



MULTISTATE INDIRECT TAX

## Treasury releases guidance on Superfund excise taxes Tax Alert

### Overview

The Internal Revenue Service (“IRS”) and Department of the Treasury (“Treasury”) published a [Notice of Proposed Rulemaking](#) (“NPRM”) on March 29, 2023, relating to the Superfund excise taxes imposed on certain chemicals and certain imported substances (Superfund chemical taxes). The NPRM contains proposed Treasury Regulations that clarify certain Superfund excise tax provisions, as reinstated under the Infrastructure Investment and Jobs Act of 2021. Written or electronic comments and requests for a hearing must be submitted by May 30, 2023.

Additionally, the IRS released [Revenue Procedure 2023-20](#) on March 27, 2023, which modifies the rules for refund claims related to exports of taxable chemicals under Internal Revenue Code (“IRC”) section 4662(e). On the same date, the IRS also released [Notice 2023-28](#), which extends the temporary penalty relief provided in IRS Notice 2022-15 related to deposits for Superfund chemical taxes.

### Notice of proposed rulemaking

#### Superfund excise tax general rules

The NPRM includes general rules surrounding the IRC section 4661 excise tax on taxable chemicals and IRC section 4671 excise tax on taxable substances.

The NPRM clarifies that diluting a chemical mixture with a non-taxable solvent is not a taxable event, provided that the IRC section 4661 tax has already been paid on the underlying taxable chemicals. The NPRM defines the term “chemical mixture” as a “substance composed of two or more physically-combined components that are not chemically bonded...includ[ing] alloys, solutions, suspensions, and colloids.” The preamble to the NPRM also distinguishes a chemical mixture from a chemical compound, defined generally as “any substance composed of identical molecules, each of which consists of two or more atoms of the same or different elements held together by chemical bonds.” Treasury included this definition to address disparities between foreign manufacturers and domestic manufacturers. Therefore, under the NPRM, an importer of a chemical mixture would be responsible for

reporting and remitting the excise tax upon the first sale or use of the chemical mixture by the importer.

The NPRM also clarifies that the extraction of a taxable chemical from an ore is not a taxable event, but the person who does the extraction will be responsible for reporting and remitting the excise tax upon the first use or first sale after extraction as the manufacturer.

### **Superfund excise tax definitions**

The NPRM also provides the following guidance on various defined terms related to IRC sections 4661 and 4662 including the following:

- The definition of a taxable chemical includes all isomeric forms (aside from xylene which has specific definitions).
- A person acting as an agent or customs broker is not an importer for purposes of the tax; rather the importer is the first person in the U.S. to sell or use the taxable chemical after entry of the taxable chemical for consumption, use, or warehousing.
- A manufacturer is a person who produces a taxable chemical from, among others, new or raw material, feedstocks, scrap, salvage, waste, or recycled substances. It does not include a person that dilutes a chemical mixture comprised of one or more tax-paid chemicals with a solvent that is not a taxable chemical.

The NPRM also provides rules on how to identify an importer engaged in drop ship business and defines the terms “sale” and “use.”

### **Additional guidance**

- The NPRM provides additional guidance on the exemptions from the tax imposed by IRC section 4661. It also contains model certificates that a purchaser can provide to a seller during tax-free transactions.
- The NPRM addresses the rules for making a claim for credit or refund, including such claims related to exported chemicals under IRC section 4662(e).
- The NPRM provides rules on the IRC section 4671 tax imposed on taxable substances, including guidance on how to calculate the tax rate for a taxable substance that does not have a listed rate and definitions for newly listed taxable substances.

## **Revenue Procedure 2023-20**

Revenue Procedure 2023-20 modifies Revenue Procedure 2022-26 and provides the following rules.

- For purposes of a claim for refunds related to exports under IRC section 4662(e), the taxable substance will be deemed to be added to the list of taxable substances on the first day of the calendar quarter during which the petition was filed, or the day on which the petition is deemed file.
- IRC section 4662(e) refund petitions submitted by taxpayers that were received by the IRS between July 1, 2022, and December 31, 2022 (and subsequently accepted by the IRS) were deemed to be filed on July 1, 2022. However, for purposes of the time frame for the Secretary to

make a determination, the petition is considered as being filed on the date it was accepted by the IRS.

- Refund petitions received after December 31, 2022 (and subsequently accepted by the IRS) will be considered as filed on the first day of the calendar quarter during which the petition was received. However, for purposes of the time frame for the Secretary to make a determination, the petition will be considered filed on the date it is accepted by the IRS.

## IRS Notice 2023-28

- IRS Notice 2023-28 extends the temporary relief provided in IRS Notice 2022-15 concerning IRC section 6656 penalties—which are imposed for failure to timely deposit Superfund excise tax on a semi-monthly basis.
- The IRS Notice extends the waiver of IRC section 6656 penalties through the fourth quarter of 2023.
- According to the notice, if a taxpayer makes timely deposits of the superfund excise tax and any underpayment is paid in full by the end of the calendar quarter, the IRS will not withdraw a taxpayer’s right to use the deposit safe harbor look-back during the fourth quarter of 2023 and the first and second quarters of 2024.

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