

§ 53.100 Exclusion of local advertising charges from sale price.

(a) *In general.* Section 4216(e) of the Code deals with the treatment to be accorded charges made by a manufacturer for, and reimbursements by a manufacturer or expenditures in connection with the advertising of certain articles subject to excise tax under chapter 32 of the Code. Section 4216(e) of the Code provides an exclusion (which is in addition to the exclusions provided by section 4216(a) of the Code and § 53.92) in respect of charges for local advertising, as defined in paragraph (b) of this section, for purposes of determining the price for which an article is sold. See paragraph (c) of this section. The exclusion provided by section 4216(e) of the Code and paragraph (c) of this section has application only if the advertising is broadcast over a radio or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster. Section 4216(e) of the Code also provides an overall limitation in respect of the sum of the amount of the exclusions from price as charges for local advertising and the amount of the readjustments authorized under section 6416(b)(1) of the Code (relating to credits or refunds for price readjustments) in respect of reimbursements by a manufacturer of expenditures for local advertising. See § 53.101. For provisions prohibiting exclusion from price or readjustment of price in respect of charges for, and reimbursements of expenditures for, advertising other than local advertising, see § 53.102.

(b) *Definition of local advertising—(1) In general.* For purposes of the regulations under sections 4216(e) and 6416(b)(1) of the Code (§§ 53.100-53.102 and 53.173-53.176), the term "local advertising" means advertising which relates to an article with respect to which tax is imposed under chapter 32 of the Code on the price for which sold and which:

- (i) Is initiated or obtained by the purchaser or any subsequent vendee,
- (ii) Names the article for which the price is determinable under section 4216 and states the location at which such article may be purchased at retail, and

- (iii) Is broadcast over a radio station or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster.

(2) *Initiating or obtaining advertising.* For purposes of paragraph (b)(1) of this section, the advertising must be initiated or obtained by one or more of the persons in the chain of distribution of the article (wholesale distributor, jobber, dealer, etc.) who purchased the article for resale. For purposes of this subparagraph, the manufacturer is not considered to be one of the persons in the chain of distribution of the article. In general, advertising of an article is considered to be initiated or obtained by one or more persons in the chain of distribution of the article if any such person:

- (i) Takes an active part in the actual planning and development, or in the arrangements or negotiations leading to the development, of the form and content of the advertising, or
- (ii) Contracts for the placement of the advertising.

The participation by the manufacturer of the article in the planning, development, or placement of the advertising is immaterial provided the advertising is in fact initiated or obtained by one or more persons in the chain of distribution of the article. Furthermore, it is immaterial whether or not the advertising is subject to the approval of the manufacturer of the article. However, if no person in the chain of distribution of the article takes an active part in the actual planning and development, or in the arrangements or negotiations leading to the development, of the form and content of the advertising, but, rather, all such planning, development, arrangements, and negotiations are accomplished by the manufacturer of the article, then such manufacturer is considered to have initiated the advertising, and if he also contracts for the placement of the advertising, such advertising does not qualify as "local advertising".

(3) *Identification of article and sales location.* To meet the requirements of paragraph (b)(1) of this section, the advertising must identify the article for which the price is determinable under

section 4216 of the Code and give the location or locations at which the article may be purchased at retail. All products taxable at the same rate under the same section of chapter 32 of the Code shall be considered to be an "article" for purposes of the preceding sentence. No specific method or means of identification is prescribed. The identification of the article may be made through the use of the name of the manufacturer or the use of an established trade-mark, such as a seal, picture, letter or letters, etc., or a combination thereof. The advertising must identify the particular retail establishment or establishments at which the article may be purchased at retail but need not specify the location of any such establishment in terms of the number by which the premises are designated or the name of the street on which the retail premises are situated. However, the location of the retail premises must be described sufficiently, as, for example, by reference to a particular named shopping area or shopping center, to enable customers to find the retail establishment.

(4) *Determination of costs of local advertising.* Where an advertisement identifies more than one article, and all such articles are not taxable, or are not taxable at the same rate under the same section of chapter 32 of the Code, a reasonable allocation of the cost of the advertisement must be made among:

(i) Articles taxable at the same rate under the same section of the Code, and

(ii) Articles which are not taxable under chapter 32 of the Code.

For example, in the case of a single page newspaper or magazine advertisement, an allocation of costs reflecting the lineage or space devoted to the specified categories will be considered to reflect a reasonable allocation of the cost of advertising the different articles. As a general rule, only the cost of the "spot" portion identifying the retail establishment is considered "local advertising" in the case of national television or radio programs.

(5) *Meaning of "newspaper".* The term *newspaper*, as used in paragraph (b)(1) of this section, is limited to those publications which are commonly under-

stood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character and of a general interest. The term does not include handbills, circulars, flyers, or the like, unless printed and distributed as a part of a publication which constitutes a newspaper within the meaning of this subparagraph. Neither does the term include any publication which is issued to supply information on certain subjects of interest to particular groups unless such publication otherwise qualifies as a newspaper within the meaning of this subparagraph. For purposes of this subparagraph, advertising is not considered to be news of a general character and of a general interest.

(6) *Meaning of "magazine".* The term *magazine*, as used in paragraph (b)(1) of this section, is limited to those publications which are:

(i) Commonly understood to be magazines,

(ii) Printed and distributed periodically at least twice a year, and

(iii) Published for the dissemination of information of a general nature or of special interest to particular groups.

(iv) The term does not include handbills, circulars, flyers or the like, unless printed and distributed as a part of a publication which constitutes a magazine within the meaning of this subparagraph. For purposes of this subparagraph, advertising is not considered to be information of a general nature or information of special interest to particular groups within the contemplation of paragraph (b)(6)(iii) of this section.

(7) *Meaning of "outdoor advertising sign or poster".* The term "outdoor advertising sign or poster", as used in paragraph (b)(1) of this section, means a sign or poster displaying advertising matter, which is located outside of a roofed enclosure. This term includes both signs or posters on billboards, whether placed on or affixed to land, buildings, or other structures, and those which are displayed on or attached to moving objects, provided the signs or posters are located outside of a roofed enclosure. The term "roofed enclosure" means a roof structure which

is enclosed on more than one-half of its sides by walls, fences, or other barriers.

(c) *Exclusion—(1) Conditions and limitations.* A charge for local advertising which is required by a manufacturer to be paid as a condition to his sale of an article is not a part of the taxable price of the article, to the extent that such charge meets each of the following conditions and limitations:

(i) Such charge does not exceed 5 percent of the difference between:

(A) An amount which would constitute the taxable price of the article (computed at the time of the sale of the article) if no part of any charge for local advertising were excludable in computing taxable price, and

(B) The amount of any separate charge for local advertising, whatever the amount of such charge may be,

(ii) Such charge is specifically shown as a separate charge for local advertising on the invoice or statement covering the sale of the article.

(iii) Such charge is billed by the manufacturer with the intention on his part of repaying the amount of the charge to the person purchasing the article from him, or to any person who subsequently purchases the article for resale, in reimbursement of costs incurred for local advertising of such article or some other article or articles taxable at the same rate under the same section of the Code. In the absence of evidence to the contrary, the fact of such intention will be assumed in all cases where the manufacturer and his vendees are parties to an advertising plan which calls for such repayments, or the manufacturer can otherwise establish that the vendees to whom he bills such charges understand and expect that such repayments will be made.

(2) *When exclusion ceases to apply.* To the extent that charges for local advertising meet the conditions and limitations stated in paragraph (c)(1) of this section, such charge is excludable in computing the taxable price of the article in respect of which the charge was made. However, the exclusion will cease to apply in respect of any part of such charge which the manufacturer fails to repay before May 1 of the calendar year following the calendar year in which the article was sold, to the

person who purchased the article from him, or to some other person who subsequently purchases the article for resale, in reimbursement of costs incurred for local advertising of such article or some other article or articles taxable at the same rate under the same section of the Code. If, before such May 1, any part of the charge so excluded has not been so repaid, the manufacturer becomes liable for tax on such May 1 in the same manner as if an article taxable under such section of the Code had been sold by him on such May 1 at a taxable price equivalent to that part of the charge not so repaid. However, see paragraph (b)(2) of § 53.175, relating to price readjustments in cases where local advertising charges are not repaid before such May 1 but are subsequently paid over by the manufacturer to his vendees in reimbursement of costs for local advertising. For provisions relating to the method of determining whether a payment by a manufacturer is or is not attributable to an excluded local advertising charge, see paragraph (b)(3) of § 53.101. In any case where the payment is determined to be attributable to such a charge, the date of the sale in connection with which the charge was made shall be determined on a first-in-first-out basis in respect of the vendee to whom the charge was billed by the manufacturer.

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§ 53.101 Limitation on aggregate of exclusions and price readjustments.

(a) *In general.* The sum of the amount excluded from taxable price in respect of charges for local advertising, as provided in section 4216(e)(1) of the Code and § 53.100, plus the amount of the readjustments for which credits or refunds may be claimed in respect of local advertising, as provided in section 6416(b)(1) of the Code and § 53.175, is subject to an overall 5 percent limitation. This limitation applies to each manufacturer, as of the close of each calendar quarter, in respect of all articles taxable under the same section of chapter 32 of the Code which were sold by such manufacturer in such quarter