

§ 48.4216(b)-2

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retail and to retailers to which section 4216(b)(2) and § 48.4216(b)-3 apply; and

(ii) Sales otherwise than at arm's length, and at less than fair market price.

(2) Section 4216(b)(2) applies generally to arm's-length sales of an article at retail or to retailers, or both, where the manufacturer also sells the same article to wholesale distributors.

(3) Section 4216(b)(3) provides a formula for determining a constructive sale price for sales of taxable articles between members of an affiliated group of corporations (as "affiliated group" is defined in section 1504(a)) in those instances where the purchasing corporation regularly resells to retailers but does not regularly resell to wholesale distributors, and except for situations where section 4216(b) (4) or (5) applies.

(4) Section 4216(b)(4) provides a special method for computing a constructive sale price for sales of taxable articles between affiliated corporations where the purchasing corporation sells only to retailers, and the normal method of selling within the industry is for manufacturers to sell to wholesale distributors.

(5) Section 4216(b)(5) provides a special method for computing a constructive sale price for sales of articles subject to a tax imposed by section 4061(a) (trucks, buses, tractors, etc.) between affiliated corporations, where the purchasing corporation regularly sells such articles in arm's-length transactions to independent retailers.

(c) *Definitions.* For purposes of section 4216(b) and the regulations thereunder and unless otherwise indicated:

(1) *Sale at retail.* A "sale at retail," or a "retail sale", is a sale of an article to a purchaser who intends to use or lease the article rather than resell it. The fact that articles are sold in wholesale lots, or at wholesale prices, will not change the character of such sales as "sales at retail" if the purchaser is not engaged in the business of reselling such articles, and acquires them for the purpose of using them rather than reselling them.

(2) *Retail dealers.* A "retail dealer", or "retailer", is a person engaged in the business of selling articles at retail.

(3) *Wholesale distributor.* The term "wholesale distributor" means a per-

son engaged in the business of selling articles to persons engaged in the business of reselling such articles.

[T.D. 7613, 44 FR 23824, Apr. 23, 1979]

§ 48.4216(b)-2 Constructive sale price; basic rules.

(a) *In general.* Section 4216(b)(1) sets forth the conditions that require the Secretary to construct a sale price on which to compute a tax imposed under Chapter 32 on the price for which an article is sold. The section requires a constructive sale price to be established where a taxable article is (1) sold at retail, (2) sold while on consignment, or (3) sold otherwise than through an arm's-length transaction at less than fair market price. See § 48.4216 (b)-2 (c) for the treatment of articles taxable under section 4061(a).

(b) *Sales at retail.* Section 4216(b)(1)(A) relates to the determination of a constructive sale price for sales of taxable articles sold at arm's length and at retail. In the case of such sales, the constructive sale price is the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. If the constructive sale price is less than the actual sale price, the constructive sale price shall be used as the tax base. If the constructive sale price is not less than the actual sale price, the actual sale price shall be considered as not less than fair market, and shall be used as the tax base. In determining the highest price for which articles are sold by manufacturers to wholesale distributors, there must be taken into consideration the normal industry practices with respect to section 4216 (a) and (f) inclusions and exclusions. However, once a constructive sale price has been determined by the Secretary or his delegate, no further adjustment of such price shall be made. The provisions of section 4216(b)(1)(A) and this paragraph shall not apply in those instances where the provisions of section 4216(b)(2) and § 48.4216(b)-3 apply.

(c) *Sales of articles taxable under section 4061(a).* With respect to sales made after December 31, 1978, in the case of an article the sale of which is taxable under section 4061(a) and which is sold

at retail, the tax under this chapter shall be computed on a percentage (as determined by the Secretary but not greater than 100 percent) of the actual selling price based on the highest price for which such articles are sold by manufacturers and producers in the ordinary course of trade. The constructive sale price under this section shall be determined without regard to any individual manufacturer's or producer's cost.

(d) *Sales on consignment.* As in the case of sales at retail, the constructive sale price for sales on consignment shall be the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. For purposes of section 4216(b)(1)(B) and this paragraph, an article is considered to be sold on consignment if it is sold while it is on consignment to a person which has the right to sell, and does sell, such article in its own name, but never receives title to the article from the manufacturer. Ordinarily, the constructive sale price of an article sold on consignment is the net price received by the manufacturer from the consignee. The provisions of section 4216(b)(1)(B) and this paragraph shall not apply if the provisions of section 4216(b)(2) and § 48.4216(b)-3 apply.

(e) *Sales not at arm's length.* For purposes of section 4216(b)(1)(C) and this paragraph, a sale is considered to be made under circumstances otherwise than at "arm's length" if:

(1) One of the parties is controlled (in law or in fact) by the other, or there is common control, whether or not such control is actually exercised to influence the sale price, or

(2) The sale is made pursuant to special arrangements between a manufacturer and a purchaser.

In the case of an article sold otherwise than at arm's length, and at less than fair market price, the constructive sale price shall be the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. Once such a constructive sale price has been determined, no further adjustment of such price shall be made. See sections 4216(b) (3), (4), and

(5), and § 48.4216 (b)-4, for specific methods for determining constructive sale prices for intercompany sales under certain defined conditions.

[T.D. 7613, 44 FR 23825, Apr. 23, 1979; 44 FR 47767, Aug. 15, 1979]

§ 48.4216(b)-3 Constructive sale price; special rule for arm's-length sales.

(a) *In general.* Section 4216 (b)(2) provides a special rule under which a manufacturer shall determine a constructive sale price for his sales of taxable articles at retail, and to retail dealers, under certain conditions. The rule is applicable where:

(1) The manufacturer regularly sells such articles at retail, or to retailers, or both, as the case may be,

(2) The manufacturer also regularly sells such articles to one or more wholesale distributors in arm's-length transactions, and the manufacturer establishes that its prices in such cases are determined without regard to any benefit to be derived under section 4216(b)(2),

(3) The transactions are arm's-length transactions, and

(4) With respect to articles to which the tax imposed by section 4061(a) applies (relating to trucks, buses, tractors, etc.), the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof.

A manufacturer meeting the foregoing requirements shall base its tax liability for sales at retail and sales to retailers on the lower of its actual sale price or the highest price for which it sells the same articles under the same conditions to wholesale distributors.

(b) *Definitions.* For purposes of section 4216(b)(2) and this section:

(1) *Actual sale price.* "Actual sale price" means the actual selling price of an article determined in the same manner as sale price is determined for a taxable sale. Accordingly, such price must reflect the inclusions and exclusions set forth in sections 4216 (a) and (f), and any price adjustments described in section 6416(b)(1).

(2) *Highest price to wholesale distributors.* The "highest price" charged wholesale distributors for an article by a manufacturer, producer, or importer thereof, is the highest price at which