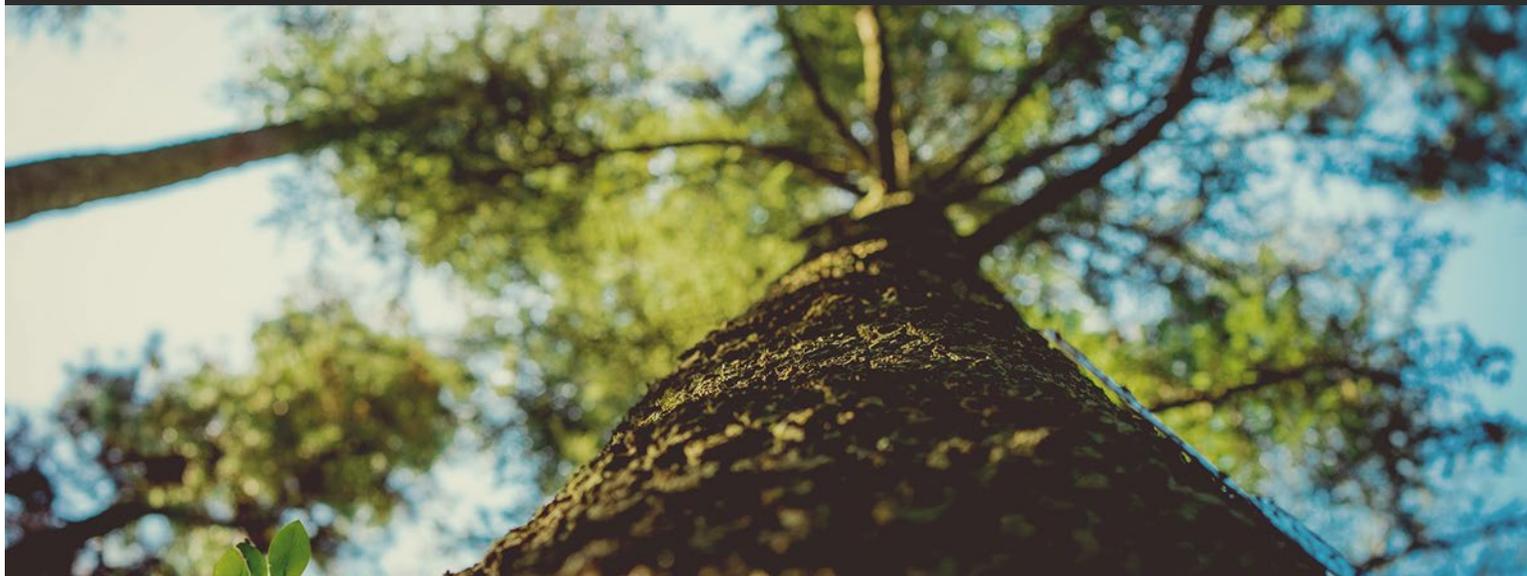


A Brief Overview of the Superfund Chemical Excise Tax



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The original 1980 enactment of the federal Superfund statute, the Comprehensive, Environmental Response, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (Dec. 11, 1980), included a Title II titled the Hazardous Substance Response Revenue Act of 1980, 94 Stat. 2796. That statute imposed two excise taxes: on petroleum and petroleum products, 26 U.S.C. Sections 2611-12, and on taxable chemicals, 26 U.S.C. Sections 4661-62. In conjunction with the Superfund Amendments and Reauthorization Act of 1986, Congress extended the second excise tax to importation of “taxable

substances” composed materially of taxable chemicals but manufactured outside the United States. In all cases, the amounts paid under the taxes went into the Hazardous Substance Response Superfund.

The petroleum tax in particular was regarded as a trade for the exclusion of petroleum from the definition of “hazardous substance” under CERCLA. 42 U.S.C. Section 9601(14). But, the two excise taxes were linked. When the petroleum tax expired after several extensions, so did the chemical excise tax in 1995.

The Infrastructure Investment and Jobs Act (IIJA or the Bipartisan Infrastructure Law) reinstated the chemical excise tax. Pub. L. No. 117-58, § 80201, 135 Stat. 429, 1328-30 (Nov. 15, 2021). The amendment had an effective date of July 1, 2022, and has a termination date of Dec. 31, 2031.

As noted above, the tax falls separately on “taxable chemicals” and “taxable substances.” Congress prescribed the list of taxable chemicals in 1980, and that list may be found in 25 U.S.C. Section 4661(b). In addition to being on the list, a taxable chemical must be “manufactured or produced in the United States or entered into the United States for consumption, use, or warehousing.”

Taxable substances are materials imported into the United States for sale or use by the importer. The amount of the tax is the amount that would have been paid on the taxable chemicals used in the manufacture outside the United States of the taxable substance had that manufacture occurred domestically. So, in effect, the Section 4671 tax on imported taxable substances squares up the tax that would have been paid for taxable chemicals had those chemicals been used as intermediate products in the manufacture here.

These are excise taxes. The tax due is calculated based upon the amounts of the taxable chemicals or substances manufactured, produced, or imported in or into the United States. Congress prescribed the rates for the tax on the 42 listed taxable chemicals and updated them those rates IIJA. The rates range from \$0.44/ton on potassium hydroxide to \$9.74/ton on a set of common organic chemicals.

The Internal Revenue Service (IRS) must calculate the rates for taxable substances. To do that, the IRS applies a ratio of the amount of a taxable chemical used in the manufacture of the taxable substance to the amount of the hazardous substance. The IRS then publishes the rates, which it did for the 121 listed taxable substances on June 24. On the same day, the IRS also issued a useful set of answers to frequently asked questions.

A taxpayer reports the tax it owes on a quarterly form reporting the sale or use of taxable chemicals or taxable substances. Specifically, the report goes on Form 6627 attached to Form 720 on the last days of April (for January to March), July (for April to June), October (for July to September), and January (for October to December). But the tax is due on the 15th and last day of each month on an ongoing basis, and penalties are due if the tax deposited does not cover 95% of the tax actually due does not otherwise fall into a safe harbor.

For companies seeking to begin compliance yet this month, this poses a problem because they may not have a history on which to base their semi-monthly deposits or from which to calculate compliance with a safe harbor. The IRS provided relief from penalties for failure to make correctly calculated semi-monthly deposits provided that the taxpayer makes timely deposits and trues up the tax due at the time of the filing of the quarterly form. This relief applies to the third and fourth quarters of 2022 and the first quarter of 2023 (that is, tax due on transactions or use through March 2023). See IRS Notice 2022-15, <https://www.irs.gov/pub/irs-drop/n-22-15.pdf>.

The excise tax on taxable chemicals provides two exemptions that require registration. Section 4662(b)(10) exempts dispositions of organic taxable chemicals that are part of an intermediate organic chemical stream.

Section 4662(c)(2)(A) exempts inventory exchanges. In each case both parties have to register under Section 4662(c)(2)(B). The IRS issued a Notice 2021-66 that explains this process, and also addresses certain other issues described above.

Ultimately, our tax brethren will have to come to the rescue here. But this brief overview should help address clients' issues in this ramp-up period. Even if no one ever asks you for help with this, consider the few minutes you have spent on this entirely anodyne topic as a respite from the more fraught legal news of the past several weeks.

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