides an exemption for sulfuric acid produced as a byproduct of air pollution control equipment, including imported sulfuric acid so produced. The proposed regulations define “air pollution control equipment” as any equipment used to comply with the Clean Air Act under 42 U.S.C. chapter 8, or any similar provision under state law.²⁶

IRS Request: The IRS has requested comments on the definition of “air pollution control equipment” and the type of documentation that is available to demonstrate that sulfuric acid produced outside the United States meets the exemption.

- **Refunds precluded by statute for exports of substances that are not taxable substances.** Section 4662(e)(2) allows a refund of tax paid on taxable chemicals in exported taxable substances (i.e., listed in the statute or by the IRS). Generally, tax attaches to the use of taxable chemicals, including use to produce substances that are not taxable substances. Therefore, the preamble to the proposed regulations notes that domestic manufacturers that are liable for tax on the use of taxable chemicals in the United States to produce a substance would not be allowed to claim a refund of the tax upon exportation of a substance that is not a taxable substance.²⁷

²⁵ Proposed section 52.4661-1(f), 88 Fed. Reg. at 18457.

²⁶ Proposed section 52.4662-2(c), 88 Fed. Reg. at 18460.

²⁷ 88 Fed. Reg. at 18453.

IRS Request: Because of the disadvantage to domestic manufacturers resulting from the statutory requirement that export credits and refunds are allowable only with respect to exported substances that are taxable substances, the IRS has requested comments on possible ways to mitigate the issue.

- **Definition of “predominant method of production.”** Section 4671 uses the undefined term “predominant method of production” as the basis of calculating the Hazardous Substances tax. The proposed regulations define the term to mean the method used to produce the greatest number of tons of a particular substance worldwide, relative to the total number of tons of the substance produced worldwide.²⁸ The preamble provides that the definition uses worldwide production as the metric because the term applies only in the context of imported taxable substances. It is unclear whether the IRS used this definition to calculate the partial list of tax rates for imported taxable substances posted on the IRS website.²⁹

IRS Request: The IRS has requested comments on the definition of “predominant method of production” and for relevant information needed to calculate the Hazardous Substances tax on a list of statutory substances for which the IRS has not calculated a tax rate.

- **Use of Chemical Abstract Service numbers and Harmonized Tariff Schedule code.** The uniform identification and classification of taxable chemicals and taxable substances would contribute to tax compliance on the part of taxpayers and facilitate tax administration on the part of the IRS. As a result, the IRS has been asked in public comments to assign the appropriate Chemical Abstract Service (“CAS”) numbers and Harmonized Tariff Schedule (“HTS”) numbers to taxable chemicals and substances.³⁰

IRS Request: The IRS has requested comments on the degree of specificity that would be required for use of CAS numbers and HTS numbers in the Superfund excise tax context, specifically the appropriate number of decimal places that would be used in each type of number to identify taxable chemicals and taxable substances.

Additional Open Questions Remain

Although the proposed regulations provide helpful clarification regarding the application of the Superfund taxes, many open questions remain. Some of these open questions are raised below.

How does the Petroleum tax interact with the Chemicals and Hazardous Substances taxes? The section 4611 Petroleum tax is imposed on crude oil and imported petroleum products.³¹ The IRS currently takes a broad view of the term imported petroleum products in the Instructions for Form 6627, to include refined oil, residual oil, and other liquid hydrocarbon refinery products. Thus, the same imported petroleum product may be both an imported petroleum product and a taxable substance. The statute generally provides a special rule that section 4611 (relating to imported petroleum products) supersedes section 4671 (relating to imported taxable substances), but only if both taxes are imposed on the same sale or use.³² However, the taxable event on imported petroleum products is entry into the United States while the Hazardous Substances tax is imposed on the first sale or use after entry. Read literally, the special rule would never apply. Further, several liquid

²⁸ Proposed section 52.4672-1(b)(4), 88 Fed. Reg. at 18470.

²⁹ 88 Fed. Reg. at 18453.

³⁰ 88 Fed. Reg. at 18454.

³¹ Section 4611(a).

³² Section 4671(c).

hydrocarbon products appear to be subject to both the Petroleum tax and the Chemicals tax.³³ Thus, it would be useful if the IRS clarified the application of the special rule and provided a clear definition of imported petroleum products in published guidance.

Will the IRS reconsider burdensome documents required for credits, refunds, tax-free sales, and other special rules that require preparing or obtaining documentation, such as waivers, consents and certificates? The proposed regulations require extensive and potentially burdensome paperwork and documentation for the application of various special rules, including :

- Fertilizer, animal feed, and motor fuel³⁴
- Chemicals used to make other chemicals³⁵
- Exports³⁶
- Intermediate hydrocarbon streams³⁷
- Inventory exchanges³⁸

The proposed regulations require the proper claimant to obtain the appropriate documentation, which varies depending on the particular special rule. Generally, documentation must be obtained prior to or at the time of the relevant transaction. In many cases, the proposed regulations require a claimant to obtain arguably sensitive information from the upstream seller. Furthermore, the proposed regulations require many documents to be signed under penalty of perjury. In some cases, it is unclear whether these documents must be submitted with the claim or merely retained by the claimant. Several commenters have noted the perceived burden of these requirements and have urged the IRS to reconsider their scope.³⁹

What key characteristics identify an “end-use product”? For purposes of identifying taxable substances, IRS guidance provides that the term “synthetic organic substance” excludes textile fiber (other than polymers in extruded fiber form), yarn, or staple, or a fabricated product that is molded, formed, woven, or otherwise finished into an end-use product.⁴⁰ However, end-use product is not defined, causing uncertainty in many situations where there are multiple steps in production. Thus, it would be useful if the IRS provided examples of end-use products.

³³ For example, the IRS concluded that even toluene, xylene, and benzene derived from natural gas is subject to section 4611 in TAM 9410001 (Nov. 18, 1993), 1993 WL 597872. A TAM is not precedential authority and cannot be relied on; however, such documents provide useful guidance about how the IRS may view the issue.

³⁴ Proposed section 52.4671-2.

³⁵ Proposed section 52.4662-4.

³⁶ Proposed section 52.4662-5.

³⁷ Proposed section 52.4662-2(g).

³⁸ Proposed section 52.4662-3.

³⁹ See, e.g., Agriculture Retailers Association, Comment Letter on Proposed Rule concerning Superfund Chemical Taxes (May 30, 2023), <https://www.regulations.gov/comment/IRS-2023-0013-0011>; The Fertilizer Institute, Comment Letter on Proposed Rule concerning Superfund Chemical Taxes (May 30, 2023), <https://www.regulations.gov/comment/IRS-2023-0013-0022>; Simplot, Comment Letter on Proposed Rule concerning Superfund Chemical Taxes (May 30, 2023), <https://www.regulations.gov/comment/IRS-2023-0013-0018>.

⁴⁰ Rev. Proc. 2022-26, sec. 3.10, 2022-29 I.R.B. 90; proposed section 52.4672-2, 88 Fed. Reg. at 18471.

What definitions apply to terminology used for taxable substances that represent broad groups of raw materials?

The statutory list of taxable substances includes several entries that represent broad categories of raw materials grouped under a single heading.⁴¹ Others contain undefined terms. For example, “polypropylene resins,” “polyethylene resins, total,” and “polystyrene resins and copolymers” are taxable substances that do not mean one substance with a single chemical formula. They also contain undefined terms. For example, neither the statute nor IRS guidance has defined the term “total” or explained why it does not also modify “polypropylene resins.” The terms “resins” and “polymers” are often used as synonyms in industry usage, but it is unclear whether there is a distinction for excise tax purposes, or whether the term “resins” includes “copolymers.” Providing definitions would bring clarity to compliance, assist in identifying additional taxable substances, and ensure that similarly situated taxpayers are treated the same way. Use of HTS and CAS numbers may be useful in achieving uniform application of the tax.

Will the IRS provide a complete list of tax rates for taxable substances? A safe harbor to calculate the tax?

Section 4671 describes three methods to compute tax on a taxable substance: an IRS prescribed rate, a hypothetical rate based on the amount of tax that would have been imposed under section 4661 on the taxable chemicals used as materials in the manufacture of the substance if it had been produced in the United States, or 10 percent of the appraised entry value of the substance (“default rate”).⁴² The IRS has not provided tax rates for approximately 30 taxable substances; thus, for those substances, taxpayers must either follow a complicated computation method based on a hypothetical or pay the default rate, which is understood to be punitive in nature. Application of the default rate could pose a barrier to entry and affect competition. As noted above, the IRS issued only a partial list of tax rates and has not calculated a tax rate for 30 substances. In the proposed regulations, the IRS has requested information needed to calculate tax on several of the remaining substances, a clear indication of how difficult it is to apply the statutory rule. Because of this acknowledged difficulty, and given the punitive nature of the default rate, it seems reasonable to limit its application to situations in which a taxpayer makes no effort to comply with the statute. Further, a taxpayer may attempt in good faith to comply with the statute but not have access to all relevant information for a variety of reasons, such as trade secrets or contractual limitations. In these cases, it seems reasonable for the IRS to provide a safe harbor to prevent gross disparities between similarly situated taxpayers.

What affect, if any, would recent litigation have on the definition of “importer”?

The Superfund excise taxes generally apply to importers. The proposed regulations restate the statutory definition of importer as the person entering the taxable chemical into the United States for consumption, use, or warehousing. In addition, the regulations provide that an agent or customs broker is not the importer; rather, the first person in the United States that sells or uses the taxable chemical is the importer.⁴³ Further, the proposed regulations include a special rule for drop ship businesses that would impose tax on a U.S. purchaser, not the foreign drop ship business that delivers the taxable chemical. In recent litigation, a federal district court concluded that a non-U.S. person “importer of record” named in U.S. Customs and Border Protection (CBP) Form 7501, *Entry Summary*, was the importer for excise tax purposes.⁴⁴ This conclusion is contrary to the proposed regulations. There are several differences between the tax at issue in the litigation and the Superfund excise taxes and the litigation would not control the interpretation of “importer” under Superfund. Further, there is a strong possibility that the

⁴¹ See, e.g., Notice 94-54, 1994-1, C.B. 369 (May 16, 1994) (withdrawing a petition for acrylonitrile-butadiene-styrene (ABS) pellets because it was decided that ABS is a member of the polystyrene resins and copolymers group of taxable substances, and, as such, is already on the list of taxable substances).

⁴² Section 4671(b)(2).

⁴³ Proposed section 52.4662-1(c)(5).

⁴⁴ *Texas Truck Parts & Tire Inc v. United States*, No. 4:21-cv-02055 (S.D. Tex. Sept. 28, 2023).

government will appeal. Nevertheless, the court concluded as a matter of fact that the foreign person actually packed the taxable goods, brought them into the United States, handled all customs paperwork, and paid all duties and excise taxes, and thus was in plain English the importer, even though the foreign person did not meet the IRS's preferred "U.S.-nexus requirement" or "first-sale rule." This rationale may affect the final regulations issued by the IRS for Superfund excise taxes.

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