

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 4216(b)(1)(B) of the Code and this paragraph shall not apply if the provisions of section 4216(b)(2) of the Code and § 53.96 apply.

(d) *Sales not at arm's-length.* For purposes of section 4216(b)(1)(C) of the Code 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

(2) The sale is made pursuant to special arrangements between a manufacturer and a purchaser.

In case of an article sold otherwise than at arm's-length, and at less than fair market price, the constructive sale price 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. Once such a constructive sale price has been determined, no further adjustment of such price shall be made. See sections 4216(b)(3) and (4) of the Code, and § 53.97, for specific methods for determining constructive sale prices for intercompany sales under certain defined conditions.

§ 53.96 Constructive sale price; special rule for arm's-length sales.

(a) *In general.* Section 4216(b)(2) of the Code provides a special rule under which a manufacturer shall determine a constructive sale price for this sale of taxable articles at retail, and to retail dealers, under certain conditions. The rule is applicable where:

(1) The manufacturer regularly sells such articles at retail, or to retailers, or both, as the case may be,

(2) The manufacturer also regularly sells such articles to one or more wholesale distributors in arm's-length transactions, and the manufacturer establishes that its prices in such cases are determined without regard to any benefit to be derived under section 4216(b)(2) of the Code, and

(3) The transactions are arm's-length transactions.

(4) A manufacturer meeting the foregoing requirements shall base its tax liability for sales at retail and sales to retailers on the lower of its actual sale price or the highest price for which it sells the same articles under the same conditions to wholesale distributors.

(b) *Definitions.* For purposes of section 4216(b)(2) of the Code and this section:

(1) *Actual sale price.* "Actual sale price" means the actual selling price for an article determined in the same manner as sale price is determined for a taxable sale. Accordingly, such price

must reflect the inclusions and exclusions set forth in section 4216(a) of the Code, and any price adjustments described in section 6416(b)(1) of the Code.

(2) *Highest price to wholesale distributors.* The “highest price” charged wholesale distributors for an article by a manufacturer, producer, or importer thereof, is the highest price at which the manufacturer, producer, or importer sells the article to wholesale distributors, determined without regard to quantity. Such price shall be determined in the same manner as sale price is determined for a taxable sale with respect to the inclusions and exclusions under section 4216(a) of the Code; however, since the price is to be a “highest” price, no further adjustment may be made for price readjustments under section 6416(b)(1) of the Code.

(3) *Regular sales.* An article is considered to be sold “regularly” at retail or to retailers if sales are made at retail or to retailers periodically and recurringly as a regular part of the seller’s business. If a seller makes only isolated or casual sales of an article at retail or to retailers, it is not considered to be selling “regularly” at retail or to retailers. Similarly, a manufacturer is considered to be making regular sales of an article to one or more distributors if it sells the article to at least one distributor periodically and recurringly as a regular part of its business.

(4) *Normal method of sales in industry.* In the absence of a showing to the appropriate TTB officer of a more appropriate manner of determining the normal method of sales within an industry which is practical in application, the normal method of sales within an industry shall be regarded as not being at retail or to retailers, or both, if the industry dollar volume of sales which are at retail or to retailers, or both, is less than half the total industry dollar volume of sales at all levels of distribution by manufacturers, producers, or importers, including sales to other manufacturers, producers, or importers.

[T.D. ATF-308, 56 FR 303, Jan. 3, 1991, as amended by T.D. ATF-312, 56 FR 31083, July 9, 1991]

§ 53.97 Constructive sale price; affiliated corporations.

(a) *In general.* Sections 4216(b) (3) and (4) of the Code establish procedures for determining a constructive sale price under section 4216(b)(1)(C) of the Code for sales between corporations that are members of the same “affiliated group”, as that term is defined in section 1504(a) of the Code.

(b) *Sales to which section 4216(b)(3) of the Code applies.* Section 4216(b)(3) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instances where:

(1) A manufacturer, producer or importer regularly sells a taxable article to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producers or importer, and

(2) The wholesale distributor regularly sells such article to one or more independent retailers, but does not regularly sell to wholesale distributors. Under such circumstances the constructive sale price for the article shall be an amount equal to 90 percent of the lowest price for which the distributor regularly sells the article in arm’s-length transactions to such independent retailers. Once the constructive sale price has been determined, no adjustment shall be made for inclusions or exclusions under section 4216(a) of the Code or price readjustments under section 6416(b)(1) of the Code. If both sections 4216(b)(3) and 4216(b)(4) of the Code apply with respect to the sale of an article, the constructive sale price for such article shall be the lower of the prices computed under sections 4216(b)(3) and 4216(b)(4).

(c) *Sales to which section 4216(b)(4) of the Code applies.* Section 4216(b)(4) of the Code provides a procedure for determining a constructive sale price under section 4216(b)(1)(C) of the Code in those instance where:

(1) A manufacturer, producer, or importer regularly sells (except for tax-free sales) a taxable article only to a wholesale distributor which is a member of the same affiliated group as the manufacturer, producer, or importer,