

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Alfredo Valdespino
Acting Chief, Excise Tax Program

from: Stephanie Bland
Branch Chief, CC:PSI:7

subject: Medical Device Excise Tax Claim for Credit or Refund

This responds to your request for non-taxpayer specific legal advice regarding the application of section 6416(a) of the Internal Revenue Code (Code) to claims for credit or refund of the medical device excise tax imposed by section 4191. This advice may not be used or cited as precedent.

ISSUE

Whether a credit or refund of the medical device excise tax imposed by section 4191 is subject to the conditions to allowance set forth in section 6416(a) where the credit or refund results from a manufacturer's erroneous computation of the tax, or from a recomputation of tax by the manufacturer in order to use one of the constructive sale price interim rules set forth in Notice 2012-77.

CONCLUSION

In both situations, a claim for credit or refund of the medical device excise tax is subject to the conditions to allowance set forth in section 6416(a) and the regulations thereunder.

FACTS

In the first scenario, a medical device manufacturer sold taxable medical devices at retail to a purchaser in the United States. The manufacturer did not separately state the federal excise tax on the sales invoice. The manufacturer erroneously computed tax by multiplying the total invoice amount, \$100,000, by 2.3%, the tax rate imposed by section 4191(a). The manufacturer reported \$2,300 of tax liability under section 4191(a) on the manufacturer's Form 720, Quarterly Federal Excise Tax Return, and paid the tax.

In the second scenario, the manufacturer correctly computed the tax. The manufacturer reported the tax imposed by section 4191(a) on its Form 720 and paid the tax. The manufacturer later realized that recomputing the tax under an interim rule in section 3(b) of Notice 2012-77 would result in a lower tax liability than the manufacturer originally reported on its return.

LAW

Section 4191 imposes on the sale of any taxable medical device by the manufacturer or importer a tax equal to 2.3% of the price for which the device is sold.

Section 4216(a) provides that in determining the price for which an article is sold, there should be excluded the amount of tax imposed, whether or not stated as a separate charge.

Section 48.4216(a)-2(a)(1) provides, in part, that the tax imposed by chapter 32 of the Code on the sale of an article is not part of the taxable sale price of an article. Where no separate charge is made as tax, it will be presumed that the price charged to the purchaser for the article includes the proper tax, and the proper percentage of such price will be allocated to the tax.

Section 6416(a)(1) bars a credit or refund of any overpayment of tax imposed by chapter 32 unless, among other conditions, the person who paid the tax establishes, under regulations prescribed by the Secretary, that he (i) has not included the tax in the price of the article with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article; (ii) has repaid the amount of the tax to the ultimate purchaser of the article; or (iii) has filed with the Secretary the written consent of the ultimate purchaser of the article to the allowance of the credit or the making of the refund.

Section 6416(a)(2) provides that the conditions to allowance of a credit or refund of an overpayment in section 6416(a)(1) shall not apply to an overpayment of tax resulting from a price readjustment under section 6416(b)(1).

Section 6416(b)(1) provides, in part, that if the price of any article, the sale of which is taxable under chapter 32, is readjusted by a bona fide discount, rebate, or allowance, the part of the tax proportionate to the part of the price repaid or credited to the purchaser is considered an overpayment.

Section 48.6416(b)(1)-2(a) provides that a readjustment of price to the purchaser may occur by reason of return of the article, repossession of the article, return or repossession of the covering or container of the article, or a bona fide discount, rebate, or allowance against the price at which the article was sold.

Section 3(b) of Notice 2012-77 provides temporary guidance for application of the constructive sale price rules in section 4216 to certain model distribution chains employed by some manufacturers in the medical device industry.

ANALYSIS

Section 4191 is a manufacturers excise tax under chapter 32 of the Code. Accordingly, the rules applicable to chapter 32, including section 6416, apply to the medical device excise tax.

In the first scenario, the manufacturer erroneously calculated the tax due by multiplying the sale price of \$100,000 by the 2.3% medical device excise tax rate, and reported tax of \$2,300 on its Form 720. This resulted in an overpayment of tax. The manufacturer may make a claim for credit or refund of the overpayment, subject to the conditions to allowance set forth in section 6416(a) and the regulations thereunder.

Likewise, in the second scenario, the manufacturer may make a claim for credit or refund after recalculating the tax under an interim rule in section 3(b) of Notice 2012-77, subject to the conditions to allowance set forth in section 6416(a) and the regulations thereunder. We note that the manufacturer's initial failure to use the interim rule in Notice 2012-77 to calculate its medical device tax liability is not a subsequent transaction that is considered a price readjustment for purposes of section 6416(b)(1) of the Code, and none of the other rules in section 6416(b) apply. Thus, the claim for credit or refund is subject to the conditions to allowance set forth in section 6416(a) rather than those set forth in section 6416(b).

If you have any questions concerning this memorandum, please contact Amanda F. Dunlap at (202) 317-6855.