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Person To Contact:

ID No.
Telephone Number:

Refer Reply To:
CC:PSI:7
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Date:
September 08, 2010

LEGEND:

X =

Dear :

This letter responds to a letter dated January 6, 2010, and supplemental correspondence, submitted on behalf of X requesting a ruling that X is not the manufacturer, producer or importer for purposes of the excise tax on archery equipment under § 4161 of the Internal Revenue Code ("Code").

According to the facts submitted, X is a domestic corporation that manufactures and sells archery equipment, including both patented and non-patented . Additionally, X has developed and that X is planning to introduce to the market . X does not currently hold any patents with respect to its and . X has filed a patent application for its design, but does not know whether any patents will be issued. With respect to its design, X has since determined not to pursue a patent.

. X has also determined that it will not manufacture the and it recently developed. X proposes the following plan for the production of its (referred to herein collectively as the "Products" or individually as a "Product"). The transaction will be substantially similar for all types of Products. However, a given transaction may vary slightly from the facts described below, depending on the type of Product being produced.

X has identified an import broker ("Broker") from whom it intends to purchase Products that will be manufactured outside of the United States ("U.S."). X will place a purchase order with Broker. X will also provide Broker with design specifications.

Broker, in turn, will find a foreign manufacturer or manufacturers to produce finished Products according to the specifications X provides. After the foreign manufacturer produces the Products, Broker will transport the finished Products to the U.S. Broker will be the importer of record and will be responsible for ensuring that all importation requirements are met. Once in the U.S., Broker will sell the Products to X. X will affix its trade name and branding to the Products and package them for sale. X will have the right to refuse any products that do not meet X's specifications.

X anticipates a four to ten month time period from the time it places an order until the time of delivery. X and Broker will negotiate an all-inclusive purchase price (which covers the manufacturing costs, profit margins, insurance, import/export duties, and sipping costs) at the time X places an order and Broker will bear the risk of any change in the cost of manufacturing or transportation that occurs between the time X places an order and Broker delivers the finished products. Broker will also bear the risk for any loss that may occur while the Products are being transported. The purchase order will specifically provide that the price is inclusive of excise tax and that Broker will assume all responsibility for reporting and remitting any and all federal excise tax due.

Broker will be solely responsible for finding the foreign manufacturer and ensuring that the Products meet X's design specifications. X will not approve or disapprove of Broker's choice of a foreign manufacturer, will not have direct contact with the foreign manufacturer, and will not inspect or observe the production facilities. X may receive samples from the foreign manufacturer, through Broker, for X's approval before full production begins. X will not provide materials to the Broker or foreign manufacturer to make the Products. X will not generally advance any type of payment to either Broker or the foreign manufacturer, except in situations when the foreign manufacturer must make molds or undertake machine retooling specifically to make a Product to X's specifications. Otherwise, X will be obligated to pay only after the Products are imported into the U.S. If X rejects the Products brought into the U.S. by Broker, X's payment obligation to Broker will cease. X will have no control over what Broker does with any rejected Products. However, Broker will not be able to sell patented Products in the U.S. without the risk of patent infringement actions.

X and Broker, as well as X and the foreign manufacturer, will be unrelated parties; they will not share management or office facilities or have common ownership. All agreements made between X and Broker will be the result of arm's length negotiations. Furthermore, although X has identified a specific Broker and Broker has entered into discussions with a specific foreign manufacturer, there are no exclusive contracts. X is free to negotiate with other brokers or other manufacturers, foreign or domestic, either in conjunction with or in lieu of Broker. Broker and the foreign manufacturer are also free to provide their respective services to other businesses including X's competitors. As previously mentioned, Broker is free to use any manufacturer or manufacturers to produce a finished Product that X can brand and package.

Section 4161(b)(1)(B) imposes an 11% tax on the sale by the manufacturer, producer, or importer— (i) of any part or accessory suitable for inclusion in or attachment to a bow described in § 4161(b)(1)(A), and (ii) of any quiver, broadhead, or point suitable for use with an arrow described in § 4161(b)(2).

Section 48.0-2(a)(4)(i) of the Manufacturers and Retailers Excise Taxes regulations provides, in part, that the term manufacturer includes any person who produces a taxable article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. The term also includes a "producer" and an "importer." An "importer" of a taxable article is any person who brings such an article into the U.S. from a source outside the U.S., or who withdraws such an article from a customs bonded warehouse for sale or use in the U.S. If the nominal importer of a taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the "importer" of the article for purposes of chapter 32 and is liable for tax on his sale or use of the article in the U.S..

Section 48.0-2(a)(4)(ii) provides that under certain circumstances, as where a person manufactures or produces a taxable article for another person who furnishes materials under an agreement whereby the person who furnished the materials retains title thereto and to the finished article, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

The “importer” for purposes of the manufacturers excise tax is the person who as principal and not as agent arranges for, or is the inducing and efficient cause of, goods being brought into the U.S. for sale or use by him. Handley Motor Co. Inc. v. U.S., 338 F.2d 361 (Ct. Cl. 1964); Import Wholesalers Corp. v. U.S., 368 F.2d 577 (Ct. Cl. 1966); Rev. Rul. 68-197, 1968-1 C.B. 455; Rev. Rul. 69-393, 1969-2 C.B. 206. The passing of title to the goods, either at the time of shipment or upon arrival in the U.S., is not a controlling factor. Rev. Rul. 68-197. It is necessary to look to the substance rather than the form of a transaction in order to determine whether the nominal importer actually functions as a typical import merchant or merely serves in a representative capacity. Rev. Rul. 67-209.

In Import Wholesalers Corporation v. U.S., the court held that the plaintiff, an automobile dealer, was the importer when another party placed the order with the foreign supplier and was named as importer in all of the documents, but plaintiff provided all of the financing to make importation possible and paid the other party a competitive market price plus $5 for each automobile. The court determined that the technicalities of importation were outweighed by the financing arrangements and that the small fee paid by the plaintiff was adequate payment for the risks and responsibilities assumed by the other party.

In Corex Corp. v. U.S., 524 F.2d 1017 (9th Cir. 1975), cert. denied, 425 U.S. 912 (1976), the court determined that a party was not the importer because it performed no substantial promotional activities, bore none of the usual risks associated with shipments in transit, performed no function other than as a conduit, and earned little profit.

In Terry Haggerty Tire Co. v. U.S., 16 Cl. Ct. 620 (1989), aff'd 899 F.2d 1199 (Fed. Cir. 1990), the plaintiff was in the business of selling, distributing and retreading tires. It ordered the tires from a foreign tire company (Canada Tire) that had no business facilities in the U.S. The plaintiff purchased tires when visited by a Canada Tire representative or by placing orders over the telephone. At the time of placing its orders, the plaintiff negotiated an inclusive price that covered the tires, shipping, freight charges, brokerage fees and customs duty. After the plaintiff placed an order, Canada Tire shipped tires from Canada or arranged to release tires it stored at a U.S. customs bonded warehouse. The plaintiff had the right to refuse a shipment if the tires were defective. The court held that because the plaintiff induced and caused the tires to be brought into the U.S., the plaintiff must be regarded as the importer for purposes of the manufacturers excise tax

X requests a ruling that it is not the manufacturer, producer or importer of the Products for purposes of § 4161. We find that under the circumstances described above, X is not the manufacturer or producer of such Products.

With regard to the question of whether X is the importer for purposes of § 4161, the key inquiry is whether X is the beneficial owner of the taxable article (i.e., the Products). To make that determination we must consider whether X as principal and not as agent arranges for, or is the inducing and efficient cause of, the Products being brought into the U.S. for sale by X.

In the proposed transaction, Broker will be a pre-existing, unrelated entity in which X retains no financial interest.
. X will provide Broker with design specifications and Broker will find a foreign manufacturer or manufacturers to produce finished Products in accordance with the specifications X provides. The foreign manufacturer will provide all of the tooling, equipment, personnel, and raw materials required for the fabrication of the Products. X will not supply anything other than product drawings, mock-ups, specification documents, and one-time mold production fees. In addition, Broker will be responsible for arranging all transportation and paying all freight charges, and will bear the risk of loss until title to the products passes to X. X will pay for the finished Products only after
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Once it receives the Products from Broker, X will retain the right to reject any Products not meeting X's specifications or quality standards.

In the case of non-patented Products, Broker and/or the foreign manufacturer may sell or distribute any such products in the U.S., including to X's competitors, without additional cost, consequence or restriction with respect to X. In other words, Broker may bring non-patented Products manufactured to X's specifications into the U.S. in excess of the quantity ordered by X and then sell such Products to a party other than X. This, when combined with other factors (including but not limited those described in the preceding paragraph) leads us to conclude that X is not the inducing and efficient cause of these non-patented Products being brought into the U.S. Accordingly, for purposes of § 4161, X is not the importer of the non-patented Products brought into the U.S. in accordance with the proposed transaction.

We reach a different conclusion, however, with respect to X's patented Products. Because of X's patents, Broker can only bring patented Products into the U.S. for sale to X and can only do so with respect to the Products included in a pending purchase order from X. Thus, X is the inducing and efficient cause of its patented Products being brought into the U.S. Accordingly, we conclude that for purposes of § 4161, X is the importer of any patented Products brought into the U.S. in accordance with the proposed transaction.

Except as specifically set forth above, no opinion is expressed or implied as to the federal tax consequences of the transaction described above under any other provision of the Code.

This ruling is directed only to the taxpayer on whose behalf it was requested. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, a copy of this letter are being sent to X's authorized representative.

Sincerely,

Stephanie Bland
Senior Technician Reviewer, Branch 7
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2)

Copy of this letter
Copy for § 6110 purposes

cc: