

Superfund Tax on Chemicals: IRS Guidance, Including Proposed Regulations

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Agenda

- Basic Overview
- Previous IRS Guidance
- Taxable Chemicals Rules
- Taxable Substances Rules
- Items Needing Guidance and Comments Requested

Basic Overview

- The IIJA reinstated and modified the Superfund Tax on Chemicals
- Effective July 1, 2022 through 2031
- Doubled tax rates as compared to previous version of the tax

Taxable Chemicals	Taxable Substances
<p>26 USC § 4661 - Imposition of Tax</p> <p>26 USC § 4662 - Definitions and Special Rules</p> <ul style="list-style-type: none">➤ Static list of 42 chemicals in statute➤ Applies to Manufacturers, Producers, or Importers at sale or use.	<p>26 USC § 4671 - Imposition of Tax</p> <p>26 USC § 4672 - Definitions and Special Rules</p> <ul style="list-style-type: none">➤ List of 50 taxable substances in statute➤ Taxpayers can petition to add or remove substances➤ Applies to Importers at sale or use; Exporters of taxable substances receive a credit for tax paid on taxable chemicals.

Basic Overview

- For policy reasons, several chemicals are exempt from taxation, notwithstanding the fact they are taxable chemicals and appear on the list of 42
 - These exemptions are generally based on use
 - For example:
 - Methane or butane used as fuel
 - Nitric acid, sulfuric acid, or ammonia, or methane used to produce ammonia used for production of fertilizer
 - Acetylene, benzene, butylene, butdiene, ethylene, naphthalene, propylene, toluene, and xylene used in the production of a motor fuel
- Other notable statutory rules:
 - No tax if chemical is exported
 - Fractional tons are taxed
- Refunds or credits

Taxable Substance

- Taxable Substance is a substance with respect to which Taxable Chemicals constitute more than 20% of the weight or value.
- Notice 2021-66:
 - 50 Taxable Substances listed in section 4672(a)(3)
 - Notice 2021-66 provides list of an additional 101 Taxable Substances
- IR 2022-132:
 - Tax rate on imported taxable substance is tax that would have been imposed under section 4661 if the Taxable Chemical in the Taxable Substance has been sold in the US.
 - Tax rates provided for 121 of the 151 Taxable Substances.
 - If unknown, and no tax rate provided, tax rate equals 10% of appraised value of Taxable Substance

Petitioning to Add or Remove Taxable Substance

- Rev. Proc. 2022-26 provides procedures for importers, exporters, and interested parties to petition under section 4672(a)(2) for addition/removal from Taxable Substances list
- Rev. Proc. 2023-20 modified effective dates for purposes of refunds for exporters
 - If new substance added to list and that substance is exported, the substance is deemed added to the list (i) first day of quarter petition filed (interested party) or (ii) day petition filed (importer or exporter)
 - Petitions filed by importer after 2022 deemed filed first day of quarter petition received
- Petitions Pending: Cellulose Acetate and Cellulose Diacetate; 4,4'-Isopropylidenediphenol-Epichlorohydrin Copolymer; Polyoxymethylene; Polyphenylene sulfide

Payment of Superfund Tax

- Semi-Monthly Deposits due within 14 days after close of each period:
 - First 15 days of each calendar month
 - Remainder of each calendar month
- Notice 2022-15 provides relief from the requirement to make semi-monthly deposits of the Superfund Tax for Q3 and Q4 2022
 - Safe harbor to determine the amount of the semi-monthly deposits for Q1 and Q2 2023
 - Relief from section 6656 failure to deposit penalties for 2022 and Q1 2023
- Notice 2023-18 extends relief provided in Notice 2022-15 for:
 - Safe harbor rules available through Q2 2024
 - Relief from failure to deposit penalties extended to Q2 to Q4 2023

Proposed Regulations

- Issued on March 29, 2023
- Comments due by May 30, 2023
 - Definitional terms
 - Molecular formulas
 - Exceptions and Special Rules
 - Credits and Refunds

Name	Molecular formula or chemical symbol
Acetylene	C_2H_2
Benzene	C_6H_6
Butane	C_4H_{10}
Butylene	C_4H_8
Butadiene	C_4H_6
Ethylene	C_2H_4
Methane	CH_4
Naphthalene	$C_{10}H_8$
Propylene	C_3H_6
Toluene	C_7H_8
Xylene	C_8H_{10}
Ammonia	NH_3
Antimony	Sb
Antimony trioxide	SbO_3
Arsenic	As

Definitions: Taxable Chemicals

Who is Taxpayer?

- Manufacturer (also Producer): person that produces a taxable chemical from 1) new or raw material, feedstocks, or other substances, or from scrap, salvage, waste, or recycled substances; 2) the mining process, or extracts, isolates, separates, or otherwise removes a taxable chemical from an ore or from another substance; 3) by processing or manipulating a substance, such as through the oxidation process.
 - Not: contract manufacturer
- Importer: person entering the taxable chemical for consumption, use, or warehousing.
 - Not: Agent or Customs Broker
 - Includes: Drop Ship Business in US

Definitions: Taxable Chemicals

Attachment of Tax

The tax attaches when the manufacturer, producer, or importer of a taxable chemical first sells or uses the taxable chemical.

Sale when:

- Transfer of title or substantial incidents of ownership (whether delivery to, or payment by, the purchaser has been made) in a taxable chemical for a consideration

Used when:

- Consumed
- Functions as a catalyst
- Chemical composition changes
- Used in manufacture or production of a chemical mixture or other substance
- Put into service in a trade or business to produce income.

Definitions: Taxable Chemicals

Attachment of Tax – Special Rules

- No use when:
 - Loss of destruction through spillage, fire, natural degradation
 - Chemical mixture containing previously “tax-paid” chemical when chemical mixture diluted to change concentration
- Special rules
 - Foreign manufacturer sales to importer are not taxed, rather tax is triggered when importer sells or uses
 - Including imported chemical mixture containing taxable chemical is imported and sold
 - No authority to tax import of taxable compounds

Taxable Chemicals produced from from ores

Manufacturer is extractor. Tax attaches to first sale or use after extraction of taxable chemical from ore. Includes nickel, cobalt, chromium, phosphorus.

Taxable Chemical that is an ore.

Attaches to first sale or use of chromite after mining. Includes chromite.

Taxable Chemicals: Calculation of the Amount of Tax

$$\text{Tax} = \text{Tons} * \text{Tax Rate}$$

Tax imposed on weight of each taxable chemical
in the chemical mixture

Volumetric conversion required

Ex. Company X, an importer, enters 1.2 tons of a chemical mixture comprised of 98.3% sulfuric acid and 1.7% water for consumption, use, or warehousing. Company X sells the chemical mixture to Company Y, a US corporation. X is liable for the section 4661 tax. The section 4661 tax is calculated based on the weight of the sulfuric acid in the chemical mixture ($98.3\% \times 1.2 \text{ tons} = 1.18 \text{ tons}$), and then multiplying 1.18 tons by \$0.52 (the rate of tax per ton of sulfuric acid per statute). The amount of section 4661 tax is \$0.61.

Exceptions and Special Rules

- 1. Methane or butane used as a fuel**
- 2. Substances used in the production of fertilizer**
3. Substances used in the production of animal feed
4. Sulfuric acid produced as a byproduct of air pollution control
5. Substances derived from coal
- 6. Substances used in the production of motor fuel**
- 7. Hydrocarbon streams containing mixtures of organic taxable chemicals**

Exception: Qualified Fuel Use

- Methane or butane is a taxable chemical only if it is **used other than as a fuel**, or other than in the manufacture or production of any motor fuel, diesel fuel, aviation fuel, or jet fuel.
- Other than a fuel = used other than in the production of energy

Company X, a domestic corporation, produces methane in the US and sells it to Company Y, a domestic corporation. Company Y uses the methane in the production of antifreeze. The methane is not treated as a taxable chemical until Company Y uses the methane in the production of antifreeze. Company Y is treated as the manufacturer of the methane and the section 4661 tax attaches at the time Company Y uses the methane in the production of antifreeze. Company Y is liable for the section 4661 tax.

Exception: Qualified Fertilizer Use

- No section 4661 tax is imposed on nitric acid, sulfuric acid, ammonia, or methane used to produce ammonia that is a qualified fertilizer substance
- If no tax imposed on the sale or use of fertilizer chemicals because of the exception, the first person that sells or uses the chemicals other than as a qualified fertilizer substance is treated as the manufacturer of such chemical

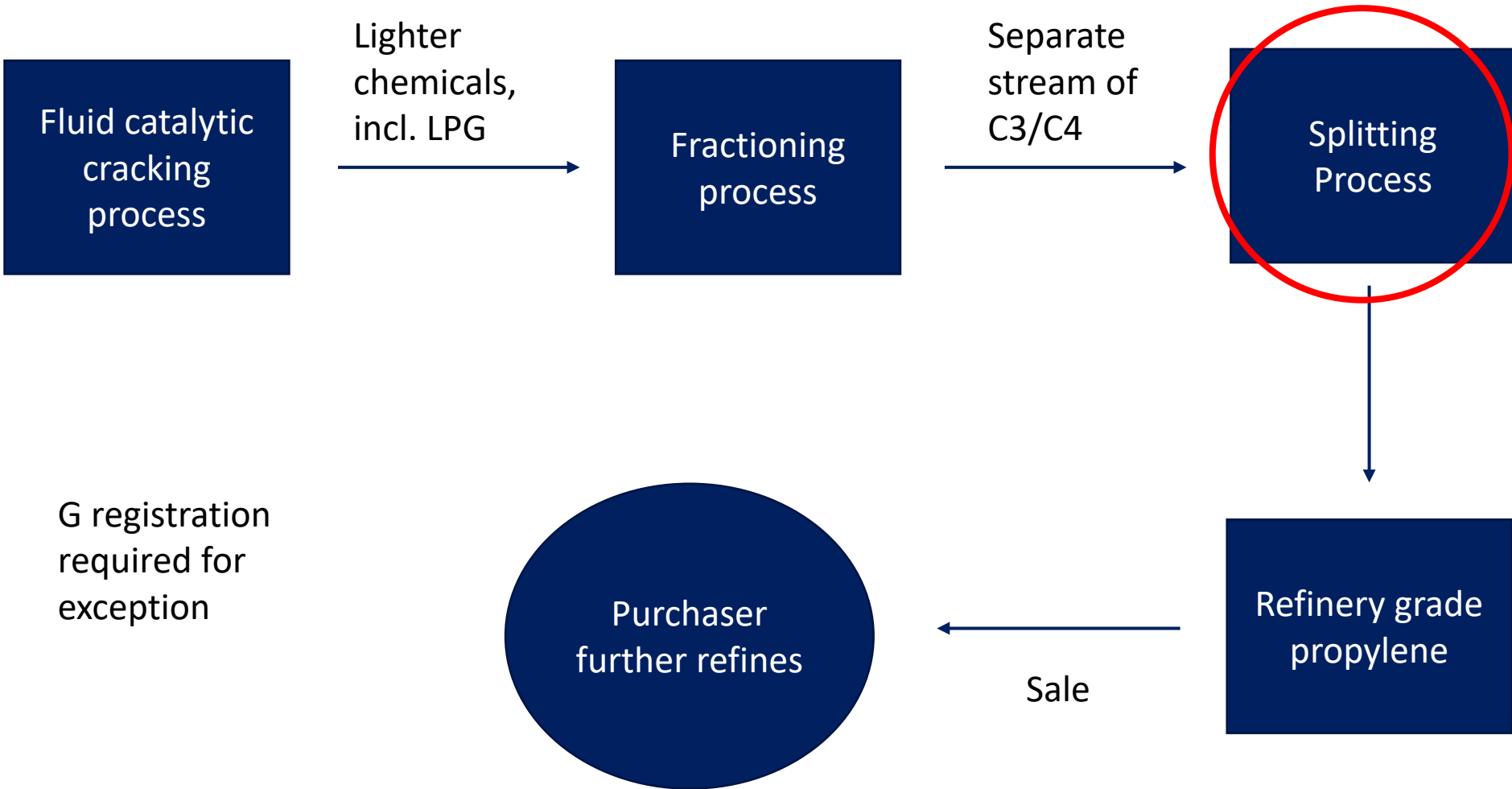
Exception: Use as a Motor Fuel

- No section 4661 tax is imposed in the case of **acetylene, benzene, butylene, butadiene, ethylene, naphthalene, propylene, toluene, or xylene** (“fuel chemicals”) is a qualified fuel substance.
- Qualified Fuel Substance:
 - used by the manufacturer, producer, or importer thereof in a qualified fuel use
 - sold for use by any purchaser in a qualified fuel use
 - sold for resale by any purchaser for use, or resale for ultimate use, in a qualified fuel use.
- Qualified Fuel Use: used in the manufacture or production of any motor fuel, diesel fuel, aviation fuel, or jet fuel, or any use of a fuel chemical as such a fuel.
- First person to use other than as a qualified fuel substance is treated as manufacturer of chemical
 - Tax is calculated based on the **weight of the fuel chemical** sold or used to produce the derivative substance

Exception: Hydrocarbon streams

- No section 4661 tax is imposed on any organic taxable chemical while such chemical is part of an **intermediate hydrocarbon stream** containing one or more organic taxable chemicals.
 - Acetylene, benzene, butylene, butadiene, ethylene, naphthalene, propylene, toluene, and xylene
- Isolation:
 - One-Step: If any organic taxable chemical on which no section 4661 tax was imposed is isolated from an intermediate hydrocarbon stream, such isolation is **treated as a use** by the person causing the isolation, and such person is **treated as the manufacturer** of the organic taxable chemical isolated.
 - Multi-Step: The first process that a person uses to isolate the organic taxable chemical from the intermediate hydrocarbon stream is treated as a use by the person causing the isolation, and such person is treated as the manufacturer of the organic taxable chemical so isolated.

Exception: Hydrocarbon streams



Form 637: Intermediate Hydrocarbon Stream and Inventory Exchange Registration

- IRS Form 637 is used to apply for excise tax registrations
- Registration is needed for certain exemptions
 - Inventory exchanges of taxable chemicals under section 4662(c)(2)
 - Selling or buying intermediate hydrocarbon streams under section 4662(b)(10)
- Ease of registration process is affected by clarity in application materials

Tax-Free Sales

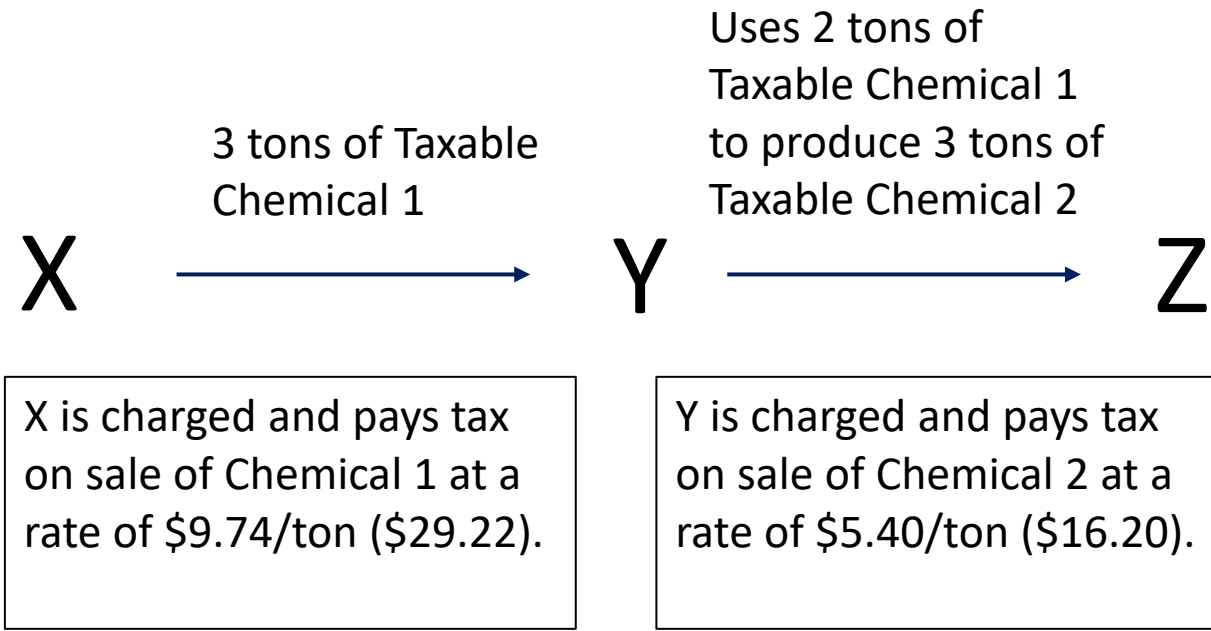
Requirements for Tax-Free Sale:

- Must obtain an unexpired exemption certificate from the purchaser
 - Model exemption certificate provided
- No reason to believe that any information in the certificate regarding the use of the taxable chemical is false.
 - If purchaser subsequently uses the taxable chemical in an exempt manner, the purchaser may file a claim for credit or refund

Credits and Refunds

- Any section 4661 tax paid with respect to a tax-paid chemical that is subsequently used by any person (subsequent manufacturer) in the manufacture or production of any other substance that is a taxable chemical is allowed a credit or refund to the subsequent manufacturer
- Must allocate the overpayment of the section 4661 tax paid among all subsequent taxable chemicals and other substances manufactured or produced with the tax-paid chemical and apply the allocation to the claim for credit or refund.
 1. Tax was paid
 2. After tax paid, subsequent manufacturer used the tax-paid chemical to manufacture subsequent taxable chemical(s) or substance(s)
 3. Subsequent manufacturer sold or used the subsequent taxable chemical for which a credit or refund sought and section 4661 tax imposed
 4. Timely refund claimed
 5. Certificate

Example (Assumes US parties)



Refund: Total of \$29.22 Tax Paid on Chemical 1
2/3 to Chemical 1 = \$19.48 → Enough to cover all \$16.20 of tax paid on Chemical 2
1/3 to other substance = \$9.74

Refunds for Exempt Uses

Use as a Fuel

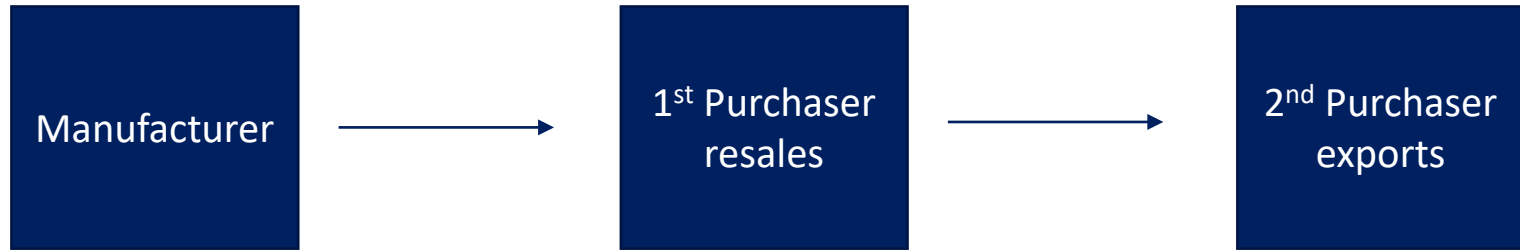
Any tax paid that exceeds amount of tax determined regarding the exception for chemicals used as a fuel allowed as credit or overpayment *to person using fuel chemical as a qualified fuel substance.*

Use as a Fertilizer

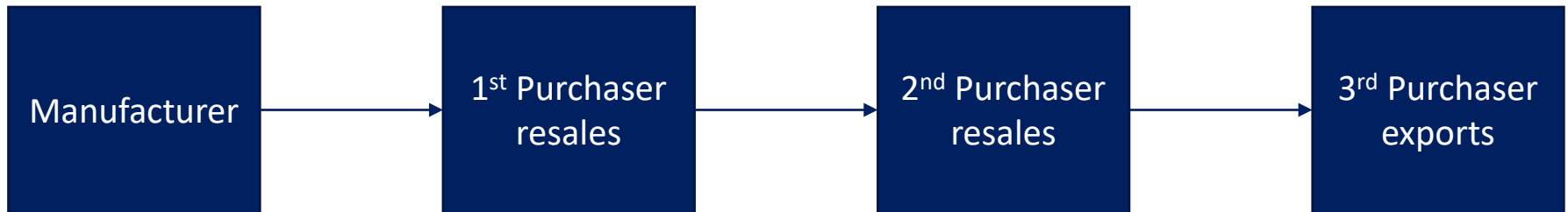
Any tax paid that exceeds amount of tax determined regarding the exception for chemicals used as a fertilizer allowed as credit or overpayment *to person using fuel chemical as a qualified fertilizer substance.*

Exports

- Tax-free sale if: person that purchases the taxable chemical from the manufacturer (1st purchaser) intends to export the taxable chemical or resell it to a 2nd purchaser that intends to export the taxable chemical.

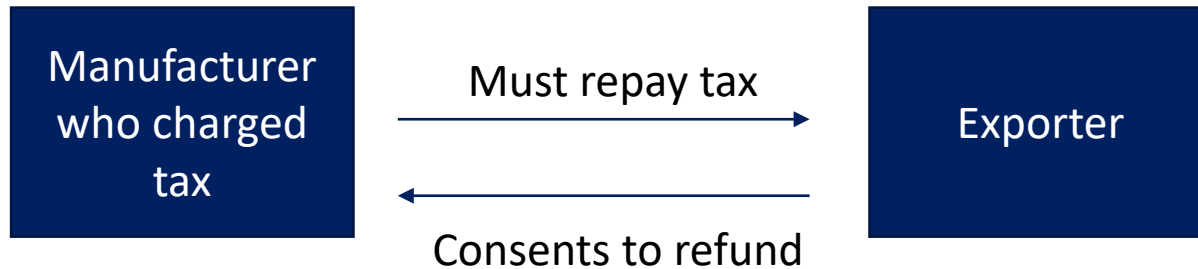


- Taxable sale if: person that purchases the taxable chemical from the manufacturer (1st purchaser) intends to resell it to a 2nd purchaser that intends to resell to 3rd purchaser.



Exports: Credit or Refund

- Credit or refund allowed if:
 - Chemical exported, or
 - Chemical used as material in the manufacture or production of a substance that was exported by any person and, at the time of export, was a taxable substance



Taxable Substances

- The importer of a taxable substance is liable for the section 4671 tax.
- Tax attaches at time importer first sells or uses the taxable substance
- Calculation of tax = amount of section 4661 tax that would have been imposed on the taxable chemicals used as materials in the manufacture or production of the taxable substance if the taxable chemicals had been sold in the United States for use in the manufacture or production of the taxable substance
 - Default: 10% of the appraised value of the taxable substance at the time the substance was entered into the United States for consumption, use, or warehousing.

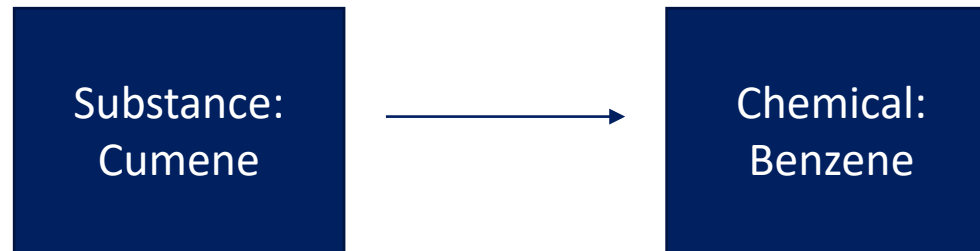
Example: An importer sells a taxable substance listed in section 4672(a)(3). The taxable chemical, acetylene, constitutes, by weight, 19% of the materials used to produce the taxable substance. Assume weight is 5 tons.

Tax rate of \$9.74/ton of acetylene.

$5 \text{ tons} * 19\% = 0.95 \text{ tons} * \9.74
 $= \$9.25 \text{ tax}$

Tax-Free Sales

- No tax imposed under section 4671 if taxable substance used or sold for use for the below purposes, if the taxable chemicals used as materials in manufacture of the substance would have been exempt
 - Fuel Use
 - Fertilizer Use
 - Animal Feed Use



Used as a Fuel → Exempt

Credits and Refunds

- If any section 4671 tax was paid with respect to a taxable substance used or sold for an exempt purpose, the portion of the tax *attributable to any taxable chemical* used as material in the manufacture or production of such substance (that would have been exempt if the taxable chemical had been sold in the US) is allowed as a credit or refund *to the person using the substance*.
 1. Tax paid
 2. Person used taxable substance in exempt use
 3. Timely claim for refund
 4. Certificate of tax paid

Specific Comments Sought On:

- Appropriate methods to measure tonnage
- Air Pollution Control Exception
- Sales Between Certain Registrants
- Use of Harmonized Tariff Schedule (HTS) and Chemical Abstract Service (CAS) Numbers

Comments due by May 30, 2023

Questions?



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