

manufacturer's factory are not excludable transportation or delivery expenses. An allowance granted by the manufacturer, producer, or importer to the purchaser for transportation, delivery, or other expenses incurred or to be incurred by the purchaser in connection with the sale shall be excluded in computing the taxable sale price, if charges for similar expenses would be excludable if incurred by the manufacturer.

(4) *Records in support of exclusion.* Every manufacturer, producer, or importer making sales of taxable articles shall keep records which will disclose the amount of transportation, delivery, insurance, installation or other expense actually incurred by it in connection with the delivery of a taxable article to a purchaser pursuant to a bona fide sale.

(c) *Other charges.* A charge or expense not within the scope of paragraph (a) or (b) of this section, whether or not separately stated, may not be excluded in computing the taxable sale price unless it can be shown by adequate records that the charge or expense is not properly included as a manufacturing or selling expense or is in no way incidental to placing the article in condition packed ready for shipment. Commissions to manufacturers' agents, or allowances, payments, or adjustments made to, and for the benefit of, persons other than the purchaser may not be excluded or deducted, under any condition, in computing the sale price upon which the tax is computed.

#### § 53.93 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 of the Code 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 of the Code on the price for which sold, is returned to the manufacturer by reason of the failure of the ar-

ticle 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 § 53.174(b) 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 the 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) of the Code and §§ 53.174-53.176.

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#### § 53.94 Constructive sale price; scope and application.

(a) *In general.* Section 4216(b) of the Code pertains to those taxes imposed under chapter 32 of the Code 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) of the Code 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) of the Code and § 53.96 apply; and

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

(2) Section 4216(b)(2) of the Code 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) of the Code 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) of the Code) 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) of the Code applies.

(4) Section 4216(b)(4) of the Code 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.

(c) *Definitions.* For purposes of section 4216(b) of the Code and §§ 53.94–53.97 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.

**§ 53.95 Constructive sale price; basic rules.**

(a) *In general.* Section 4216(b)(1) of the Code sets forth the conditions that require the Secretary to construct a sale price on which to compute a tax imposed under chapter 32 of the Code 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.

(b) *Sales at retail.* Section 4216(b)(1)(A) of the Code 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 inclusions and exclusions under section 4216(a) of the Code. However, once a constructive sale price has been determined by the Secretary, no further adjustment of such price shall be made. The provisions of section 4216(b)(1)(A) of the Code and this paragraph shall not apply in those instances where the provisions of section 4216(b)(2) of the Code and § 53.96 apply.

(c) *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 for trade, by manufacturers or producers thereof, as determined by the Secretary. For purposes of section 4216(b)(1)(B) of the Code 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