



ALERTS

IRS Issues Proposed Rule To Implement Reinstated Superfund Excise Taxes: A Good Start But Stakeholder Input Is Needed

April 14, 2023

Highlights

The IRS issued a proposed rule in March to implement the Superfund excise taxes that were reinstated in late 2021 as part of the Infrastructure Investment and Jobs Act

The proposed rule is a good start, but further guidance is needed – and has been invited by the IRS – on a number of issues, with comments accepted until May 30, 2023

As these excise taxes will be in effect for at least 10 years, stakeholders should consider carefully assessing the proposed rule and the many open issues and comment on those aspects that will affect their interests

Two weeks after a relatively quick review by the Office of Management and Budget, on March 29 the Internal Revenue Service (IRS) issued a notice of proposed rulemaking to [implement the Superfund excise taxes](#) that were reinstated in late 2021 by the Infrastructure Investment and Jobs Act.

Comments on the proposal and requests for a public hearing must be

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received by the IRS by May 30, 2023. The rules are proposed to be effective the first quarter after the rules are finalized.

In the meantime, while the proposal is being considered, the IRS [extended the temporary relief](#) from failure-to-deposit penalties through the end of 2023. That notice also extended the temporary relief related to the authority of the IRS to withdraw a taxpayer's right to use the deposit safe harbor rules of Section 40.6302(c)-1(b)(2), through the second calendar quarter of 2024. Revenue Procedure [2023-20](#), issued on March 27, modifies the effective date of newly added taxable substances for purposes of claiming tax refunds.

Background

The original Superfund excise taxes expired in 1995. They were reinstated effective July 1, 2022, and are set to expire Dec. 31, 2031. Two separate Superfund chemical excise taxes were resurrected in 2021: a tax on the sale or use of "taxable chemicals" under Section 4661 of the Internal Revenue Code and a tax on the sale or use of imported "taxable substances" under Section 4671. Explaining the need for the proposed rule, the IRS stated:

In addition to clarifying statutory rules in sections 4661 and 4671 regarding the Superfund chemical tax procedural rules and computation of tax, these proposed regulations provide definitions that track the statutory language and otherwise borrow from existing excise tax rules, including regulations relating to ozone-depleting chemicals and manufacturers excise taxes. The proposed regulations provide procedural guidance regarding tax-free sales of certain taxable chemicals and taxable substances. Finally, the proposed regulations provide procedures for taxpayers to claim credits and refunds of Superfund chemical taxes paid with respect to taxable chemicals or taxable substances sold for use or used for certain purposes.

Issues That Require Further Guidance

The proposed regulations go a long way toward providing [guidance sought by businesses since the Superfund excise taxes were revived](#) in late 2021; however, the IRS is requesting comment on a number of important issues to refine the regulations and improve their practical application and implementation. Examples of clarifications and related inquiries, and some of the issues yet to be addressed, include:

Definitions of key terms used in Sections 4661 and 4662. The proposed regulations include needed definitions for manufacturer, importer, person, sale, use and taxable chemicals. Of these, the definition of the term "manufacture" is sure to draw comment: in addition to any person that produces a taxable chemical from new or raw material, feedstocks, or other substances, the definition also includes those who produce a taxable chemical from scrap, salvage, waste, or recycled substances.

Definitions of key term used in Sections 4671. A general definition of the key term "predominant method of production" used in Section 4671 is provided, but the IRS asks for specific comments on the predominant method of production for the following taxable substances: ferronickel; formaldehyde; hydrogen peroxide; methanol; nickel powders; nickel waste

and scrap; polystyrene resins and copolymers; styrene-butadiene, snpf; synthetic rubber not containing fillers; unwrought nickel; vinyl resins; vinyl resins, nsfp; and wrought nickel rods and wires.

Chemical mixtures vs. chemical compounds. Explanations are included regarding the distinctions between chemical mixtures and chemical compounds for purposes of taxation. These are accompanied by an acknowledgment that the statute creates an advantage for foreign manufacturers of chemical compounds that are produced with taxable chemicals but are not taxable substances, and a request from the agency for comments on possible ways to mitigate the disadvantage to domestic manufacturers within the constraints of the statutory scheme.

Treatment of Metals. Initial guidance is provided on treatment of taxable chemicals that are produced from ores, including nickel, cobalt, chromium, and phosphorus. This is followed by a specific request from the IRS for comments on whether an additional or alternative rule for metals would be appropriate or warranted.

Attachment of the tax at first sale or use. Direction is provided that the tax attaches to the first sale or use of a taxable chemical by the manufacturer, producer, or importer, but there is still ambiguity as to whether and to what extent that first use or sale that renders the chemical or substance taxable under Section 4661 takes place within the supply chain.

Taxation of diluted chemical mixtures. Further clarification is added that in the case of chemical mixtures containing one or more chemicals with respect to which tax was paid, no further Section 4661 tax attaches when the chemical mixture is diluted with a solvent to change the concentration of the chemical mixture (unless and to the extent that the solvent is itself a taxable chemical).

Calculation of the Section 4661 tax. Direction is given on how to calculate the amount of Section 4661 tax, accompanied by a request from the IRS for comments on any other appropriate methods that could be used to measure tonnage, with specificity and without artificially reducing the tax base.

Special rules and exceptions to Section 4661 tax. Further explanation is given for special rules and exceptions to Section 4661 tax, including provisions for: methane or butane used as fuel; qualified fertilizer, fuel, and animal feed substances; sulfuric acid produced as a byproduct of air pollution control equipment, and; intermediate hydrocarbon streams.

Credits and refunds. Long-awaited direction is provided on how to secure credits and refunds of the Section 4661 tax and how to effect tax-free sales for export (including model forms of certificates and statements). However, further clarification is needed to reconcile differences in the methodology for calculating the tax on the one hand, and the amount of refunds due under the proposed rule on the other.

Use of HTS and CAS numbers. The IRS also asked for comments on suggestions made that the Treasury Department and the IRS provide Harmonized Tariff Schedule (HTS) and Chemical Abstract Service (CAS) numbers to ensure uniform identification of chemicals and substances by stakeholders and the IRS. Specifically, they are asking for comments on the appropriate number of decimal places for the HTS and CAS numbers that would be used to identify taxable chemicals and taxable substances on the degree of specificity that would be required for HTS and CAS

numbers.

Economic analysis of the impact of the proposed regulations. The IRS acknowledges that it does not have the information to perform an economic analysis of the impact of the proposed regulations at this time, and “[t]hus two similarly situated taxpayers might interpret the statutory provisions pertaining to the calculation of tax differently or reach different conclusions regarding eligibility for exemptions from the Superfund chemical taxes.” The IRS concludes that this “lack of certainty may lead to very different tax liabilities for taxpayers undertaking similar activities.” The Treasury Department and the IRS invite comments, especially data sets or analyses, on the impact of the proposed regulations.

Number of affected taxpayers. The Treasury Department and the IRS also concede that they do not have readily available data to assess how many entities may be affected by the proposed regulations, and invite comments, especially data sets or analyses, on the number of affected taxpayers.

Tax Rates. More in-depth analysis and explanation is needed on the default tax values assigned to 121 of the 151 designated taxable substances, and better guidance is needed for calculating the tax rates for the 30 of the 151 hazardous substances for which there are no default values.

Taxation of chemicals and substance that are also petroleum products. Further guidance is also still needed on how to treat taxable chemicals and hazardous substances that are also taxable petroleum products under the Hazardous Substance Superfund Financing Tax Rate on Crude Oil and Petroleum Products, a third excise tax that was separately reinstated on Aug. 16, 2022, as part of the Inflation Reduction Act.

Takeaways and Next Steps

While the proposed rules to implement the restored Superfund excise taxes provide welcome preliminary guidance and clarification that address a number of questions raised and needs identified by industry since late 2021, the Treasury Department and the IRS both recognize that they need further information to refine the regulations and satisfy regulatory planning and review requirements. In addition to generally requesting comments on all aspects of the proposed regulations, the agency expressly invited information and comments on more than a dozen specific aspects of the proposed rules, ranging from key definitions and the methodology for calculating the taxes to their economic impact.

The notice of proposed rulemaking reflects that the Treasury Department and the IRS have listened to stakeholders and signals that they need to and are prepared to account for further information to develop and implement workable and fair rules to manage and administer the Superfund excise taxes. In addition, mirroring the time afforded for submission and agency consideration of comments, the agency has extended the relief from failure-to-deposit penalties through the end of 2023, and taxpayer rights to use the deposit safe harbor rules through at least the second calendar quarter of 2024.

Industry and other affected taxpayers should consider using the time before comments are due to assess whether and how the proposed rule affects their prior understanding and application of the Superfund excise

taxes and to develop and submit additional information and comments on aspects of the proposed rule that affect their interests.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Bruce White at 312-214-4584 or bwhite@btlaw.com.

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