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memorandum**

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from: Frank Boland
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subject: Section 4161 - Imported Archery Products

This responds to your request for assistance as to which person is liable for the excise tax imposed by § 4161 of the Internal Revenue Code in the following seven scenarios. This advice may not be used or cited as precedent.

Scenario 1 – Foreign Manufacturer selling directly to United States Consumer/End User (U. S. Consumer).

The Foreign Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to the products. The Foreign Manufacturer offers these products for sale on its website and markets these products in other forums including print. The U. S. Consumer orders these products from the Foreign Manufacturer's website. The Foreign Manufacturer accepts payment from the U. S. Consumer and packs, documents, and ships the ordered products to the U. S. Consumer.

Question: Who is liable for the excise tax imposed by § 4161?

Law and Analysis:

Section 4161(b) imposes a manufacturer's excise tax on the sale by the manufacturer, producer, or importer of certain described archery products.

Section 48.0-2(a)(4)(i) of the Manufacturers and Retailers Excise Taxes Regulations provides that "manufacturer" includes any person who produces a taxable

article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. The term also includes a “producer” and an “importer.” An “importer” of a taxable article is any person who brings such an article into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States. If the nominal importer of a taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the “importer” of the article for purposes of chapter 32 (which includes the tax on archery products imposed by § 4161) and is liable for tax on its sale or use of the article in the United States.

Section 48.0-2(b) provides that the manufacturers excise tax generally attaches when the title to the article sold passes from the manufacturer to a purchaser. When title passes is dependent upon the intention of the parties as gathered from the contract of sale and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption followed in the jurisdiction where the sale is made govern in determining when title passes.

Section 4218(a) provides that if any person manufactures, produces, or imports an article and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article taxable under chapter 32, to be manufactured or produced by him), he is liable for tax under chapter 32 as if such article were sold by him.

Section 48.4218-2(b) provides that the use tax imposed by § 4218 will not apply to an individual who incidentally manufactures, produces, or imports a taxable article for the individual’s personal use or causes a taxable article to be manufactured, produced, or imported for the individual’s personal use.

The question of “who is the importer” has been the subject of numerous court decisions and revenue rulings. Generally, the cases and rulings hold that the “importer” for purposes of the manufacturers excise tax is the first purchaser resident in the United States who arranges (as principal and not as agent) for, or is the inducing and efficient cause of, goods being brought into the United States for sale or use by him. In determining who is the importer and the nominal importer the substance of the transaction rather than the mere passing of title to the goods is material. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 661 (U.S. 1945) overruled in part by Limbach v. Hooven & Allison Co., 466 U.S. 353 (U.S. 1984); Handley Motor Co. Inc. v. United States, 338 F.2d 361, 364 (Ct. Cl. 1964); Import Wholesalers Corp. v. United States, 368 F.2d 577, 578, 583-585 (Ct. Cl. 1966); Sony Corporation of America v. United States, 428 F.2d 1258, 1266 (Ct. Cl. 1970); Corex Corp. v. United States, 524 F.2d 1017, 1019-1020 (9th Cir. 1975), cert. denied, 425 U.S. 912 (1976); Terry Haggerty Tire Co. v. United States, 16 Cl. Ct. 620, 622-623 (1989), aff’d 899 F.2d 1199 (Fed. Cir. 1990); Rev. Rul. 67-209, 1967-1 C.B. 297; Rev. Rul. 68-197, 1968-1 C.B. 455; Rev.

Rul. 69-393, 1969-2 C.B. 206; Rev. Rul. 72-215, 1972-1 C.B. 339; and Rev. Rul. 82-40, 1982-1 C.B. 175.

Rev. Rul. 72-215 involves a situation in which a U. S. resident purchased a foreign-made firearm from a foreign vendor for his personal use and paid the vendor directly. The resident engaged a licensed firearms importer to obtain the required import license, to clear the firearm through customs, and to pay the customs duty and other incidentals. The firearms importer then billed the resident for the customs duty, incidental items, and a fee for the firearms importer's services. The revenue ruling holds that the U. S. resident is the importer for purposes of the tax imposed by § 4181. The firearms importer did not assume any of the risks of a typical import-merchant. The firearms importer merely imported the U. S. resident's firearm into the United States for a fee.

The revenue ruling further holds that the firearm was not 'incidentally' imported, within the meaning of § 48.4218-2(b). The ruling explains that the term "incidentally * * * imports" refers to a combination of circumstances in which the importation is incidental or consequent to another purpose for acquiring the article. The term does not include any situation where use of a foreign-made article in the United States is the reason for acquiring the article. See also, Rev. Rul. 65-317, 1965-2 C.B. 422 (foreign-made automobile a U. S. resident purchases for personal use in the United States from a foreign manufacturer through a U. S. person or dealer acting as agent for the resident is not "incidentally" imported, within the meaning of § 48.4218-2(b)) and Rev. Rul. 68-30, 1968-1 C.B. 481 (foreign-made automobile a U. S. citizen purchases for personal use in the United States from a foreign manufacturer during a visit to a foreign country or at the conclusion of an extended stay in a foreign country is not "incidentally" imported within the meaning of § 48.4218-2(b)).

In this scenario, the U. S. Consumer is the importer because the U. S. Consumer is the inducing and efficient cause of the archery products being brought into the United States for the U. S. Consumer's use. But for the U. S. Consumer's order, the archery products would not have been shipped into the United States. As the importer, the U. S. Consumer is liable for the § 4161 tax on its use of the archery products.

Also, the U. S. Consumer is not relieved of the liability for the tax by the personal use exception under § 48.4218-2(b) because the U. S. Consumer's intended use of the archery products is not incidental or consequential to another purpose for acquiring the archery products. The U. S. Consumer's purpose for acquiring the archery products is to use them. See, Rev. Rul. 72-215.

Scenario 2 – Foreign Manufacturer to Foreign Internet Retail selling to U. S. Consumer at Retail.

The Foreign Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to

the products. The Foreign Manufacturer sells these products directly to a Foreign Internet Retailer.

The Foreign Internet Retailer offers these products for sale on its website and markets these products in other forums including print. The U. S. Consumer orders these products from the Foreign Internet Retailer's website. The Foreign Internet Retailer accepts payment from the U. S. Consumer and packs, documents, and ships the ordered products to the U. S. Consumer.

Question: Who is liable for the excise tax imposed by § 4161?

Law and Analysis:

The U. S. Consumer is the importer of the archery products and is liable for the excise tax imposed by § 4161 on its use of the products for the reasons set forth in Scenario 1.

Scenario 3 - Foreign Manufacturer Sales of Archery Products at U. S. Shows, Tournaments, and Events (U. S. Events).

The Foreign Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to the products.

Situation 1. The Foreign Manufacturer brings products into the United States so the Foreign Manufacturer's employees can demonstrate the products and obtain orders for the demonstrated products from U. S. Consumers who attend the U. S. Events in the United States. The Foreign Manufacturer does not sell the products its employees use as demonstration models at the U. S. Events.

Situation 2. The Foreign Manufacturer does not bring any products into the United States. Instead, U. S. Distributors purchase archery products from the Foreign Manufacturer's website. The U. S. Distributors are independent of the Foreign Manufacturer. The U. S. Distributors purchase the archery products for the purpose of selling the products at wholesale to Retailers that attend the U. S. Events. The U. S. Distributors are independent of the Retailers. There are no contracts between the U. S. Distributors, U. S. Retailers, or the Foreign Manufacturer regarding the sale, use, or distribution of the Foreign Manufacturer's archery products in the United States.

Situation 3. The Foreign Manufacturer does not bring any products into the United States. Instead, the U. S. Retailers purchase archery products from the Foreign Manufacturer's website for the purposes of selling the products to U. S. Consumers who attend the U. S. Events.

Question: Who is liable for the excise tax imposed by § 4161 in situations 1, 2 and 3, above?

Law and Analysis:

Situation 1. The Foreign Manufacturer is the importer of the archery products it brings into the United States for demonstration purposes at the U. S. Events. The Foreign Manufacturer is the inducing and efficient cause of the archery products being brought into the United States for use by it. See Hooven & Allison Co. v. Evatt; Handley Motor Co. Inc. v. United States; Import Wholesalers Corp. v. United States; Sony Corporation of America v. United States; Corex Corp. v. United States; Rev. Rul. 68-197; Rev. Rul. 69-393; Rev. Rul. 72-215; and Rev. Rul. 82-40.

The Foreign Manufacturer is liable for the excise tax imposed by § 4161 on the archery products it uses for demonstration under § 4218. See Rev. Rul. 60-290, 1960-2 C.B. 331 (Use of a taxable article as a demonstrator by the manufacturer in the operation of a business in which he is engaged makes such person liable, under § 4218, for the manufacturers excise tax in the same manner as if he sold the article.)

Situations 2 and 3. The U. S. Retailers and Distributors are the importers of the archery products because they are the inducing and efficient cause of the archery products being brought into the United States for sale. In situation 2, the U. S. Distributors are liable for the § 4161 tax on their sale of the archery products in the United States. In situation 3, the U. S. Retailers are liable for the tax imposed by § 4161 on their sale of the archery products in the United States. See Hooven & Allison Co. v. Evatt; Handley Motor Co. Inc. v. United States; Import Wholesalers Corp. v. United States; Sony Corporation of America v. United States; Corex Corp. v. United States; Rev. Rul. 68-197; Rev. Rul. 69-393; Rev. Rul. 72-215; and Rev. Rul. 82-40.

Scenario 4 - Foreign Manufacturer to Foreign Distributor to Foreign Internet Retailer to U. S. Consumer.

The Foreign Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to the products. The Foreign Manufacturer sells these products to a Foreign Distributor. The Foreign Distributor sells these products to a Foreign Internet Retailer. The Foreign Internet Retailer offers these products for sale on its website and markets these products in other forums including print. The U. S. Consumer orders these products from the Foreign Internet Retailer's website. The Foreign Internet Retailer accepts payment from the U. S. Consumer and packs, documents, and ships the ordered products to the U. S. Consumer.

Question: Who is liable for the excise tax imposed by § 4161?

Law and Analysis:

The U. S. Consumer is the importer of the archery products and is liable for the excise tax imposed by § 4161 on its use of the products for the reasons set forth in Scenario 1.

Scenario 5 - Foreign Manufacturer Drop Ships Items for Foreign Internet Retailer to U. S. Consumer.

The Foreign Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to the products. The Foreign Manufacturer allows or provides sales information and marketing content to a Foreign Internet Retailer so that this retailer can offer these products for sale on its website. The Foreign Internet Retailer offers these products for sale on its website and markets these products in other forums including print.

The U. S. Consumer orders these products from the Foreign Internet Retailer's website. The Foreign Internet Retailer accepts payment from the U. S. Consumer for the products ordered and the shipping costs of these products. The Foreign Internet Retailer also obtains the U. S. Consumer's United States shipping address, instructions, etc. The Foreign Internet Retailer then forwards the U. S. Consumer's order and related information to the Foreign Manufacturer. The Foreign Manufacturer packs, documents, and ships the archery products to the U. S. Consumer.

The Foreign Manufacturer charges the Foreign Internet Retailer for the wholesale cost of the products the U. S. Consumer ordered and the cost to ship these products to the United States. Consequently, the difference between the wholesale cost of the products and the price at which the Foreign Internet Retailer sells the products to the U. S. Consumer is the amount the Foreign Internet Retailer receives for its services. The Foreign Internet Retailer guarantees its customers' satisfaction for the products they purchase. If a customer is not satisfied for any reason, the Foreign Internet Retailer will replace the purchased product free of charge or return the customer's payment. The Foreign Manufacturer will not compensate the Foreign Internet Retailer for products the U. S. Consumer returns or for the refund of the purchase price. The Foreign Internet Retailer absorbs the costs of replacement and refund.

Question: Who is liable for the excise tax imposed by § 4161?

Law and Analysis:

The U. S. Consumer is the importer of the archery products and is liable for the excise tax imposed by § 4161 on its use of the products for the reasons set forth in Scenario 1.

Scenario 6 - Foreign Manufacturer to Foreign Distributor dropping shipping for a U. S. Internet Retailer to a U. S. Consumer.

The Foreign Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to the products. Foreign Manufacturer sells these products to a Foreign Distributor.

The Foreign Distributor allows or provides sales information and marketing content to a U. S. Internet Retailer so that this retailer can offer these products for sale on its website. The U. S. Internet Retailer offers these products for sale on its website and markets these products in other forums including print. The U. S. Internet Retailer is independent of the Foreign Manufacturer and the Foreign Distributor. The U. S. Internet Retailer does not have a contract or arrangement with the Foreign Distributor or the Foreign Manufacturer that provides that the U. S. Internet Retailer has the exclusive right to sell or market the Foreign Manufacturer's products in the United States.

The U. S. Consumer orders these products from the U. S. Internet Retailer's website. The U. S. Internet Retailer accepts payment from the U. S. Consumer for the products ordered and the shipping costs of these products. The U. S. Internet Retailer also obtains the U. S. Consumer's United States shipping address, instructions, etc. The U. S. Internet Retailer then forwards the U. S. Consumer's order and related information to the Foreign Distributor. The Foreign Distributor packs, documents, and ships the archery products to the U. S. Consumer.

The Foreign Distributor charges the U. S. Internet Retailer for the wholesale cost of the products the U. S. Consumer ordered and the cost to ship these products to the United States. Consequently, the difference between the wholesale cost of the products and the price at which the U. S. Internet Retailer sells the products to the U. S. Consumer is the amount the U. S. Internet Retailer receives for its services. The U. S. Internet Retailer guarantees its customers' satisfaction for the products they purchase. If a customer is not satisfied for any reason, the U. S. Internet Retailer will replace the purchased product free of charge or return the customer's payment. The Foreign Distributor will not compensate the U. S. Internet Retailer for products the U. S. Consumer returns or for the refund of the purchase price. The U. S. Internet Retailer absorbs the costs of replacement and refund.

Question: Who is liable for the excise tax imposed by § 4161?

Law and Analysis:

The U. S. Internet Retailer is the importer of the archery products and is liable for the excise tax imposed by § 4161 on its sale of the products in the United States. The U. S. Internet Retailer is the importer because it assumes the risks of a typical import-merchant. The U. S. Internet Retailer guarantees the U. S. Consumer's satisfaction for the archery products. The U. S. Internet Retailer is not compensated by the Foreign Distributor for archery products the U. S. Consumer returns for replacement or refund of the purchase price.

This scenario is distinguishable from Import Wholesalers Corporation v. United States and Corex Corporation v. United States. In Import, the court found that a U. S. automobile dealer was the importer of foreign-made automobiles instead of another U. S. company that placed the orders with the foreign supplier and was named as importer in all of the documents. The U. S. automobile dealer provided all of the financing to make importation possible and paid the other U. S. company a competitive market price plus \$5 for each automobile imported. The court determined that the technicalities of importation were outweighed by the financing arrangements. The court also determined that the small fee the U. S. automobile dealer paid the U. S. company for its services was adequate compensation for the risks and responsibilities the U. S. company assumed.

In Corex, the court found that a U. S. corporation, instead of the U. S. association that performed importation functions for the U. S. corporation, was the importer of fishing reels and supplies. The court concluded that the U. S. association was not the importer because it performed no substantial promotional activities, bore none of the usual risks, performed no function other than as a conduit, and earned little profit.

In Import and Corex, the intermediary U. S. company acted as the nominal importer, within the meaning of § 48.0-2(a)(4)(i). The courts in these cases found that the intermediary company was exposed to minimal risk in the transaction. What risk they were exposed to was fully compensated by the fees the beneficial owner, within the meaning of § 48.0-2(a)(4)(i), paid them. In contrast, in this scenario, the U. S. Internet Retailer has assumed all of the risk by guaranteeing the U. S. Consumer's full satisfaction with the archery products. If the U. S. Consumer is not satisfied, it is the U. S. Internet Retailer and not the Foreign Distributor that is obligated to make the U. S. Consumer whole by either replacing the purchased product or refunding the full purchase price.

Scenario 7 – U. S. Domestic Manufacturer Exports to Foreign Distributor Excise Tax Free, Foreign Distributor Sells to Foreign Internet Retailer who then ships archery products back into the United States to a U. S. Consumer.

The U. S. Domestic Manufacturer develops, manufactures, and markets archery products that are taxable under § 4161 and affixes its own or licensed brand names to the products. The U. S. Domestic Manufacturer sells products free of the § 4161 tax pursuant to § 4221(a)(2) (relating to exemption for sales for export) to a Foreign Distributor. The Foreign Distributor sells these products to a Foreign Internet Retailer. The Foreign Internet Retailer offers these products for sale on its website and markets these products in other forums including print. The U. S. Consumer orders these products from the Foreign Internet Retailer's website. The Foreign Internet Retailer accepts payment from the U. S. Consumer for the products ordered and packs, documents, and ships archery products to the U. S. Consumer. The archery products the U. S. Consumer purchases are in the same unused and undamaged condition as

they were when the U. S. Domestic Manufacturer sold the products to the Foreign Distributor.

Question: Who is liable for the excise tax imposed by § 4161?

Law and Analysis:

Under § 4221(a)(2), the § 4161 tax does not apply to the sale by the manufacturer of archery products article for export, or for resale by the purchaser to a second purchaser for export but only if such exportation or use is to occur before any other use.

Generally, the manufacturers excise tax is imposed on only the first sale of article in the United States. See, for example, U. S. Truck Sales Co. v. United States, 229 F.2d 693, 697 (6th Cir. 1956). However, § 48.4221-3(a)(2) provides that if an article, otherwise taxable under chapter 32: (i) is sold tax free by the manufacturer pursuant to § 4221(a)(2) and (ii) is returned subsequently to the United States in an unused and undamaged condition, then the importer is liable for the tax imposed by chapter 32 on the subsequent sale or use of the article in the United States.

Section 48.4221-3(a)(2), Example 1 provides as follows: Q, a U. S. motor vehicle manufacturer, previously sold a truck chassis to R, a company in Canada. The sale was tax free under § 4221(a)(2). R mounted a truck body on the truck chassis and sold the completed vehicle to S. Thereafter S sold the completed new vehicle to T who imported the vehicle into the United States and sold it. The sale of the completed truck subjects T to an excise tax liability under § 4061(a)(1) with respect to both the body and the chassis.

The U. S. Consumer is the importer of the archery products and is liable for the excise tax imposed by § 4161 on its use of the products for the reasons set forth in Scenario 1. The U. S. Consumer purchased the products that are in the same unused and undamaged condition as these products were when the U. S. Domestic Manufacturer sold the products for export. See § 48.4221-3(a)(2) and Example 1 of this regulation.

Please call (202) 622-3130 if you have any further questions.