

Legal Update

Chemical Superfund Excise Taxes Reinstated, Increased and Expanded by US Infrastructure Act; House-Passed Build Back Better Act Proposes Reinstatement of Superfund Excise Tax on Crude Oil and Petroleum Products

On November 15, 2021, President Biden signed H.R. 3684, the Infrastructure Investment and Jobs Act (the "Infrastructure Act"), into law. The Infrastructure Act reinstates two long-expired Superfund excise taxes on certain manufactured and imported chemicals, with effect as of July 1, 2022, through December 31, 2031.¹ As a result, chemical companies, many of whom may not be intimately familiar with the Superfund excise taxes of the '80s and '90s and the body of law and Internal Revenue Service ("IRS") guidance that developed during that time, will need to undertake a detailed review of the chemical composition of their products and their supply chain to understand if a product is subject to excise tax or whether an exception applies.

Superfund Excise Tax on Chemical Sales (IRC Section 4661)

The Superfund excise tax on chemical sales applies to 42 listed chemicals on a per-ton basis when sold by a manufacturer, producer or importer but only if the chemical is manufactured or produced in the United States or has entered into the United States for consumption, use or warehousing ("Taxable Chemicals").² Significantly, the tax is not imposed on chemical exports. The Infrastructure Act did not modify the list of previously specified Taxable Chemicals, but it did double the former per-ton tax rates. The Taxable Chemicals and new corresponding per-ton tax rates are as follows:³

Taxable Chemical	Per Ton Tax
Acetylene	\$9.74
Benzene	\$9.74
Butane	\$9.74
Butylene	\$9.74

Butadiene	\$9.74
Ethylene	\$9.74
Methane	\$6.88
Napthalene	\$9.74
Propylene	\$9.74
Toluene	\$9.74
Xylene	\$9.74
Ammonia	\$5.28
Antimony	\$8.90
Antimony trioxide	\$7.50
Arsenic	\$8.90
Arsenic trioxide	\$6.82
Barium sulfide	\$4.60
Bromine	\$8.90
Cadmium	\$8.90
Chlorine	\$5.40
Chromium	\$8.90
Chromite	\$3.04
Potassium dichromate	\$3.38
Sodium dichromate	\$3.74
Cobalt	\$8.90
Cupric sulfate	\$3.74
Cupric oxide	\$7.18
Cuprous oxide	\$7.94
Hydrochloric acid	\$0.58
Hydrogen fluoride	\$8.46
Lead oxide	\$8.28
Mercury	\$8.90
Nickel	\$8.90

Phosphorus	\$8.90
Stannous chloride	\$5.70
Stannic chloride	\$4.24
Zinc chloride	\$4.44
Zinc sulfate	\$3.80
Potassium hydroxide	\$0.44
Sodium hydroxide	\$0.56
Sulfuric acid	\$0.52
Nitric acid	\$0.48

EXCEPTIONS TO CHEMICAL SALES EXCISE TAX

In certain circumstances, an exception to Section 4661 tax may apply, such as when:

- Methane or butane used as a fuel or in the manufacture or production of any motor, aviation, jet or diesel fuel;
- Nitric acid, sulfuric acid, ammonia or methane used to produce ammonia that is a qualified fertilizer substance;
- Sulfuric acid is produced solely as a byproduct of and on the same site as air pollution control equipment;
- Any substance is derived from coal;
- Acetylene, benzene, butylene, butadiene, ethylene, naphthalene, propylene, toluene and xylene used by the manufacturer, producer or importer, or sold for use by any purchaser or sold for resale by any purchaser for use, or resale for ultimate use as a fuel or in the manufacture or production of motor, aviation, jet or diesel fuel.
- Barium sulfide, cupric sulfate, cupric oxide, cuprous oxide, lead oxide, zinc chloride, zinc sulfate and any solution or mixture containing any of those chemicals have a transitory presence during any process of smelting, refining or otherwise extracting any substance not subject to tax under Section 4661(a) of the Code;
- Separated isomers of xylene, except in the case of any substance imported into the United States or exported from the United States;
- Any chromium, cobalt or nickel diverted or recovered in the United States from any solid waste as part of a recycling process (and not as part of the original manufacturing or production process);
- Nitric acid, sulfuric acid, ammonia or methane is used to produce ammonia, which is used in the production of animal feed and is a qualified animal feed substance;
- Any organic taxable chemical part of an intermediate hydrocarbon stream containing one or more organic taxable chemicals.⁴

As noted above, the chemical sales excise tax will not apply to any Taxable Chemical sold by a manufacturer or producer for export or for resale by the purchaser to a second purchaser for export.⁵

The manufacturer or producer must receive proof that the Taxable Chemical has been exported or resold for export in order to qualify for the exemption.⁶

Superfund Excise Tax on Chemical Importers (IRC Section 4671)

The Infrastructure Act also reinstates, at two times its prior rate, an excise tax on specified chemical-containing substances (a "Taxable Substance") that an importer sells or uses.⁷ The rate of tax for each Taxable Substance is based on the rate of tax imposed on the chemicals (see the above list of 42 chemicals and per-ton rates) used as materials in the manufacture or production of the Taxable Substance.⁸

If an importer provides Treasury with insufficient information about the chemicals used in the substance to determine the applicable tax, the tax imposed will be 10% (two-times the previous rate) of the appraised value of the Taxable Substance at the time the substance entered the United States for consumption, use or warehousing.⁹

An exception is provided if the chemical or chemicals that make up the Taxable Substance were subject to the chemical sales excise tax under Section 4661.¹⁰

Currently, the excise tax applies to the following Taxable Substances:¹¹

Taxable Substance
Cumene
Styrene
Ammonium nitrate
Nickel oxide
Isopropyl alcohol
Ethylene glycol
Vinyl chloride
Polyethylene resins, total
Polybutadiene
Styrene-butadiene, latex
Styrene-butadiene, snpf
Synthetic rubber, not containing fillers
Urea
Ferronickel
Ferrocromium nov 3 pct

Ferrochrome ov 3 pct. Carbon
Unwrought nickel
Nickel waste and scrap
Wrought nickel rods and wire
Nickel powders
Phenolic resins
Polyvinylchloride resins
Polystyrene resins and copolymers
Ethyl alcohol for nonbeverage use
Ethylbenzene
Methylene chloride
Polypropylene
Propylene glycol
Formaldehyde
Acetone
Acrylonitrile
Methanol
Propylene oxide
Polypropylene resins
Ethylene oxide
Ethylene dichloride
Cyclohexane
Isophthalic acid
Maleic anhydride
Phthalic anhydride
Ethyl methyl ketone
Chloroform
Carbon tetrachloride
Chromic acid

Hydrogen peroxide
Polystyrenehomopolymer resins
Polystyrenehomopolymer Melamine
Acrylic and methacrylic acid resins
Vinyl resins
Vinyl resins, NSPF

In the 1980s, the IRS provided a process for taxpayers to request a substance be included or excluded from the above list. Through that process, the IRS adjusted which substances were considered Taxable Substances.¹² The Infrastructure Act recognizes the IRS’s prior determinations but requires Treasury to publish an updated list of Taxable Substances by January 1, 2022.¹³

ADDITIONAL SUBSTANCES TAXABLE IF 20% WEIGHT OR VALUE TEST MET

A substance not listed above may be deemed to be a Taxable Substance if a chemical weight or value test is met. Under prior law, a substance was deemed to be a Taxable Substance if a Taxable Chemical constituted more than 50% of the weight or value of the materials used to produce the substance. The Infrastructure Act modifies the previous test by reducing the percentage to 20%, which may significantly expand the number of substances now subject to tax.¹⁴

Superfund Excise Tax on Crude Oil and Petroleum Products (IRC Section 4611)

Expired Superfund excise taxes on crude oil and petroleum products previously under Section 4611 of the Code were not reinstated by the Infrastructure Act; however, their reinstatement has been proposed in H.R. 5376, the Build Back Better Act (the “BBB Act”), passed by the House of Representatives on November 19, 2021. If passed by the Senate, as currently proposed, the excise tax on crude oil and petroleum products would increase from the previous rate of 9.7 cents to 16.4 cents per gallon effective July 1, 2022, and indexed to inflation starting in 2023.

Reporting Requirements

Previously, the excise taxes described above were required to be reported on IRS Form 6627, *Environmental Taxes*, and attached to IRS Form 720, *Quarterly Federal Excise Tax Return*. It is expected that the IRS will announce reinstatement of the same or similar procedures for remitting the excise tax.

Previously, certain taxpayers that were involved in inventory exchanges of Taxable Chemicals or buy-sell activities of mixed organic hydrocarbon chemical streams were required to register these activities with the IRS using IRS Form 637, *Application for Registration (For Certain Excise Tax Activities)*, indicating activity letter G, in order to claim exemption from the chemicals sales excise tax under Section 4661.¹⁵ Activity letter G has been reserved in the current Form 637 instructions. Form 637 should be monitored for revisions and taxpayers should prepare to be able to provide the detailed additional information required by the form regarding these activities.

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Endnotes

¹ The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") enacted in 1980 originally established Superfund programs to clean up hazardous substances sites in the United States. These programs were administered by the US Environmental Protection Agency and through 1995, generally funded by excise taxes on petroleum and chemical manufacturers and importers that were appropriated to the Hazardous Substance Superfund Trust under section 9507 of the Internal Revenue Code of 1986. The Infrastructure Act provides that the sums, as are available in the Hazardous Substance Superfund established under section 9507 at the end of the preceding fiscal year, from the taxes received in the Treasury under section 9507 (including sections 4611, 4661 and 4671) shall be available, without further appropriation, to be used to carry out the CERCLA for the current fiscal year and each fiscal year thereafter. Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 613 (2021).

² Section 4661 of the Internal Revenue Code of 1986 (as amended) (the "Code"). All section references are to the Code.

³ Infrastructure Act, § 80201.

⁴ Section 4662(b).

⁵ Section 4662(e)(1)(A).

⁶ Section 4662(e)(1)(B).

⁷ Section 4671. An "importer" is the person that enters the Taxable Substance for consumption, use or warehousing in the United States. Section 4672(b)(1).

⁸ Section 4671(b)(1). "Taxable substance" means any substance which, at the time of sale or use by the importer, is listed as a taxable substance by Treasury under Section 4672. Section 4672(a)(1).

⁹ Section 4671(b)(2). The amount of tax is imposed in lieu of the amount of tax imposed under Section 4671(b)(1) of the Code to the extent the importer does not furnish the appropriate information to Treasury.

¹⁰ Section 4671(c).

¹¹ Section 4672(a)(3).

¹² See IRS Notice 89-61, 1989-1 C.B. 717, modified by IRS Notice 95-39, 1995-1 C.B. 312.

¹³ Infrastructure Act, § 80201(c)(3).

¹⁴ Section 4672. "Taxable chemical" means any substance which is listed in Section 4661(b) and which is manufactured or produced in the United States or entered into the United States for consumption, use or warehousing. Section 4662(a)(1).

¹⁵ Section 4662(b)(10)(C); Section 4662(c)(2)(B).

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