



The Agricultural Chemical Security Credit: The Types of Taxpayers That Are Eligible for the Credit Is Much Broader Than Many Taxpayers Initially Realized

The IRS seems to view the agricultural chemical security credit of section 450 with a more inclusive eye than taxpayers originally perceived. This article describes eligibility for the credit and explains why taxpayers should be looking at whether they might fit within the statute after all.

Section 450 of the Code provides a credit for qualified chemical security expenditures incurred by an eligible agricultural business during the tax year. The amount of the credit with respect to any facility for any tax year cannot exceed \$100,000 reduced by the aggregate amount of credits determined with respect to such facility for the prior five tax years. The amount of the credit for any taxpayer for any tax year cannot exceed \$2 million.

The credit is equal to 30 percent of eligible expenditures, and is available for amounts paid or incurred after May 22, 2008, and prior to January 1, 2013.

The types of taxpayers that are eligible for this credit are much broader than many taxpayers initially realized, and many taxpayers did not claim the credit during the years that it was available even though they were eligible. For calendar year taxpayers that are eligible for the credit, the 2011 and 2012 tax years are still open, but time is running out. For such taxpayers, refund claims for the 2011 tax year would generally need to be filed no later than September 15, 2015.

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Background

An eligible agricultural business means any person in the trade or business of:

- Selling agricultural products, including specified agricultural chemicals, at retail predominantly to farmers and ranchers or
- Manufacturing, formulating, distributing, or aerially applying specified agricultural chemicals

Qualified chemical security expenditures means, with respect to any eligible agricultural business for the tax year, any amount paid or incurred by the business during such tax year for:

- Conducting employee security training and background checks
- Limiting and preventing access to controls of specified agricultural chemicals stored at the facility
- Tagging, locking tank valves, and providing chemical additives to prevent theft of specified agricultural chemicals or to render such chemicals unfit for illegal use
- Protecting the perimeter of specified agricultural chemicals
- Installing security lighting, cameras, recording equipment, and intrusion detection sensors
- Implementing measures to increase computer or computer network security
- Conducting security vulnerability assessments
- Implementing a site security plan and
- Such other measures for the protection of specified agricultural chemicals as the Secretary of Treasury may identify by regulation.

Otherwise eligible expenditures can be taken into account only to the extent that such amounts are paid or incurred for the purpose of protecting specified agricultural chemicals.

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").

Specified agricultural chemicals means:

- Any fertilizer commonly used in agricultural operations that is listed under: (i) section 302(a)(2) of the Emergency Planning and Community Right-to-Know Act of 1986, (ii) section 101 of part 172 of title 49, Code of Federal Regulations, or (iii) part 126, 127, or 154 of title 33, Code of Federal Regulations, and
- Any pesticide (as defined in section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act), including all active and inert ingredients thereof, which is customarily used on crops grown for food, feed, or fiber.

In addition to the authorization for the Secretary of the Treasury to identify additional categories of qualified chemical security expenditures, above, section 45O provides that the Treasury may prescribe regulations as may be necessary or appropriate to carry out the purposes of section 45O, including regulations that:

- 1) “[P]rovide for the proper treatment of amounts which are paid or incurred for purpose of protecting any specified agricultural chemical and for other purposes,” and
- 2) “[P]rovide for the treatment of related properties as one facility” for purposes of applying the \$100,000 credit per facility limitation.

However, no regulations or any other guidance has been issued under section 45O.

Unrealized Opportunities

Based on the author’s experience with clients that have made claims for these credits, the IRS has accepted broad interpretations of a number of critical terms in determining eligibility for the credit. In particular, the IRS has accepted very broad interpretations of three important terms: “eligible agricultural business”; “specified agricultural chemical”; and “facility.”

Definition of Eligible Agricultural Business

The definition of an eligible agricultural business is broader than businesses that sell pesticides and fertilizers at retail.

For example, eligible agricultural businesses include taxpayers in the business of “distributing” specified agricultural chemicals. The IRS has accepted a broad definition of “distributing” that includes taxpayers that transport specified agricultural chemicals such as trucking, shipping and railway businesses.

Per the plain text of the statute, eligible agricultural businesses also include businesses that manufacture not just pesticides and fertilizers, but also items that could constitute an active or inert ingredient in a pesticide. In the latter case, it is not necessary to demonstrate that a given gallon of an active or inert ingredient manufactured by the business is ultimately incorporated into a pesticide. Further, as described below, the definition of an active or inert ingredient in a pesticides is quite broad.

Definition of Specified Agricultural Chemicals

The definition of a specified agricultural chemical includes all active and inert ingredients used in any pesticide (as defined in section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act), which is customarily used on crops grown for food, feed, or fiber. The phrase “customarily used on crops” modifies “pesticides” not “active or inert” ingredients. Thus, it is not necessary for an eligible agricultural business to demonstrate that the chemicals they are manufacturing are ultimately incorporated into a pesticide or customarily used as a pesticide.

Consequently, the list of active and inert ingredients that can be used in pesticides is quite long. It includes, for instance, flour, chlorine, sodium hypochlorine (bleach), and citric acid.

A list of active and inert ingredients for pesticides can be found in the Pesticide Action Network (PAN) Pesticide Database, which is available at <http://www.pesticideinfo.org/>.

Definition of Facility

The credit is capped at \$100,000 per facility. There is no direct authority defining what constitutes a “facility” for this purpose.

There is, however, a definition for a “facility” in section 45 of the Code. Section 45 provides a credit for electricity produced from certain renewable resources. This credit uses the term “qualified facility.”

The Code does not further define facility for purposes of this credit; however, Revenue Ruling 94-31 provides additional guidance. In Revenue Ruling 94-31, the IRS found each wind turbine to be a separate facility for purposes of the section 45 credit. The conclusion was based on the fact that each wind turbine could operate independently.

In the absence of other guidance, a facility may be defined as any activity/function at a business location that can be operated independently of other activities/functions at the same location.

For instance, in a trucking business, each vehicle would be a separate facility because each vehicle can operate separately from any other vehicle. In a manufacturing business, parts of the production process that can be operated separately from other parts of the production process would each be a separate facility.

Conclusion

Because the IRS has accepted broad interpretations of these terms when determining eligibility for the agricultural chemical security credit, the types of taxpayers potentially eligible for the credit may be more inclusive than many taxpayers initially realized. Taxpayers that did not claim the credit still may be able to file claims; time is not on their side, however. Eligibility for the agricultural chemical security credit in light of the IRS's view of the statute is an important consideration for these taxpayers.



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