

not be excluded or deducted, under any condition, in computing the sale price upon which the tax is computed.

[T.D. 7536, 43 FR 13518, Mar. 31, 1978; T.D. 7536, 43 FR 16974, Apr. 21, 1978]

§ 48.4216(a)-3 Other items relating to tax on sale price.

(a) *Exchanges.* If, in connection with the sale of an article subject to a tax imposed under Chapter 32 on the price for which sold, a manufacturer receives from its vendee another article in exchange, the tax on the manufacturer's sale shall be computed on the basis of the amount allowed for the article received from the vendee, plus any additional amount charged the vendee.

(b) *Replacements under warranty.* If an article, subject to a tax imposed under Chapter 32 on the price for which sold, is returned to the manufacturer by reason of the failure of the article under a warranty as to its quality or service, and a new article is given by the manufacturer, free, or at a reduced price, the tax on the new article shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article. See paragraph (b)(2) of § 48.6416(b)-1 for the circumstances under which the allowance made by the manufacturer, producer, or importer upon the return of the first article constitutes a price readjustment of the sale price of first article and the extent, if any, to which a credit may be allowed, or refund made, of the tax paid by the manufacturer, producer, or importer on the sale of the first article.

(c) *Readjustments in sale price.* Readjustment in sale price (such as allowable discounts, rebates, bonuses, etc.) cannot be anticipated. The tax must be based upon the original price unless the readjustments have actually been made prior to the close of the period for which the tax upon the sale is returned. However, if the price upon which the tax was computed is subsequently readjusted, credit may be taken against the tax due on a subsequent return or a claim for refund filed as provided by section 6416(b)(1) and the regulations thereunder.

[T.D. 7536, 43 FR 13519, Mar. 31, 1978]

§ 48.4216(b)-1 Constructive sale price; scope and application.

(a) *In general.* Section 4216(b) pertains to those taxes imposed under Chapter 32 that are based on the price for which an article is sold, and contains the provisions for constructing a tax base other than the actual sale price of the article, under certain defined conditions.

(b) *Specific applications.* (1) Section 4216(b)(1) applies to:

(i) Arm's-length sales at retail or on consignment, other than those sales at retail and to retailers to which section 4216(b)(2) and § 48.4216(b)-3 apply; and

(ii) Sales otherwise than at arm's length, and at less than fair market price.

(2) Section 4216(b)(2) applies generally to arm's-length sales of an article at retail or to retailers, or both, where the manufacturer also sells the same article to wholesale distributors.

(3) Section 4216(b)(3) provides a formula for determining a constructive sale price for sales of taxable articles between members of an affiliated group of corporations (as "affiliated group" is defined in section 1504(a)) in those instances where the purchasing corporation regularly resells to retailers but does not regularly resell to wholesale distributors, and except for situations where section 4216(b) (4) or (5) applies.

(4) Section 4216(b)(4) provides a special method for computing a constructive sale price for sales of taxable articles between affiliated corporations where the purchasing corporation sells only to retailers, and the normal method of selling within the industry is for manufacturers to sell to wholesale distributors.

(5) Section 4216(b)(5) provides a special method for computing a constructive sale price for sales of articles subject to a tax imposed by section 4061(a) (trucks, buses, tractors, etc.) between affiliated corporations, where the purchasing corporation regularly sells such articles in arm's-length transactions to independent retailers.

(c) *Definitions.* For purposes of section 4216(b) and the regulations thereunder and unless otherwise indicated:

(1) *Sale at retail.* A "sale at retail," or a "retail sale", is a sale of an article to a purchaser who intends to use or lease

the article rather than resell it. The fact that articles are sold in wholesale lots, or at wholesale prices, will not change the character of such sales as "sales at retail" if the purchaser is not engaged in the business of reselling such articles, and acquires them for the purpose of using them rather than reselling them.

(2) *Retail dealers.* A "retail dealer", or "retailer", is a person engaged in the business of selling articles at retail.

(3) *Wholesale distributor.* The term "wholesale distributor" means a person engaged in the business of selling articles to persons engaged in the business of reselling such articles.

[T.D. 7613, 44 FR 23824, Apr. 23, 1979]

§ 48.4216(b)-2 Constructive sale price; basic rules.

(a) *In general.* Section 4216(b)(1) sets forth the conditions that require the Secretary to construct a sale price on which to compute a tax imposed under Chapter 32 on the price for which an article is sold. The section requires a constructive sale price to be established where a taxable article is (1) sold at retail, (2) sold while on consignment, or (3) sold otherwise than through an arm's-length transaction at less than fair market price. See § 48.4216(b)-2 (c) for the treatment of articles taxable under section 4061(a).

(b) *Sales at retail.* Section 4216(b)(1)(A) relates to the determination of a constructive sale price for sales of taxable articles sold at arm's length and at retail. In the case of such sales, the constructive sale price is the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary. If the constructive sale price is less than the actual 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 distributors, there must be taken into consideration the normal industry practices with respect to section 4216 (a) and (f) inclusions and

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