

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.

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§ 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 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 sections 4216 (a) and (f) inclusions and exclusions; however, since the price is to be a “highest” price, no further adjustment may be made for price readjustments under section 6416(b)(1).

(3) *Regular sales.* An article is considered to sold “regularly” at retail or to retailers if sales are made at retail or to retailers periodically and recurringly 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 for an article to one or more distributors if it sells the article to at least one distributor periodically and recurringly as a regular part of its business.

(4) *Normal method of sales in industry.* In the absence of a showing to the Commissioner of Internal Revenue 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.

(5) *Industry.* Each of the following categories of articles upon which tax is imposed by section 4061(a) constitutes a separate “industry”:

(i) Taxable automobile trucks (consisting of automobile truck bodies and chassis);

(ii) Taxable automobile buses (consisting of automobile bus bodies and chassis);

(iii) Taxable truck and bus trailers and semitrailers (consisting of chassis and bodies of such trailers and semitrailers); and

(iv) Taxable tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer.

(6) *Application of section 4216(b)(2) to certain sales before June 22, 1965.* In the case of sales before June 22, 1965, of articles then taxable under section 4121 (relating to electric, gas, and oil appliances), section 4216(b)(2) also applied in the case of a sale of such an article to a special dealer. The applicability of section 4216(b)(2) to such a sale may be determined by inserting “or to a special dealer” following “or to a retailer” in so much of section 4216(b)(2) as precedes subparagraph (A); by inserting “or to special dealers” following “retailers” in section 4216(b)(2)(A); and by inserting “(other than special dealers)” after “wholesale distributors” in section 4216(b)(2)(B) and so much of section 4216(b)(2) as follows section 4216(b)(2)(D). A “special dealer” was a distributor of articles taxable under section 4121 who did not maintain a sales force to resell the article whose constructive sale price was established under section 4216(b)(2) but relied on salesmen of the manufacturer, producer, or importer of the article. In the case of sales before June 22, 1965, of articles taxable under section 4191 (relating to business machines) or section 4211 (relating to matches), section 4216(b)(2) was applicable in the same manner as in the case of articles taxable under section 4061(a). With respect to sales after September 30, 1972, section 4216(b)(2)(C) applied only to articles taxable under section 4061(a), 4191, or 4211. Section 4216(b)(2)(C) was applicable to sales before October 1,

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1962, of all articles subject to tax under Chapter 32.

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§ 48.4216(b)-4 Constructive sale price; affiliated corporations.

(a) *In general.* Sections 4216(b) (3), (4), and (5) establish procedures for determining a constructive sale price under section 4216(b)(1)(C) for sales between corporations that are members of the same "affiliated group", as that term is defined in section 1504(a).

(b) *Sales to which section 4216(b)(3) applies.* Section 4216(b)(3), which applies to articles sold after December 31, 1969, provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) in those instances where:

(1) A manufacturer, producer or importer regularly sells a taxable article (other than an article subject to a tax imposed by section 4061(a) (trucks, buses, etc.)) to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producer 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 sections 4216 (a) and (f) inclusions or exclusions or section 6416(b)(1) price readjustments. If both section 4216(b)(3) and section 4216(b)(4) 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 section 4216(b)(3) and section 4216(b)(4).

(c) *Sales to which section 4216(b)(4) applies.* Section 4216(b)(4), which applies to articles sold after December 31, 1969, provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) 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 mem-

ber of the same affiliated group as the manufacturer, producer, or importer,

(2) The distributor regularly sells (except for tax-free sales) such article only to retail dealers, and

(3) The normal method of sales for such articles within the industry is to sell such articles in arm's-length transactions to wholesale distributors.

Section 4216(b)(4) applies with respect to articles taxable under section 4061(a) (relating to trucks, buses, etc.) only as to sales after December 31, 1969, and before January 1, 1971. Under section 4216(b)(4), the constructive sale price of such article shall be the median price at which the distributor, at the time of the sale by the manufacturer, resells the article to retail dealers, reduced by a percentage of such price equal to the percentage which:

(i) The difference between the median price for which comparable articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers of producers thereof, and the median price at which such wholesale distributors in arm's-length transactions sell such comparable articles to retailers, is of

(ii) The median price at which such wholesale distributors in arm's-length transactions sell such comparable articles to retailers.

For purposes of this paragraph, the "median price" for which an article is sold at a particular level of distribution is the price midway between the highest and lowest prices charged vendees at the particular level of distribution. Where only one price is charged at a level of distribution, "median price" is equivalent to "actual price". All sale prices referred to in paragraphs (b), (c), (d), and (e) of this section are prices that must reflect the inclusions and exclusions set forth in sections 4216(a) and (f). However, once a constructive sale price has been determined under these paragraphs, no further adjustment of such price is allowed.

(d) *Application of section 4216(b)(4).* The application of section 4216(b)(4) and paragraph (c) of this section may be illustrated by the following example: