



Episode Title: Misunderstood: The Excise Tax No One Likes or Understands -- A Conversation with Douglas Charnas and Richard E. Engler, Ph.D.

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Lynn L. Bergeson (LLB): Hello, and welcome to All Things Chemical, a podcast produced by Bergeson & Campbell (B&C[®]), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I sat down with Doug Charnas, a nationally recognized corporate and tax attorney and Partner at McGlinchey Stafford in its Washington, D.C., offices, and our own Dr. Rich Engler, Director of Chemistry at B&C and at our consulting affiliate, The Acta Group. We discuss the recently reinstated Superfund tax, which entities the tax applies to, what exactly is a taxable chemical and how to distinguish between taxable chemicals and taxable substances, and exactly why just about everyone is really grumpy about this newly reinstated tax. Now here's my conversation with Doug Charnas and Rich Engler.

Good morning, gentlemen. I have been so looking forward to this conversation about taxes and chemistry, believe it or not. Doug, welcome to the studio. Rich, it's always a pleasure to have you back.

Richard E. Engler (REE): Glad to be back.

LLB: Let's jump right in, as the expression goes. Doug, in super general terms, can you provide maybe some historic background and overview of the excise tax that was resumed and called back into action for the first time in over 30 years, back on July 1, 2022?

Douglas W. Charnas (DWC): Yes, Lynn, I'd be delighted to. Just to provide a little bit of history, I remember well, shortly after finishing the bar, the story on Love Canal broke in August 1978. It was a real shocking story and I think a major wakeup call for everybody about where we were in the country with respect to environmental contamination. And that, in part with other events, led to the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act, which we all referred to as CERCLA in December 1980.

And the purpose of CERCLA was to fund cleanup when the responsible party for the contamination was no longer in existence or was unable to pay. And as a part of CERCLA, there was the Hazardous Substance Superfund (Trust Fund) and this was the mechanism by which funding would be raised to do the cleanup. It enacted the original Superfund tax on taxable chemicals, crude oil, and petroleum products, and that was effective for sales or uses after March 31, 1981.

Then later, the Superfund Amendments and Reauthorization Act of 1986 added the tax on imported chemicals, and that was effective for sales and uses after January 1, 1989. So as of 1989, we had the Superfund tax being imposed on chemicals, domestic chemicals and imported chemicals, and then chemical substances that were imported, as well as petroleum products and crude oil. But these taxes expired at the end of 1995, and we had no Superfund taxes for many, many years, as you had noted. But then, tax on chemicals and imported substances was reinstated by the Infrastructure Investment and Jobs Act (IIJA) of late 2021, and these taxes are scheduled to expire at the end of 2031. I'm always a little nervous when taxes are scheduled to expire because sometimes they have a habit of not expiring. But that's a whole other issue.

LLB: Exactly.

DWC: And then shortly thereafter, the tax on crude oil and petroleum products was reinstated by the Inflation Reduction Act of 2022. Now, for crude oil and petroleum products, that tax is 16.4 cents per barrel, and it is adjusted for inflation. That kicks in January 1, 2023, so we have a little bit of time to prepare for that tax. The tax on chemicals is set forth in the Internal Revenue Code. The code identifies 42 chemicals, and the code provides the rates for those chemicals. And the rates are -- the lowest rate is \$0.44 per ton and the highest rate is \$9.74 per ton.

The tax on the imported taxable substances is a little bit different. The Internal Revenue Code sets forth 50 taxable substances. It establishes that 50 of these are going to be subject to tax, but it does not provide the tax rate. And then it provides that the Secretary of Treasury, in consultation with [the U.S. Environmental Protection Agency] EPA and [U.S. Customs and Border Protection] Customs, can identify additional substances that are subject to tax. And the IRS has identified an additional 151 taxable substances but has provided rates for 121 taxable substances. And those rates range from \$1.49 per ton to the highest rate of \$23.65 per ton. So that's sort of a background and where we are today.

LLB: That was a great overview, Doug, and just an awful lot to unpack because there are actually two taxes, one on chemicals and one on oil. We're going to talk a little bit about both. But for chemical stakeholders that were either unaware of the original Superfund tax that expired 17 years ago, the tax that the IIJA, the Infrastructure Investment and Jobs Act of 2021, resurrected seemingly came out of nowhere. I really think based on my conversations with clients and interested others, it was like, "Whoa, where did this thing come from?" It just wasn't top of mind.

Did the IRS engage in any type of outreach to familiarize stakeholders with the tax? Because based on our personal observation here at B&C, and I suspect yours at McGlinchey, the answer is no or definitely not enough.

DWC: Yes, it's always difficult for the Service to do much of anything before the law is enacted. It certainly would have been helpful for the provision once it got slipped -- I don't want to say

slipped, but a lot of times these things are just slipped into a bill. There's just not a lot of exposure before that happens, and even after that happens and before the law is enacted.

From my -- I saw nothing from the Internal Revenue Service before the law was enacted about this, but that's not uncommon because legislation changes so quickly that we don't want to get out front and say something and then have it not enacted. They did try to get some information out after it was enacted, but their method of getting it out doesn't necessarily reach everyone.

The law was enacted in November 2021, November 15. And by December 14, the IRS did release notice 2021-16. And this was the notice that said here are an additional 101 taxable substances, so you had 50 in the code, and here's an additional 101 taxable substances. Now, it was relatively easy for the Service to do that, I think, because they could reach back to what they had done with the prior Superfund tax and use that. But as we'll talk about a little bit later, the new Superfund tax is broader than the old one. There are new substances that are out there that weren't before and subject to tax. And that's possibly why we're getting a delay on some additional information from the Service.

So it came out with that, and then there was a bit of a pause and it didn't come out with anything more until April 15, 2022. And this was a notice that provided the relief on deposits. And we'll talk a little bit about deposits later. And then in June, it released a draft of Form 6627, and its instructions on that form that is used to pay the tax. But, you know, nobody really pays attention when the IRS releases a draft form; it rarely gets much publicity. So it comes out, tax practitioners know about it, but the general public typically doesn't. Then on June 24, the IRS issued 121 taxable substances rates. That was important. We needed those rates. We still need more rates, but that was helpful. And then the same day, it also announced that it had posted Q&As to its website, so those were somewhat helpful.

And then on June 28, it issued Revenue Procedure 2022-26. And that's the procedure that you follow to add or remove chemicals from the taxable substance list. We'll touch on that a little bit later. But even though the Service took these steps, it didn't -- in putting this information out there -- it didn't affirmatively, to my knowledge, contact any representatives of the chemical industry to inform them that this tax had been enacted and that there's all this information they're trying to put out to help. So it was hard for taxpayers to really know what's going on.

Now, the IRS does have a service that anyone can sign up for that sends out e-mails daily, updating taxpayers on everything that the IRS is doing. And I'm on that service, and I look at it. Much of what comes out doesn't affect me, but at least I have the ability to see it. I think it's a problem, in that there's not a good mechanism -- other than working with trade associations, and we can probably talk about that as well -- to get this information out there to the public.

LLB: Yes, I'm hearing a lot of after-the-fact implementation, which I think itself has been of questionable utility to some extent. As you know, the FAQ came out, and some other documents, but there, as we will discuss, continues to be a great deal of confusion on key aspects of the tax.

But Rich, you field an awful lot of questions because people, surprisingly, think as a Ph.D. chemist, you are also a tax expert. So what's your sense in response to that question?

REE: Well, early this year, questions started coming in about, oh, are my products taxable? And right then, there's immediately the confusion between what's a taxable chemical and what's a taxable substance, and how are those different. And in the TSCA [Toxic Substances Control Act] space, in the space where I normally live, we talk about chemical substances. We use those words together.

LLB: It would be a very important term of art.

REE: Right. And it's specifically defined in the statute. And so, this was a challenge to parse the difference between a taxable chemical and a taxable substance. But in the months since, and in what I've read, and speaking with Doug, I think of taxable chemicals as sort of the fundamental chemical building blocks. These are the raw materials that are generally the first step in making a more complex chemical product. And then the taxable substances are the things that are made from taxable chemicals. So just as an example, propylene is a taxable chemical, and polypropylene is a taxable substance. Helping clients understand that distinction, and the 20% rule -- which we'll talk about in a little bit -- really helped clarify -- when the tax applies. So that's another key question that -- Doug, I hope you'll answer, is -- were really the burning questions that we were getting from clients.

LLB: Well, my sense is -- and again, this is based on my probably several steps removed, and I'm talking to the two experts here -- is that the existence of the tax, precisely how it operates, and this semimonthly payment schedule continue to be pretty extensively misunderstood and not surprisingly, unwelcome. Taxes always are.

A key area of confusion in my mind relates to precisely what you just noted, Rich, and that is the difference between a taxable chemical and a taxable substance, terms that, because of the nature of our work in industrial and agrochemical substances, there is an opportunity for just wild confusion and lack of clarity. And that -- who pays in the supply chain or complex industrial supply chain? Who pays what and when?

First, Doug, can you help us out with addressing some of these ambiguities? And then, Rich, I'll ask you to comment on what Doug offers.

DWC: I think Rich's point about the taxable chemicals being the building blocks is really important. On the domestic side, we have manufacturers and producers of chemicals. And the way the tax is imposed on building block chemicals, it's imposed when they are used or sold, or if they are imported. And I think the idea is that when you tax those at the time that they are sold or used, then you've already imposed the tax on anything that is the result of using those chemicals.

So if we've got a chemical, and it's used to produce a -- what would be a taxable substance if it were imported -- that chemical tax has already been paid, with respect to things that are being imported into the country that are not the building blocks, but something that is built *from* the building blocks. If we don't tax those, then we're putting the domestic producers at a competitive disadvantage, so what the law is trying to do is it's trying to look at those items that are coming into the country and say, "If this item had been made here, how much tax would have been paid on those building block chemicals that were used to make that taxable substance?" And that's what we're trying to capture, so that there isn't an advantage to selling these taxable substances if they're imported rather than if they're domestically produced.

LLB: That's a very helpful construct for listeners to keep in mind. The IRS is trying to protect the home team and get after imports of products that contain the building blocks but are not themselves imported as such. Rich, what's your take?

REE: It's not just the competitive disadvantage to the domestic producer. It's also we need the revenue to do the cleanup, so there's both the need for the tax revenue, and there's the fairness issue. And that fairness issue, I think, is going to -- I mean, we'll talk more about adding new taxable substances. I think that fairness issue is going to come up as the list of taxable substances expands.

LLB: Yes. Another issue that I think you gentlemen have both alluded to is how this so-called 20% provision is applied. To the extent I've been involved in some of the internal discussions for clients and others, my understanding is that if a product contains 20% by weight of a taxable chemical, does it necessarily mean that it is a taxable substance? I don't know, Doug or Rich -- who wants to tackle that question first?

DWC: The 20% rule is used to determine what constitutes a taxable substance. Now, if the IRS has identified an item as a taxable substance, then there's really no need for the taxpayer to go beyond that. It knows that the item is the taxable substance because it's been identified by the IRS. We'll talk a little bit later about expanding the taxable substances, because right now we've got 151 identified, but it's likely it's going to expand considerably. So if you are trying to identify a taxable substance or a chemical product as constituting a taxable substance, then you look to this 20% rule, and that's what determines whether that item is a taxable substance.

And then once that's determined, then the rate -- and there's another methodology for determining the rate -- but the rate applies to the entire amount, entire volume of that chemical. And that's where a lot of confusion comes about is whether the 20% rate somehow affects how much of the tonnage of a taxable substance is taxed. Once it's determined that it's a taxable substance, the entire tonnage is taxed at whatever that applicable rate is.

REE: Well, Doug, correct me if I'm wrong, but to be a taxable substance, the substance has to be on the list of taxable substances, so that if something is 20% or more by weight of a taxable chemical but is not currently listed as a taxable substance, it's not currently taxable.

DWC: That is correct. That is correct.

REE: So the taxable substance list is the list of substances that are taxable. Looking through -- as a chemist, looking through this list -- there are some things that are fairly straightforward. I can look at it and say, "Propanol, okay" -- well, propanol is not a good example because you've got a couple of isomers there. But tetrabromobisphenol A, that is a Class 1 substance. I know exactly what it is. But many of these taxable substances are categorical substances, and in a TSCA world, we look to [Chemical Abstracts Service] CAS [Registry] Numbers (CAS RN[®]) to define -- either to identify -- a chemical substance and what the obligations are related to that substance.

But that's not available from the IRS, so there's definitely a need for some interpretation whether a particular product is or is not a taxable substance. Is it in one of the categories? Is it explicitly listed? Is it listed under one name but not another? You've got to make sure you're checking the multiple ways it might be listed. So even with the definitiveness of the taxable substance list, there's still some ambiguity that, as a TSCA practitioner, I would

appreciate -- or as a chemist, really, I would appreciate -- if the IRS would provide some clarity. But until then, we'll do our best to interpret what's written.

DWC: Right. And right now -- we can talk a little bit later about the rates -- but the IRS has identified 151 taxable substances, but it's provided the rates for 121. So we're sitting with 30 taxable substances, and we don't know what the rate is. And that makes it very difficult for the chemical companies that are out there.

I think -- Rich, one of the things I wanted to talk with you about -- and we've talked about this before -- with respect to the 20%, it's true that unless the IRS identifies a chemical product as a taxable substance on its list, it's not a taxable substance. So the bluish reaction to that is, well, if I'm importing something that is not on the list and I sell that chemical product or I use that chemical product, I am not subject to the Superfund tax on taxable chemicals or taxable substances, and that would be a reasonable reaction. But I don't think that's exactly what the IRS is going to do, and we get into this very difficult question of whether a chemical product that's being imported is a substance and therefore not subject to any tax.

And I'm not using the words well, Rich, and you can correct me on this. Or it's, for lack of a better word, a mixture. And in my simple way of thinking of chemistry, if you've got something that has gone through a type of chemical reaction so that there's a change in the original base chemicals that were brought together, then maybe that's a substance. But if you mix two things together that can be easily separated, then maybe that's not a taxable substance. And the concern -- and the IRS has expressed this to us in meetings -- is that if something is simply a mixture of taxable chemicals that can be separated relatively easily, then maybe that mixture is subject to tax. And it's subject to tax on the constituent taxable chemicals that are in that mixture when that mixture is sold or used. Can you help me with a little bit of this distinction between what might be a substance and what might be a mixture?

REE: Yes, I think your framing there is a fairly good one. So in a TSCA context, when you put two chemicals together and a reaction occurs, then it's generally viewed that what results from that reaction is a different identity than what you started with. So A plus B goes to C; that C is a different chemical than A or B. If a reaction doesn't occur, then it's generally viewed as a mixture. So you put A and B together and no reaction occurs, you end up with a mixture of A and B. The construct about easily separable is -- I think that'll be a challenge. I think that the stakeholder community really needs to work with the IRS about what that means, because there are some chemical reactions that are easily reversible, and there are some forms of mixing that are not.

In what instances is the mixture of multiple -- if your product is a mixture of multiple CAS RNs, is it still a taxable substance for the purpose of the Superfund tax? And in what instance might there be instances where you have a reaction product that is easily reversible but is not on the taxable chemical -- or taxable substance list -- might that still be subject to the taxable chemical tax, even before that product is listed specifically on the taxable substance list? These are some of the complicating issues that I don't know the answer to, and I don't know that IRS has really wrestled to the ground.

LLB: And you're a Ph.D. chemist, Rich. What shocks me, gentlemen, is not so much that these questions have arisen because --

REE: -- questions arise.

LLB: They do. And when you put A plus B, you might get C, or you might get A plus A, and B and B, and they never co-mingle and don't change their inherent chemical properties. And I can see the intellectual purity of the argument that, "Well, those are taxable chemicals, not substances." But that being said, what shocks me is the fact that we are now approaching November 2022, and we're having this discussion. And to my knowledge, Doug, there isn't a bank of Ph.D. chemists that are informing the judgment of the IRS in parsing these issues and preparing helpful FAQs for the regulated community. Or maybe you're holding out on us here and there is.

REE: Or teeing up the questions, like, help us out. We have this complicated situation. How should we think about this?

DWC: I don't know what the current staffing level is at the Service. I know historically they've had chemical engineers. I'm sure they still have some. But whether there are enough to dig in on these issues, I just don't know the answer.

LLB: Well, we do. That answer is a big fat no!

DWC: Right. Right. Sometimes what the Service does to help taxpayers when there's a much gray area -- let me put it that way -- is it will identify certain things and categorize them one way or the other, most common things. So if there are some common mixtures -- for lack of a better term -- that are imported, it may identify those and say, "These things are mixtures, and we're going to tax the constituent chemical components." I don't know, Rich, whether there's enough commonality of what gets imported that that would be of any help, but that may be one way to approach it. I suspect you'll never be able to identify everything. And all you can do is put down some rules for how these things get determined.

REE: Yes. On the taxable substance -- among the things on the taxable substance list -- are a lot of polymer resins, PVC resins, polyethylene resin. It's clear that -- I mean, the way I would interpret that is if you are importing that polymer resin and it's got some colorants in it, maybe some plasticizers and antioxidants, and whatever those may be, the polymer part of that -- the IRS views that as the inherent polymer, as the substance. And so just because you've mixed in these other components, colorants, antioxidants, that doesn't change the fact that it's polyethylene, and polyethylene *is* a taxable substance, so there would be tax on either the pure polyethylene or the polyethylene resin that's imported. In some cases, there are those categorical listings where it makes it clear that this is a mixture, and it is nevertheless taxable as the principal substance component.

LLB: We both talked -- both of you gentlemen have talked about the fact that the IJA expanded the list of taxable substances, and it's now at 151, but it remains a work in progress. What is unclear to me -- and both of you are invited to comment on this -- is at what pace will this list evolve? Is it something in the short term, or are we looking at two years from now, or every other month? And how should listeners monitor for developments in this regard? You had mentioned the e-mail LISTSERV[®], Doug, that the IRS -- I'm sure that's one source, but can you prepare us for at what rate? And is this list going to expand exponentially in the coming years or just modestly?

DWC: My expectation is that there will be many requests, many petitions filed under the revenue procedure to add chemical compounds or products to the list of taxable substances. And that sounds counterintuitive. Why would anybody want to add additional items to be subject to tax? But the answer lies in the exportation of chemical products. The domestic manufacturers may make products -- or *do* make products -- that are exported. And if you

make a chemical that is one of the 42 base chemicals and you export it, but for whatever reason, you've had to pay a tax on it in the United States before it's exported, you can get a refund for the tax that you paid because tax is not imposed on chemicals or taxable substances that are exported.

So there are a lot of substances that are made that are exported. But if you do not have the item on a list -- if the item is not on the list, then it's not going to be eligible for the credit. And so what's happening is companies are saying, "Listen, we export these substances. We've paid tax on them because we have to pay tax when we use the base chemicals to create them. We want a refund."

So they're going to be coming in and petitioning the government to add their substance to the list of taxable substances. Now, if you look at the revenue procedure, it is very detailed. It's not an easy thing to get something added to or removed from the list. It's quite a process, and it has to go through publication in the *Federal Register*. If the IRS is considering adding or removing something from the list, it's first published in the *Federal Register* for comment, so that's a process that takes time.

LLB: Yes. Doug, that takes years!

DWC: It takes a very long time, right.

LLB: If this is flat-out APA [Administrative Procedure Act] rulemaking, notice and comment rulemaking, you're looking at just an extraordinary --.

DWC: Twelve months easy.

LLB: Yes -- infrastructure here. Have you hired 50 new practitioners to accommodate this?

DWC: Yes, that is going to be a challenge because I've heard rumors that there are *many* items that want -- that are being requested to be added to the list. I don't know yet if they've gone in on to the revenue procedure, but my understanding is that the chemical industry is going to request that many chemical substances be added to the list. And that means that -- if you look at the revenue procedure again, and Rich, you would be much more understanding of the revenue procedure than I am -- there's a lot you have to present to support adding or removing something from the list. That means that chemical engineers are going to have to review that -- lawyers can only do so much -- so I expect that it's going to be a slow process, one where they're going to get a lot of petitions, but the Service is going to be challenged turning them around.

REE: Yes. And your point about export is a good one. I think the other, sort of the fairness is -- again, we talked about it earlier -- an imported substance. If a substance is not currently a taxable substance, but it's made from taxable chemicals and you can make it outside the United States, import that without paying the tax, then there's that disadvantage of being the domestic producer. I also imagine that some of those domestic producers are going to be petitioning to add things just to put the imported products on an even tax playing field. You get both the price equity for things being sold in the United States, as well as the potential for tax refunds when you export, so I think the list is going to grow quite a bit. And I'm sure it's going to be a significant challenge for the IRS to do the technical review that's necessary to add these things. And I assume contractors will be involved.

LLB: Well, yes. I think both of you guys are going to be on speed dial by a lot of clients.

The IRS, rightly or wrongly, Doug and Rich, seems to be generally mindful of both the newness of the tax and perhaps the absence of clarity here on the tax. And to my knowledge, provided some relief from penalties through the first quarter of 2023, meaning that the taxes due on transactions through March of next year have been suspended or abated or -- not forgiven, but *delayed* with regard to their payment. Does this mean, Doug, that the IRS is trying to play nice here and cut industry some slack? And is that date likely to extend beyond March 2023?

DWC: I think the IRS is trying to do as much as it can -- well, that's probably a little bit of an overstatement -- but it's trying to do something to help.

LLB: I think a lot of people would agree with that, Doug.

REE: Maybe it can't do much.

DWC: Well, we do have to recognize that some things are within the Service's control, and some things are not. And one thing that's not in the Service's control is when the quarterly return has to be filed *and* the amount of tax that has to be paid with the quarterly return. Now, many taxes -- frankly, almost all taxes -- are paid through some kind of estimated deposits. Income tax: if you're not subject to withholding, you have to pay estimated payments. Those are just quarterly.

But when you get into excise taxes, excise taxes are typically subject to a semimonthly deposit requirement, so in theory, when it comes time to actually file the quarterly return, you've already paid all the taxes through deposits. But it's not possible to precisely determine through deposits what your liability is going to be, so there's always some amount that will -- you'll either overpay or you'll underpay. And the existing regulations for excise taxes generally require semimonthly deposits, so while the Service does have the authority to -- actually, technically Treasury -- to reissue regulations, that's quite a big deal. And I don't see the IRS issuing regulations to change the semimonthly deposit requirements for the Superfund tax.

What the Service did is it tried to come up with some relief for the amount that you have to deposit on a semimonthly basis. Generally, the rule is that you have to deposit 95% of the net liability incurred during the semimonthly period. But because this tax is new to so many -- well, it's new to everybody. And even though it existed many years ago, there are very few companies that remember having paid it or have the personnel who were involved with paying it all those years ago, so it's going to be difficult for companies to meet that 95% requirement.

There's also a safe harbor that applies a look-back, and it looks back to the second preceding quarter. And if you pay on a semimonthly basis one sixth of what you paid in that second preceding quarter, then you won't be subject to penalties. But the problem is, first, we don't have a second preceding quarter -- this tax is new. And the other problem is, as we mentioned before, we have rates for 121 of the 151 taxable substances, but there are 30 that we don't have rates for. Now, obviously, companies can try and do the rates, but that's going to be difficult.

What the Service has basically said is, if you make -- they don't say it in these terms, but this is the net effect. If you make a good-faith effort to make semimonthly deposits and when it comes time to pay the tax -- so the first tax, the first returns are going to be due October 31 -- you pay what is owed, so that gives you a month after the close of the period,

the third quarter, to determine what the tax liability is -- and you pay the tax, then we're not going to penalize you.

Now, I suspect that not only are the companies and taxpayers going to have difficulty estimating the semimonthly period, but they're also going to have some difficulties paying the right amount of tax when it comes due. As long as you've done everything you can in terms of making your best effort, I suspect the Service will probably not impose penalties if you underpay when you file your quarterly return. Now, they can't do anything about interest. You'll have to pay interest, and of course you'll have to pay the additional tax due, but I'm hoping that the Service will be understanding, at least until we probably get through 2023, in terms of paying the actual amount that's due. Now, obviously you can always overestimate to protect yourself, but again, with some of this, it's just going to be very difficult to know if you've paid the right amount.

REE: And that's going to be -- it's not just a challenge for taxpayers. It's going to be a challenge for the IRS.

DWC: Of course. Yes. And I suspect it will take them some time to examine these quarterly returns. I'm still waiting for my refund from 2021, and I file my taxes on time!

LLB: You're not alone, there, Doug.

DWC: I think it's going to take a little bit of time for the Service to examine these things, but I think the real takeaway for me, with respect to estimated payments, is pay something, pay something during the semimonthly period if you know you're going to have a liability. Now, also, I'll just note quickly that you don't have to make semimonthly deposits if you're not going to have a liability of \$2,500 or more. But I wouldn't rely on that, because like I said, you don't necessarily know how much you're going to owe. There will be some people who know that their liability is going to be very, very small, and so they don't need to make semimonthly deposits, but if you ever expect to go over the \$2,500 threshold, I would recommend that you make an estimated deposit of something.

LLB: Well, I have two takeaways on that segment of our conversation. The first is that I know at least one trade group has urged the IRS to exempt the excise tax from semimonthly deposits to quarterly. And based on your thoughts, Doug, that just is not likely to happen.

And the second is that because -- you and I are both lawyers, and the definition of "good faith" is one that is demonstrably unclear, but it's something that probably everyone listening to this podcast would be well advised to document how they derived a payment to help corroborate any assertion down the road that it lacked a good-faith basis. Would you agree on that?

DWC: Oh, yes, absolutely. Yes.

REE: Yes, show your work.

LLB: Right. I tried, but you might need --

REE: Here's how I calculated the number, right? It was this times this.

LLB: Right. I have two remaining questions, the first of which is -- and I think we've already touched upon this, Doug and Rich -- and that is what are the two or three or four commonly

asked questions that you both are getting from your clients and others? We've talked some about mixtures versus substances. We've talked about application of the 20% rule. We've talked about export. Does the tax apply? Are there others that you wish to share with our listeners now, Doug and Rich?

DWC: There are -- well, there are many, many questions, so we could go on for hours, but --

LLB: Do you have your own posted FAQs on your website?

DWC: No, I haven't done that.

LLB: Okay.

DWC: There are some very good trade associations out there that are doing that for their members.

I would say that one thing that's just very -- everybody should understand -- is the imposition of the tax is at the point of sale or use. There's been some confusion about imported products and whether the tax is imposed at the time that it's imported. It's really sale or use. Now, I don't want to get into the question of what constitutes importation. When is a product considered imported? What happens if the product is purchased offshore? Those are all issues that the Service is going to have to address, but it's use or sale. Those are the key things.

Where do we get information? We kind of touched on that: IRS web page. If you're in the chemical industry, you should consider being a member of a trade association because they're doing a really good job of getting information out to their members.

Refunds. We've got questions about refunds. Certainly, there are going to be transactions that are not subject to tax because the sale is for use in an exempt purpose. And there are several different types of uses that exempt the tax. There's some question about can we make tax-exempt sales, or do we have to tax and then get a refund? We just need to get information from the Service on that. We just don't have that yet.

The other question that comes up is what do we do with taxable substances if we don't know what the rate is? And the answer there is, unfortunately, if the IRS hasn't published the rate, you can't determine the rate. And determining the rate on a taxable substance is a significant exercise, so it's understandable that you may not be able to determine the rate. Then you have to default to the 10% rule, which is you pay the tax based on 10% of the appraised value. And in many cases -- it's probably not most -- that's going to result in an overpayment of tax. But you've got to do it. That's what the law says.

And then once you can determine the rate, you can go back in and get a refund. But you've got to use the 10% rule when it comes to paying the tax. The other things are lots of definitional questions, and we're just going to have to wait for the Service. But another one that Rich and I touched on is the finished goods item. And I don't know, Rich, if you could provide a little bit more guidance on that because that comes up -- "I've got a finished good here." Or "I've got something. Is it a finished good for which there's no tax due? Or does it - I know it contains chemicals, but do I have --"

REE: -- Everything does.

LLB: What doesn't?

REE: Anything you're importing contains chemicals.

DWC: But do I have to pay a tax on it? And I guess right now we're all sort of looking at other areas for guidance. We're looking to the old proposed regulations. They came out in 1983 under the old Superfund tax for some guides. We're looking to Customs; we're looking to EPA. And on the finished goods thing, Rich, I would imagine that EPA probably has the best rules that are out there now.

REE: Yes. There's sort of two classes. In my mind, there are two classes of finished goods. And one is an article, sort of following the traditional TSCA definition, where the form of the thing relates to its function. So you're importing -- and the classic example is a pen. The pen is an article. Its function is based on its shape, but the ink in a pen is not an article. It's a substance or a mixture of substances. So in a TSCA context, the barrel of the pen is an article, but the ink is not.

The other class of finished goods is the formulated mixture. So whether it's a laundry detergent or the ink in the pen, right? It's been specifically formulated. It's been designed to have whatever ratio of those component substances. And is that considered a finished good? I mean, many in industry think, "Well, that's a finished good. I put it in the bottle, I put the Tide in the bottle, and I imported the bottles of Tide. And so that's a finished good. And it's not chemicals." Under a TSCA context, they clearly are, because it's intended to be released. But in this context, I don't know how IRS would view a formulate -- the import of a final formulated product. Is that a finished good or not? So that to me is one of the big gray areas that stakeholders really need to answer.

LLB: I promised I'd spend at least one question on the other side of this -- chemicals in crude oil. The Inflation Reduction Act of 2022 reinstated the tax, Doug, on crude oil and petroleum products, and I suspect they increase the taxes as well. But can you just tell our listeners a little bit about that tax and what's going on there?

DWC: Yes, when the Superfund tax was originally enacted, an excise tax on crude oil and petroleum products was also enacted. For this tax, the tax rate was composed of two parts: the Hazardous Substance Superfund financing rate and the Oil Spill Liability Trust Fund rate. The Hazardous Substance Superfund rate also expired in 1995. Now the Inflation Reduction Act of 2022 reinstated the Hazardous Substance Superfund financing rate at 16.4 cents per barrel, adjusted for inflation. The tax applies to crude oil received at a U.S. refinery and to petroleum products entered into the United States for consumption, use, or warehousing. The operator of the refinery pays the tax on the crude oil received at the refinery, and the person entering the petroleum products into the United States pays the tax.

LLB: Now, is that in play now, that tax, or is that going to be imposed in the new year?

DWC: It is going to be imposed January 1, so there's some time to spool up for that. Again, though, one of the things that you have to remember -- and I think it gets forgotten on Capitol Hill -- is that when you enact a tax, there are two things you've got to think about. One is, is it administrable: can both the public and the government administer this tax? And then the second thing is, you've got to think about the time it takes to implement it. The more lead time that can be given, the better it is for both the government and the public.

LLB: Rich, that sounds familiar with TSCA.

REE: I was just thinking that!

LLB: We have sat in this podcast studio repeatedly over the past six years because we had no time to use your words, Doug, spool up for TSCA implementation.

REE: It was effective on day one.

LLB: Day one. Anyway. Yes, lead time, soak time, getting the issues socialized with stakeholder communities is a wonderful thing. And yes, indeed, Congress does forget that stuff.

Well, last question, and I'll ask you, Doug, first, and then ask you, Rich, what are the three or four or five tips that you can offer clients and those listening to this podcast to help navigate around what I think is a hugely complicated program here? Doug, what can you tell us?

DWC: I think one thing that Rich mentioned earlier is just -- top of the list. If you think you're potentially subject to the Superfund tax, keep good records. What chemicals did you purchase and when? From whom did you purchase the chemicals? What chemicals did you sell or use, and when? If you sold chemicals, who did you sell them to, and how are they going to use them? All of that kind of information is going to play into whether you owe any tax, and if so, how much you owe. So good records.

Second point is make semimonthly deposits of some amount. Even if you're just really shooting in the wind in terms of trying to estimate what it is, pay something.

The third thing is timely file your quarterly return. Even if you're new to the game, get that return in on time because what we tend to see is late returns lead to IRS examinations. And you don't want that. You don't want that. And then just watch for guidance and updates. And again, I'm not pushing trade associations, but they are really excellent sources for keeping their members informed. And if you don't do that, then you can monitor the IRS web page; if you go to www.irs.gov, there is a web page on the Superfund tax, and you can just periodically check that for updates.

LLB: And, Doug, do you and your firm put out a lot of helpful guidance in this regard? Is there a web address you can direct listeners to?

DWC: We do put out quite a bit of information. Our firm address is www.mcglinchey.com, and we do put out information. It's not a broad public type of issue. What we often do is, again, we work with the trade associations to get information up on their web pages for their members.

LLB: Rich, what do you urge listeners to do?

REE: I just want to follow up on that trade association comment. If you're in a trade association, make sure they're on top of this, right? Trade associations are responsive to members. If it's a member need, the members need to tell the trade association, "Hey, we're really confused about this. Can you work?" And that trade association can help you when there is the petition process, notice and comment on adding substances, whether you want them added or you want to comment on tax rates. Somebody needs to be monitoring the *Federal Register*, and you can do that as an individual, an individual company, or you can do it through your trade. But this is going to be an ongoing, complicated issue, and so somebody needs to be paying attention. Keep yourself out of trouble with the IRS, and ask IRS some of these tough questions because there's still a lot of difficult questions -- very technical questions -- both on the tax side and on the chemistry side that we need help with.

LLB: Well, gentlemen, this has been a sparkling, riveting, and hugely informative conversation. I can't thank you enough, Doug and Rich, for helping our listeners understand this very difficult, murky area and pick up some excellent tips to just get through it. And as we look forward to the petroleum tax next year, maybe we'll do another podcast next year to see how we're doing on chemicals and see what the IRS learned from this experience with respect to petroleum. Doug, thank you so much. Really appreciate your being here. Rich, always a pleasure.

REE: My pleasure.

LLB: My thanks again to Doug Charnas and Dr. Rich Engler for speaking with me today about the recently reinstated Superfund tax and why, if you are an industrial chemical business, you may want to consult both a tax attorney and a chemist when doing your taxes.

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