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Superfund Tax Poised to Catch Small Chemicals Companies Unaware

By David Hood and Erin Slowey 2022-05-11T04:45:22000-04:00

- Tax is projected to raise $14.5 billion over 10 years
- Smaller companies could bear a disproportionate cost

Small chemicals companies and importers are not ready for the return of an excise tax on chemicals they produce or import that was most recently in place almost 30 years ago.

The Superfund excise tax, as it is called, imposes a levy on chemicals companies and importers for substances known to pollute. The tax is designed to raise money to clean up highly polluted areas. It was first implemented in 1986 and expired in 1995.

Congress included a provision in the infrastructure law enacted in November that reinstates the tax for the first time in nearly 30 years. Small chemicals companies and importers are likely to be caught unprepared by the tax that affects most, if not all, portions of their business.

Bigger companies that have been around for decades are likely to more easily absorb the tax as the cost of doing business, but smaller, newer companies that have formed since the tax expired face compliance issues and unexpected tax bills if they are not sufficiently prepared for the levy scheduled to go into effect July 1, excise tax advisers said.

“Almost every day, I talk to another company that’s surprised to learn about the excise tax—or at least surprised to learn that it affects them,” said John Heithaus, a principal of indirect tax at EY.

Complex Tax

The law imposes two taxes: one on chemical sales and another on chemical importers. It applies to manufacturers, producers, and importers of certain chemicals or substances.

The law lists 42 chemicals subject to the tax. Some—such as benzene, butane, methane, ethylene, ammonia, arsenic, chlorine, lead oxide, and mercury—are common in consumer products. The law doubled the tax rate of chemicals from the amounts in the 1980s and 1990s, with new rates between 44 cents per ton, for potassium hydroxide, and $9.74 per ton, for petrochemicals.

The law does carve out some exemptions, such as the use of methane or butane for making motor fuel, the use of some chemicals to produce fertilizers, and substances derived from coal.

For importers, the IRS identified 151 substances a taxpayer intends to use or sell as subject to the tax but only if the weight of the substance contains 20% or more of a taxable chemical. The previous law set the threshold at 50%. Among those substances are ones with common consumer uses like glycerol and butanol.

Those calculations require tax advisers—in-house or external—to coordinate closely with scientists, operations, logistics, and procurement departments to stay compliant with the law, said Taylor Cortright, managing director of federal excise tax practice at KPMG.

That kind of complex coordination might be difficult for personnel to set up internal processes, especially if the workers who did it 30 years ago are no longer with the company, she said.

"We're not just talking about income, we're talking about chemistry," Cortright said. "So on top of the data complexities, there's also some science involved."

Small Companies Bear the Burden

While compliance costs for every company subject to the Superfund tax will go up—it is projected to raise $14.5 billion over 10 years, according to the Joint Committee on Taxation—smaller companies might bear a disproportionate cost compared with bigger entities, Cortright said.

"If you take a step back, tariffs have exacerbated costs and supply chain disruptions," she said. "Stretched supply chains are causing some disruptions and complexities in sourcing materials. And then you add on top of that this new tax—though, it's just another factor—it adds difficulty to companies that deal in these chemicals and substances."

Smaller companies, particularly trading companies, might not even be aware of the reinstated excise tax, said Shawn O'Brien, a tax partner and global co-head of tax at Mayer Brown.

Companies typically hear news from the IRS through media outlets, articles written by advisers, client alerts, or when their tax professional prepares Form 720, the form used to calculate and pay excise taxes.

"But if all that doesn't get the message across, then unfortunately, the companies may find out about it after they get audited," O'Brien said.

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