INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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District Director

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No.:

Periods Involved:

Conference Held:

LEGEND: X =

ISSUES:

(1) Is the taxpayer liable for the tax imposed by § 4071 of the Internal Revenue Code on its sale of X?

(2) If the IRS rules adversely to the taxpayer on Issue (1), will the IRS apply this technical advice memorandum on a nonretroactive basis under its § 7805(b) authority as requested by the taxpayer?

CONCLUSION:

(1) The taxpayer is liable for the tax imposed by § 4071 on its sale of X.

(2) The taxpayer's request to apply this technical advice memorandum on a nonretroactive basis under § 7805(b) is denied.

FACTS:

The taxpayer manufactures and sells a series of mixed-service deep drive axle radial tires. This series of tires is recommended for the drive axle of truck tractors, dump trucks, logging trucks, or delivery trucks operating on/off road service. The taxpayer's brochures describe the tires in this series as replacement tires for original

equipment on heavy duty dump trucks that are highway vehicles subject to the tax on highway vehicles sold at retail under § 4051. The taxpayer does not reference the use tires in this series on machinery or equipment. X is included in this series of tires.

X has a maximum operating speed of 50 miles per hour, while other tires in the series can be operated at 55 miles per hour. X has a greater load capacity than other tires in this series. The taxpayer's materials describe X as having an off-highway application.

LAW AND ANALYSIS:

Section 4071 imposes a tax on tires of the type used on highway vehicles, if wholly or in part made of rubber, sold by the manufacturer, producer, or importer. The rate of tax for a tire weighing more than 90 pounds is $10.50 plus 50 cents per pound in excess of 90 pounds.

Section 4072 defines tires of the type used on highway vehicles as tires of the type used on: (1) motor vehicles which are highway vehicles, or (2) vehicles of the type used in connection with motor vehicles that are highway vehicles.

Section 48.4072-1(c) of the Manufacturers and Retailers Excise Tax Regulations references § 48.4061(a)-1(d) for the meaning of highway vehicle.

Section 48.4061(a)-1(d)(1) defines a highway vehicle as any self-propelled vehicle, or any trailer or semi-trailer, designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions, but does not include a vehicle described in § 4061(a)-1(d)(2). It is immaterial that the vehicle is designed to perform a highway transportation function for only a particular load. The term public highways includes any domestic road that is not a private roadway. Examples of vehicles that are designed to perform a function of transporting a load over the public highway are highway-type trucks, truck tractors, trailers, and semi-trailers.

Section 48.4061(a)-1(d)(2) provides exceptions to the definition of highway vehicle contained in § 48.4061(a)-1(d)(1). Section 48.4061(a)-1(d)(2)(ii) provides an exception for certain vehicles specially designed for off-highway transportation. This exception provides that a vehicle is not a highway vehicle if it is specially designed for the primary function of transporting a particular type of load other than over the public highway in connection with construction, manufacturing, processing, farming, mining, drilling, timbering, or an operation similar to any of the foregoing enumerated operations and, by reason of the special design, the use of the vehicle to transport the load over the public highways is substantially limited or substantially impaired. In determining whether the use is limited or impaired, account may be taken of whether the vehicle may be driven at regular highway speeds, requires a special permit for highway use, is

overweight, overheight, or overwidth for regular highway use, and any other relevant considerations.

Rev. Rul. 79-296, 1979-2 C.B. 370, holds that truck-tractors and low-bed semitrailers that are used in combination to transport military equipment on and off the highway and that are oversize and require special permits and/or escort vehicles on most state highways are highway vehicles subject to tax. The revenue ruling holds that while the vehicles have characteristics that impair their use on the highway, those characteristics are necessary in order to enable the vehicles to carry their intended load and accomplish their highway transportation function.

Excise tax is imposed on the sale by the manufacturer of X if X is a tire of the type used on highway vehicles. Highway vehicles are motor vehicles that are self-propelled, or any trailer or semitrailer, and designed to perform the function of transporting a load on and off the highway. Although the motor vehicles using tires of a type similar to X are designed for and suitable for off-highway use, the motor vehicles also are designed to be used to transport property over the highway. See Rev. Rul. 79-296. Thus, these vehicles are highway vehicles within the meaning of § 48.4061(a)-1(d)(1), and tax is imposed on X under § 4071 unless the vehicles meet one of the exceptions contained in § 48.4061(a)-1(d)(2).

Section 48.4061(a)-1(d)(2)(ii) provides an exception to the definition of highway vehicle, in general, when a vehicle is designed to transport a particular load other than over the highway in connection with a construction, processing, farming, or any similar operation and this special design substantially limits or impairs the use of the vehicle to transport the load over the public highway. (The other exceptions in § 48.4061(a)-1(d)(2)(i) and (iii) relate to mobile machinery and trailers and semi-trailers and are not relevant to this technical advice memorandum.) The regulations provide that the size of the vehicle, the speed at which the vehicle may be driven, the permits required for the vehicle, and other relevant considerations may be indicative of whether highway use is limited or impaired.

The question is whether, for purposes of the exception from tax provided in § 48.4061(a)-1(d)(2)(ii), (1) these vehicles are specially designed for the primary function of transporting a particular load other than over the highway in connection with mining or timbering operations, and (2) their use to transport over the highway is substantially limited or impaired by reason of such special design.

X is a tire of the type used on dump trucks that are typically up to 9 feet wide and travel at highway speeds. The Service has held that vehicles of similar width that are capable of traveling at similar speeds are highway vehicles. See Rev. Rul. 79-296.

Finally, the taxpayer recommends use of this tire on vehicles that are highway vehicles for purposes of the § 4051 tax on trucks and tractors sold at retail. If a vehicle is a highway vehicle for purposes of § 4051, it is a highway vehicle for purposes of the tire tax under § 4071. The regulations under §§ 4051 and 4071 both reference the definition of highway vehicle contained in § 48.4061(a)-1(d)(1).

CONSIDERATION OF § 7805(b) RELIEF:

Section 7805(b) provides that the Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

The taxpayer has requested that, if the technical advice memorandum concludes that tax is imposed on the sale of X, the tax be applied without retroactive effect. The taxpayer argues that imposition of tax on the sale of X would be unfair since: X was not included in the tires at issue in a settlement agreement reached between the taxpayer and the Service in 1995 for all quarters of 1990-1994; there have been no clear standards applied by the Service in determining whether tax applies to the sale of these tires; and manufacturers selling similar tires are not paying tax.

A technical advice memorandum ordinarily is applied retroactively. See section 17.02 of Rev. Proc. 2000-2, 2000-1 I.R.B. 73 at 97. Relief under § 7805(b) usually is granted only if a taxpayer relied to its detriment on a published position of the Service or on a letter ruling or technical advice memorandum issued to that taxpayer.

No ruling was issued to the taxpayer; nor does the taxpayer claim detrimental reliance on specific language in the statute, regulations, or a revenue ruling. Even if the tires at issue had been part of the settlement agreement, reliance upon a settlement agreement does not provide a basis for relief under § 7805(b). The settlement agreement does not resolve a technical issue for periods not included in the settlement. Consequently, the taxpayer's arguments do not support granting its request for 7805(b) relief.

CAVEAT:

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent. Under § 6110(c), names, addresses, and identifying numbers have been deleted.