INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE MIS No.: TAM-130102-02/CC:PSI:B8

Director,

Taxpayer Name:
Taxpayer Address:

Taxpayer Identification No.:
Quarters Involved:
Date of Conference:

LEGEND: Taxpayer =
Manufacturer =
ISSUE:

Whether Taxpayer, a truck retailer, is liable for the tax imposed by § 4051(a) of the Internal Revenue Code on its sale of trucks purchased from Manufacturer.

CONCLUSION:

Taxpayer is not liable for the tax imposed by § 4051(a) because the trucks were sold in a prior "first retail sale" within the meaning of § 4051(a).

FACTS:

Taxpayer is a truck dealer that purchases taxable trucks from their manufacturer (Manufacturer) and sells them at retail to customers.

Taxpayer is a Form 637 "Q" registrant that at one time provided certification to Manufacturer as provided for in the regulations to purchase trucks tax free for resale. At that time Taxpayer treated its resale of the trucks as the first retail sale of the trucks for excise tax purposes.

However, for the periods at issue, Taxpayer sent Manufacturer a written revocation of its certification of purchase for resale. Manufacturer's invoices reflect the federal excise tax on the sale price of the trucks to Taxpayer adding the presumed markup percentage as provided for in the regulations. Manufacturer pays the federal excise tax as computed on this basis. Taxpayer no longer reports the federal excise tax with respect to its own sales of new trucks, even though Taxpayer is purchasing the trucks for resale.

LAW AND ANALYSIS:

Section 4051(a)(1) imposes on the first retail sale of automobile truck chassis and automobile truck bodies an excise tax of 12 percent of the amount for which the article is sold.

Section 4052(a)(1) provides that the term "first retail sale" means the first sale, for a purpose other than for resale or leasing in a long-term lease, after production, manufacture, or importation.

Section 4052(b)(1) provides the general rule for determining price for purposes of the tax on automobile truck chassis and automobile truck bodies. Section 4052(b)(4) provides the special rule that where the manufacturer is liable for the tax, the tax is to be computed with reference to the presumed markup percentage of § 4052(b)(3)(B). Section 145.4052-1(d)(7) of the Temporary Excise Tax Regulations under the Highway Revenue Act of 1982 (Pub. L. 97-424) provides that the presumed markup percentage is four percent.

Section 48.4052-1(a) of the Manufacturers and Retailers Excise Tax Regulations provides that tax is not imposed on the sale of an article for resale or leasing in a long-term lease if the seller has accepted in good faith a statement from the buyer that is in substantially the same form, and subject to the same conditions, as the certificate described in § 145.4052-1(a)(6), except that the certificate need not refer to Form 637 or include a registration number. Section 145.4052-1(a)(6) provides that the purchaser may revoke the certificate.

Section 145.4052-1(a)(1) provides that for purposes of § 4051(a)(1), the term "first retail sale" means a taxable sale described in paragraph (a)(2) of the section. Section 145.4052-1(a)(2) provides that the sale of an article is a taxable sale unless:

(i) The sale is a tax-free sale under section 4221,
(ii) [Reserved]. For sales after June 30,1998, see section 48.4052-1 of this chapter,
(iii) There has been a prior taxable sale of the article.

The IRS office that submitted this request determined that because Taxpayer is a retail dealer that sells new trucks to their ultimate user, Taxpayer's sales of new trucks were the first retail sale of the new trucks. In support of this position the IRS office states that Taxpayer acquired the new trucks for resale and Manufacturer's invoices stated that the trucks were sold to Taxpayer for resale. The IRS office points out that Taxpayer's actual markup is greater than the four percent presumed markup.

Taxpayer argues that because it did not provide Manufacturer with certification, the taxable first retail sale of the new trucks occurred when Manufacturer sold them to Taxpayer. Taxpayer further argues that because this taxable sale was effected by the truck manufacturer, the tax was correctly computed by adding the presumed markup percentage to the sale price.

We agree with Taxpayer. Section 145.4052-1(a) provides that the sale of an article is not a first retail sale if there has been a prior taxable sale of the article.

Although a person that buys a truck for resale may purchase it tax free under the above regulatory structure, a truck retailer may elect to have the § 4051 tax imposed on its purchase of a truck by not providing its seller with a certification of purchase for resale. If it does so, then there has been a prior taxable sale of the vehicle within the meaning of §145.4052-1(a)(2)(iii) and a subsequent sale of the same vehicle is not a first retail sale under these regulations.

Because Manufacturer lacked a certificate of intent to resell or similar statement once Taxpayer had revoked its certificate, Manufacturer's sale of new trucks to Taxpayer was a taxable sale and the "first retail sale" of the trucks within the meaning of § 4051(a)(1). Manufacturer and not Taxpayer was thus liable for the tax. As Manufacturer was liable for the tax, the tax was properly computed with reference to the presumed markup percentage.

CAVEATS:

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent. In accordance with § 6110(c), names, addresses, and other identifying numbers have been deleted.