What's News in Tax

Analysis that matters from Washington National Tax

Third Reinstated "Superfund" Tax Adds Complexity

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Effective January 1, 2023, the Inflation Reduction Act[1] modified section 4611 by reinstating the Hazardous Substances Superfund tax ("Petroleum Superfund tax"), which had expired December 31, 1995. Operators of U.S. refineries, importers of petroleum products, and users and exporters of crude oil may be subject to increased environmental excise taxes. The Petroleum Superfund tax is imposed in addition to an existing section 4611 tax rate and two other recently reinstated "Superfund" taxes, presenting additional compliance obligations and other considerations.[2]

Background

Generally, section 4611 of the Code[3] imposes tax on:

- The receipt of crude oil at U.S. refineries;
- The importation of petroleum products (including crude oil) for consumption, use or warehousing ("imported petroleum products"); or

1. To provide for reconciliation pursuant to title II of S. Con. Res. 14, Pub. L. No. 117-169, 136 Stat. 1818 (2022) (commonly called the "Inflation Reduction Act").
2. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021). The Hazardous Substance Superfund was created in the 1980s to fund the cleanup of hazardous waste sites. The Superfund historically was funded by three separate but interrelated excise taxes applicable to (1) crude oil and petroleum products, (2) certain chemicals, and (3) imported hazardous substances. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767.
3. Unless otherwise indicated, section references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

— The use or exportation of domestic crude oil that had not been subject to either of the preceding two taxes.

The Code defines "crude oil" to include crude oil condensates and natural gasoline and defines "petroleum products" to include crude oil.[4] The IRS has not issued regulations to interpret these definitions; however, legislative history indicates that the term petroleum product includes "refined gasoline, refined and residual oil, and any other hydrocarbon product derived from crude oil or natural gasoline which enters the United States in liquid form."[5] Thus, the section 4611 tax applies to a broad range of liquid hydrocarbons.

For crude oil received at a U.S. refinery, the refinery operator is liable for the tax. For imported petroleum products or crude oil used before receipt at a U.S. refinery, the person liable for tax is the importer, user, or exporter, as the case may be. In the case of exported crude, at least one federal appellate court—*Trafigura Trading LLC v. United States*—has ruled that imposing a tax on the exportation of crude oil violates the U.S. Constitution's Export Clause.[6]

Reinstated Petroleum Superfund Rate Is Added to Current Oil Spill Tax Rate

Section 4611 consists of two separate taxes: the reinstated Petroleum Superfund tax and the longstanding Oil Spill Liability Trust Fund tax (the "Oil Spill tax"). The Petroleum Superfund tax rate is 16.4 cents per barrel and will be indexed to inflation. The Oil Spill tax rate, which has remained in effect almost continuously since the 1980s, is 9 cents per barrel. The two taxes apply to the same products, the same transactions, follow the same procedures, and are reported on the same tax forms. Therefore, taxpayers previously paying 9 cents per barrel on domestic crude and imported petroleum products will pay in aggregate 25.4 cents per barrel beginning on January 1, 2023. In addition, there may be overlap for some taxpayers between the Petroleum Superfund tax and two other recently reinstated Superfund taxes.

Two Other "Superfund" Taxes

Two additional Superfund excise taxes were reinstated as of July 1, 2022. These taxes are imposed on taxable chemicals and taxable substances by sections 4661 and 4671, respectively. Generally, section 4661 imposes tax on a list of 42 taxable chemicals; the rate of tax varies from $0.44 to $9.74 per ton ("Chemicals tax"). Section 4671 imposes tax on specified chemical derivatives of the 42 taxable chemicals, called "taxable substances"; the rate of tax varies depending on which precursor chemicals are at issue ("Substances tax"). There are currently 151 taxable substances; however, the IRS is authorized to add to the list of taxable substances in certain cases. Export credits are available in certain cases for exported chemicals and substances.

A taxable chemical or a taxable substance may also be an imported petroleum product, as defined above. For example, toluene is both a taxable chemical and a liquid hydrocarbon derived from crude oil; thus, imported toluene would be subject to both the Chemicals tax and the aggregated 25.4 cents per

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[4] Section 4612(a)(1), (3).
[5] H.R. Rep. No. 96-1016, vol. II, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151, 6154.
[6] Trafigura Trading LLC v. United States, 29 F.4th 286 (5th Cir. 2022).

barrel taxes imposed by section 4611. On the other hand, the treatment of an imported petroleum product that is also a taxable substance is less certain because the section 4611 tax supersedes the Substances tax in certain cases.[7]

KPMG Observations

The IRS has released updated Form 6627, *Environmental Taxes*, to reflect the 16.4 cents per barrel Petroleum Superfund tax rate. Taxpayers subject to these taxes will attach Form 6627 to Form 720, *Quarterly Federal Excise Tax Return*. The first deposit of Petroleum Superfund tax is due January 27, 2023. The first Form 720 return of tax reporting Petroleum Superfund tax is due April 30, 2023.

Because the term "imported petroleum product" is broad, a single product could be subject to the Superfund Petroleum tax, the Oil Spill tax, and the Chemicals tax. In contrast, the section 4611 taxes supersede the Substances tax in some cases. Careful consideration should be given to the application of these various taxes.

With respect to exports, although the government declined to appeal the 5th Circuit's holding in *Trafigura*, the Department of Justice has publicly stated an intention to continue litigating the constitutionality of the section 4611 tax to exported crude in other circuits, resulting in inconsistency.

Export credits may be available for exported chemicals and substances. In the alternative, duty drawbacks may be available for exported petroleum products. Companies may want to review products and current practices to identify allowable opportunities.

Finally, companies may want to initiate conversations with their suppliers and customers to understand whether an amount equal to the various environmental excise taxes is being passed on through the supply chain via invoices or increased pricing.

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[7] Section 4671(c).

