are sold to wholesale distributors, in
the ordinary course of trade, by manu-
facturers or producers thereof, as de-
termined by the Secretary. If the con-
structive sale price is less than the ac-
tual 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 dis-
tributors, there must be taken into
consideration the normal industry
practices with respect to inclusions
and exclusions under section 4216(a) of
the Code. However, once a constructive
sale price has been determined by the
Secretary, no further adjustment of
such price shall be made. The provi-
sions of section 4216(b)(1)(A) of the
Code and this paragraph shall not
apply in those instances where the pro-
visions of section 4216(b)(2) of the Code
and § 53.96 apply.

(c) 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 arti-
cles are sold, in the ordinary course for
trade, by manufacturers or producers
thereof, as determined by the Sec-
retary. For purposes of section
4216(b)(1)(B) of the Code and this para-
graph, 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 re-
ceives title to the article from the
manufacturer. Ordinarily, the con-
structive sale price of an article sold
on consignment is the net price re-
ceived by the manufacturer from the
consignee. The provisions of section
4216(b)(1)(B) of the Code and this para-
graph shall not apply if the provisions
of section 4216(b)(2) of the Code and
§ 53.96 apply.

(d) Sales not at arm’s-length. For pur-
poses of section 4216(b)(1)(C) of the
Code and this paragraph, a sale is con-
sidered to be made under cir-
cumstances 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 influ-
ence the sale price, or

(2) The sale is made pursuant to spe-
cial arrangements between a manufac-
turer and a purchaser.

In 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 pro-
ducers thereof, as determined by the
Secretary. Once such a constructive
sale price has been determined, no fur-
ther adjustment of such price shall be
made. See sections 4216(b) (3) and (4)
of the Code, and §53.97, for specific meth-
ods for determining constructive sale
prices for intercompany sales under cer-
tain defined conditions.

§ 53.96 Constructive sale price; special
rule for arm’s-length sales.

(a) In general. Section 4216(b)(2) of the
Code provides a special rule under
which a manufacturer shall determine
a constructive sale price for this sale 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 es-
tablishes that its prices in such cases
are determined without regard to any
benefit to be derived under section
4216(b)(2) of the Code, and

(3) The transactions are arm’s-length
transactions.

(4) A manufacturer meeting the fore-
goin 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) of the Code and this section:

(1) Actual sale price. “Actual sale
price” means the actual selling price
for 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 (e) of the Code, and any price adjustments described in section 6416(b)(1) of the Code.

(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 the manufacturer, producer, or importer sells the article to wholesale distributors, determined without regard to quantity. Such price shall be determined in the same manner as sale price is determined for a taxable sale with respect to the inclusions and exclusions under sections 4216(a) and (e) of the Code; however, since the price is to be a “highest” price, no further adjustment may be made for price readjustments under section 6416(b)(1) of the Code.

(3) Regular sales. An article is considered to be sold “regularly” at retail or to retailers if sales are made at retail or to retailers periodically and recurring as a regular part of the seller’s business. If a seller makes only isolated or casual sales of an article at retail or to retailers, it is not considered to be selling “regularly” at retail or to retailers. Similarly, a manufacturer is considered to be making regular sales of an article to one or more distributors if it sells the article to at least one distributor periodically and recurring as a regular part of its business.

(4) Normal method of sales in industry. In the absence of a showing to the appropriate TTB officer of a more appropriate manner of determining the normal method of sales within an industry which is practical in application, the normal method of sales within an industry shall be regarded as not being at retail or to retailers, or both, if the industry dollar volume of sales which are at retail or to retailers, or both, is less than half the total industry dollar volume of sales at all levels of distribution by manufacturers, producers, or importers, including sales to other manufacturers, producers, or importers.

§ 53.97 Constructive sale price; affiliated corporations.

(a) In general. Sections 4216(b)(3) and (4) of the Code establish procedures for determining a constructive sale price under section 4216(b)(1)(C) of the Code for sales between corporations that are members of the same “affiliated group”, as that term is defined in section 1504(a) of the Code.

(b) Sales to which section 4216(b)(3) of the Code applies. Section 4216(b)(3) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instances where:

(1) A manufacturer, producer or importer regularly sells a taxable article to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producers or importer, and

(2) The wholesale distributor regularly sells such article to one or more independent retailers, but does not regularly sell to wholesale distributors. Under such circumstances the constructive sale price for the article shall be an amount equal to 90 percent of the lowest price for which the distributor regularly sells the article in arm’s-length transactions to such independent retailers. Once the constructive sale price has been determined, no adjustment shall be made for inclusions or exclusions under section 4216(a) of the Code or price readjustments under section 6416(b)(1) of the Code. If both sections 4216(b)(3) and 4216(b)(4) of the Code apply with respect to the sale of an article, the constructive sale price for such article shall be the lower of the prices computed under sections 4216(b)(3) and 4216(b)(4).

(c) Sales to which section 4216(b)(4) of the Code applies. Section 4216(b)(4) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instances where:

(1) A manufacturer, producer, or importer regularly sells (except for tax-free sales) a taxable article only to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producer, or importer.