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New Superfund Chemical Excise Taxes: IRS Ramps Up Implementation With Updated Registration Procedures and Temporary Relief From Failure-to-Deposit Penalties

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On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (the “Jobs Act”),¹ which reinstated and expanded the Superfund chemicals excise taxes under §4661² and §4671 (collectively, the “Superfund Chemical

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¹ Pub. L. No. 117-58.

² All section references herein are to the Internal Revenue Code of 1986, as amended (the Code), or the Treasury regulations promulgated hereunder, unless otherwise indicated.

Taxes”). Prior to their expiration in 1995, the Superfund Chemical Taxes were used to fund the Hazardous Substance Superfund. Expenditures were administered by the Environmental Protection Agency and used to clean up hazardous waste sites in the United States. Reinstated, the Superfund Chemical Taxes, effective July 1, 2022, apply to a long list of chemicals and chemical-containing substances through December 31, 2031, absent extension.

Many chemical companies may not be intimately familiar with the Superfund Chemical Taxes of the 1980s and 1990s, but they are swiftly brushing up on the existing body of excise tax law and related IRS guidance. These chemical companies are also reviewing the chemicals they manufacture as well as the products they import, to understand their chemical composition and determine whether any products are subject to Superfund Chemical Taxes and, if so, how to timely report and remit payments or register with the IRS for an exception.

SUPERFUND EXCISE TAX ON CHEMICAL SALES

The return of the chemical excise tax affects taxpayers that manufacture, produce, or import certain chemicals, as Superfund Chemical Taxes are imposed on the sale of 42 specific chemicals (Taxable Chemicals) listed in §4661 (Chemical Sales Excise Tax), including ammonia, butane, benzene, mercury, and other common chemicals. Any manufacturer, producer, or importer that sells or uses these chemicals must pay a per-ton tax ranging from \$0.48 to \$9.74, depending on the chemical.

There are exemptions from the Chemical Sales Excise Tax under §4662 for certain uses, derivations, and byproducts of Taxable Chemicals. Taxable Chemicals sold for export or resale by the purchaser to a second purchaser for export are also exempted from the Chemical Sales Excise Tax. However, to qualify for this exemption, the manufacturer, or producer must receive proof that the Taxable Chemical was exported or resold for export.

SUPERFUND EXCISE TAX ON IMPORTERS OF TAXABLE SUBSTANCES

The Jobs Act also reinstated the Superfund chemicals excise tax on an importer's sale or use of any taxable substance pursuant to §4671 (Taxable Substances Excise Tax). Taxable substances are defined in §4672 as: (i) the 50 substances included on the initial list of taxable substances in §4672(a)(3), (ii) substances that exceed a 20% weight or value threshold that the IRS adds to the list of taxable substances, and (iii) any substance the IRS adds to or removes from the list of taxable substances at the request of an importer or exporter (Taxable Substances). During the 1980s and 1990s, many substances were added to the initial list of 50 provided in the Code.

In Notice 2021-66, the IRS published a list of 101 Taxable Substances to which the Taxable Substances Excise Tax applies, in addition to the Code's initial list of 50 Taxable Substances, (collectively, the "List of Taxable Substances"), and suspended the existing procedure in Notice 89-61 for an importer or exporter to petition the IRS to add or remove substances from the List of Taxable Substances. The procedure in Notice 89-61 included a determination of the tax rate for newly added Taxable Substances, and the IRS would regularly publish the List of Taxable Substances including tax rates with their effective date.

Notice 2021-66, however, does not provide the current tax rate for each Taxable Substance. In response, several commenters emphasized the need for updated and standardized rates for each Taxable Substance. Without current published rates, taxpayers are forced to determine the rate for each Taxable Substance on their own. Pending further IRS guidance, prior published rates (adjusted for the Jobs Act increases) and the examples outlined in Notice 89-61 should aid in calculating the tax on Taxable Substances and the potential tax exposure if a substance is subsequently added to the List of Taxable Substances.

Commenters further suggested that for each Taxable Substance, the IRS include, along with the tax rate, the applicable classification under the Harmonized Tariff Schedule, the Schedule B number(s)³ and, if applicable, the Chemical Abstract Service number for each Taxable Substance.⁴ In the past, the IRS requested this information from taxpayers when peti-

tioning to add or subtract substances from the definition of Taxable Substances, so this information is likely available. In addition, the IRS includes this information in the listing of Ozone Depleting Chemicals. Commenters stated that the goal in providing this information to taxpayers would be to provide a uniform, consistent, and standardized methodology for applying tax to Taxable Substances.⁵

If an importer provides the Department of Treasury with insufficient information about the chemicals used in a substance to determine the applicable tax, the tax (the "Taxable Substances Excise Tax") imposed will be 10% of the appraised value of the substance at the time it entered the United States for consumption, use, or warehousing. Commenters have noted that the List of Taxable Substances needs to be updated and the process for petitioning the IRS to remove a substance needs to be reinstated immediately to avoid confusion with respect to substances that no longer meet the definition of Taxable Substance.⁶ For example, advances or changes in production methods may have caused certain substances to no longer contain even 20% of Taxable Chemicals. In this example, if the substance is still a Taxable Substance as of July 1, 2022, because it is on the List of Taxable Substances, the importer must pay Taxable Substances Excise Tax and maintain adequate records to demonstrate that the imported substance should not be subject to 10% tax, rather than the stated tax, until the IRS removes the substance from the Taxable Substance List.

The IRS, in Notice 2022-15, notes that it is continuing to consider the public comments it received. Therefore, before July 1, 2022, the IRS is expected to provide guidance on when the process to petition will be reinstated.

An exception to the Taxable Substances Excise Tax is provided if the Taxable Substance is made up of Taxable Chemicals that were previously subject to the Chemical Sales Excise Tax. A credit or refund of any Chemical Sales Excise Tax paid is also available if Taxable Chemicals are used to manufacture a Taxable Substance and the Taxable Substance is exported. Commenters reiterated that updates and additions to the List of Taxable Substances are crucial prior to the July 1, 2022, effective date so that refunds may be obtained.⁷ Due to the new 20% weight or value threshold, certain additional substances may now be consid-

³ The Harmonized Tariff Schedule of the United States sets out the tariff rates and statistical categories for all merchandise imported into the United States. Schedule B, which is administered by the U.S. Census Bureau, is used to track the amount of trade goods that are being exported from the United States.

⁴ ExxonMobil Corp., Comment Letter on Notice 2021-66 (Mar. 8, 2022), <https://www.regulations.gov/comment/IRS-2021-0018-0007>; American Chemistry Council, Comment Letter on Notice

2021-66 (Jan. 28, 2022), <http://www.regulations.gov/comment/IRS-2021-0018-0004>.

⁵ ExxonMobil Comment Letter; American Chemistry Council Comment Letter.

⁶ Lyondell Chemical Co., Comment Letter on Notice 2021-66 (Feb. 18, 2022), <http://www.regulations.gov/comment/IRS-2021-0018-0006>.

⁷ ExxonMobil Comment Letter.

ered Taxable Substances. If a substance is not on the List of Taxable Substances, then importers of those substances will not owe Taxable Substances Excise Tax. However, if those same substances are exported and they contain Taxable Chemicals, then the U.S. manufacturer will not be able to obtain a refund for Chemical Sales Excise Tax because the substance is not on the List of Taxable Substances.

In addition, certain imported products that contain Taxable Substances, but are finished end-use products, are not subject to the Taxable Substances Excise Tax.

TAX DEPOSIT, PAYMENT, AND REPORTING REQUIREMENTS

Companies not already filing excise tax returns will need to become familiar with Form 720, *Quarterly Federal Excise Tax Return*, and making required semi-monthly deposits. The Superfund Chemical Taxes are reported on Form 6627, *Environmental Taxes*, which is filed as an attachment to Form 720. If the IRS follows past practice, it can be expected to release an updated Form 6627 reflecting the reinstated Superfund Chemical Taxes and their current rates.

The first time companies are required to report Superfund Chemical Taxes is on their third-quarter 2022 Form 720 due October 31, 2022, for the period July 1, 2022, through September 30, 2022. Late-filing penalties of 5% of the amount due may apply to each month the form remains unfiled, up to a penalty of 25%.

Like other environmental taxes reported on Form 720, semi-monthly deposits are required. Given the July 1, 2022, effective date of the Superfund Chemical Taxes, the first deposit of tax covering the first 15 days of July is due by July 29, 2022. Absent a safe harbor or other relief, penalties may apply to late deposits, ranging from 2% to 15% depending on the number of late days.

TEMPORARY PENALTY RELIEF

The IRS recently provided temporary failure-to-deposit penalty relief in Notice 2022-15, in response to taxpayer comments. Effectively, Notice 2022-15 provides protection from failure-to-deposit penalties through the third quarter of 2023. In providing penalty relief, the IRS acknowledged the various compliance challenges facing taxpayers, including the short timeframe between the reinstatement of the Superfund Chemical Taxes and the due date of the first deposit, possible difficulties calculating the applicable excise tax in the third quarter of 2022, the number of taxpayers unfamiliar with complying with deposit requirements, and technical issues with claiming the deposit safe harbor until the first calendar quarter of 2023.

Notice 2022-15 provides specific criteria a taxpayer must satisfy to qualify for penalty relief, which differs based on the quarter of the year for which the relief is being sought. For the third and fourth calendar quarters of 2022, and the first calendar quarter of 2023, a taxpayer will be deemed to have acted with reasonable cause with no failure-to-deposit penalty imposed if: (i) the taxpayer makes timely deposits of applicable Superfund Chemical Taxes, even if the deposit amounts are computed incorrectly; and (ii) the amount of any underpayment of the applicable Superfund Chemical Taxes for each calendar quarter is paid in full by the due date for filing the Form 720 for that quarter.

For the first, second, and third quarters of 2023, the IRS will permit taxpayers to rely on the deposit safe harbor and will not impose a penalty for failure to deposit even if the technical requirements of the safe harbor are not met, as long as for the look-back quarter at issue (i.e., the second preceding calendar quarter): (i) the taxpayer made timely deposits of applicable Superfund Chemical Taxes, even if the deposit amounts were computed incorrectly; and (ii) the amount of any underpayment of the applicable Superfund Chemical Taxes for each calendar quarter is paid in full by the due date for filing the Form 720 for that quarter.

Effectively, the penalty relief in Notice 2022-15 provides taxpayers until October 31, 2022, to determine whether a chemical manufactured or imported is subject to a Superfund Chemical Tax and how much tax is owed. Therefore, companies should focus their efforts in the very near term on determining whether they owe tax and, if so, on preparing to make a deposit of some amount on July 29, 2022.

REGISTRATION REQUIREMENTS

There is no requirement to register with the IRS to pay either the Chemical Sales Excise Tax or the Taxable Substances Excise Tax. But there is a registration requirement to be exempted from tax under §4662(c)(2) for taxpayers making inventory exchanges of Taxable Chemicals or under §4662(b)(10) for taxpayers selling or buying intermediate hydrocarbon streams. The registration requirements are not satisfied unless both parties are registered by the IRS as manufacturers, producers, or importers of Taxable Chemicals, and the person receiving the Taxable Chemical has notified the manufacturer, producer, or importer of such person's registration number.

As of April 2022, the IRS revised the form used for registration, Form 637, *Application for Registration (For Certain Excise Tax Activities)*, to add activity letter G. Taxpayers must provide the following information: (i) a list of the Taxable Chemicals the applicant

exchanges and/or the intermediate hydrocarbon streams the applicant sells or buys; and (ii) a description of the applicant's processing plants, the products produced, the handling and storage facilities and the processes involving hydrocarbon streams, if applicable.

Treasury, in interim guidance, notes that all G registrations were revoked when the excise taxes imposed on certain chemicals and imported chemical substances expired in 1995.⁸ As a result, any previous G registrants will need to re-apply.⁹ In response to Notice 2021-66 (and before the interim guidance was released), commenters expressed concerns over delays in processing Form 637 registrations, noting that recent applications have taken almost a year to be approved. Considering the short timelines for implementation of the Superfund Chemical Taxes, commenters requested that activity G be automatically granted to those taxpayers that currently hold a Form 637 registration under activity S, for fuel transactions.¹⁰ In light of the fact that previous G registrants need to re-

⁸ Department of the Treasury, Memorandum for Director, Specialty Examination, Chief, Estate & Gift and Excise Exam, Excise Territories and Excise Group Managers: Interim Guidance on Registration Tests for Form 637 Registrations Other than Under IRC 4101, including new G Registrations, SBSE-04-0322-0012 (Mar. 1, 2022), <https://www.irs.gov/pub/foia/ig/sbse/sbse-04-0322-0012.pdf>.

⁹ *Id.*

¹⁰ American Chemistry Council Comment Letter; American Petroleum Institute, Comment Letter on Notice 2021-66 (Jan. 28, 2022), <http://www.regulations.gov/comment/IRS-2021-0018-0003>.

apply and many taxpayers need to register for the first time, commenters requested that the IRS adopt a temporary policy under which a taxpayer's Activity G registration can be retroactively effective to the date the Form 637 registration application was filed.¹¹ In addition, commenters requested that for those that do not have an Activity S registration, the IRS provide an acknowledgment that the taxpayer filed a Form 637 registration application that contains a note that the registration application is pending consideration. Applicants with such official IRS correspondence should be permitted to conduct necessary business activities as an Activity G registrant retroactive to the later of July 1, 2022, or the date of filing.

Taxpayers should file their Form 637 registration application as soon as possible so that even if the G registration is not granted before July 1, 2022, or even October 31, 2022, it could be retroactively effective to July 1, 2022, the effective date of the Superfund Chemical Taxes.

The comment period for issues related to these excise taxes and areas that require clarification or additional guidance ended in late January. However, the IRS continues to receive comment letters. Therefore, comments should be submitted as soon as possible. To date, the IRS has received seven public comments, and it appears to be carefully considering all the comments, as evidenced by its issuance of Notice 2022-15.

¹¹ American Chemistry Council Comment Letter; American Petroleum Institute Comment Letter.