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Memorandum

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from: Frank Boland
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subject: Section 4052 - Imported Leased Vehicles

This responds to your request for assistance as to who is the importer and whether the excise tax under § 4051 of the Internal Revenue Code is imposed in the following scenarios. This advice may not be used or cited as precedent.

Scenario 1 – United States Company and Foreign Company – United States Lease.

United States corporation A enters into an agreement with foreign corporation B so that B will lease to A new and used foreign-made heavy vehicles of the type that are taxable under § 4051. A does not regularly sell such vehicles in the United States at retail in arm's length transactions. The lease agreement is executed in the United States where A is located. Before the agreement, the vehicles have never been sold or used in the United States. A is not a "related person" of B within the meaning of § 4052(b)(4)(B) and § 145.4052-1(d)(2)(ii)(A) of the Temporary Excise Tax Regulations Under the Highway Revenue Act of 1982 (Pub L. 97-424).

The agreement provides that A will lease the vehicles from B for a period of time that satisfies the definition of a long-term lease under §4052(e) and § 145.4052-1(d)(6). In addition, A will be responsible for all vehicle maintenance and be responsible for registering the vehicles with the applicable state department of motor vehicle and paying all registration fees. B retains title to the vehicles and is required under the agreement to ensure that the vehicles satisfy all United States Federal Highway Safety standards prior to importation.

The vehicles are imported thru a border crossing at which time U.S. Customs and Border Protection issue a Form 7501, Entry Summary, listing B as the importer of record and A as the ultimate consignee. At the conclusion of the lease, A returns the vehicles back to B in B's country.

Questions:

1. Who is the importer?
2. Who is liable for the tax imposed under § 4051?
3. How is the tax under § 4051 calculated?

Scenario 1 - Law and Analysis – Question 1 – Who is the Importer?

Section 145.4052(f) applies the general definitions and attachment of tax provisions of § 48.0-2 of the Manufacturers and Retailers Excise Taxes Regulations to the tax imposed by § 4051.

Section 48.0-2(a)(4)(i) defines "importer" of a taxable article as any person who brings a taxable article into the United States from a source outside the United States, or who withdraws such an article from a customs bonded warehouse for sale or use in the United States. 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.

The question of "who is the importer" has been the subject of numerous court decisions and revenue rulings. Generally, the cases and rulings hold that the "importer" is the first purchaser resident in the United States who arranges (as principal and not as agent) for, or is the inducing and efficient cause of, goods being brought into the United States for sale or use by him. In determining who is the importer and the nominal importer the substance of the transaction rather than the mere passing of title to the goods is material. See Import Wholesalers Corp. v. United States, 368 F.2d 577, 578, 583-585 (Ct. Cl. 1966); Terry Haggerty Tire Co. v. United States, 16 Cl. Ct. 620, 622-623 (1989), aff'd 899 F.2d 1199 (Fed. Cir. 1990); and Rev. Rul. 69-393, 1969-2 C.B. 206.

In this scenario, A is the importer because A is the inducing and efficient cause of the vehicles being brought into the United States for A's use. But for A's agreement with B to lease the vehicles, B would not have imported the vehicles into the United States. See Import Wholesalers Corp. v. United States; Terry Haggerty Tire Co. v. United States; and Rev. Rul. 69-393.

Scenario 1 - Law and Analysis - Question 2 – Who is liable for the tax imposed by § 4051?

Section 4051(a) imposes a 12% excise tax on the first retail sale of certain enumerated articles, including bodies and chassis of highway truck trailers and semitrailers.

Section 4052(a)(1) defines "first retail sale" as the first sale, for a purpose other than for resale or leasing in a long-term lease, after production, manufacture, or importation.

Section 4052(e) defines "long-term lease" as any lease with a term of one year or more. The rules of § 168(i)(3)(A) apply in determining the lease term.

Section 145.4052–1(a)(1) provides that "first retail sale" means a taxable sale described in § 145.4052-1(a)(2).

Section 145.4052-1(a)(2) generally provides that a sale is a taxable sale unless (i) the sale is a tax-free sale under § 4221, (ii) the sale satisfies the requirements of § 48.4052-1 (for sales after June 30, 1998), or (iii) there has been a prior taxable sale of the article.

Section 145.4052-1(b)(1) generally provides that the leasing of an article on a long-term basis (as defined in § 145.4052-1(d)(6)) is deemed to be a sale of the article and is deemed to be a taxable sale.

Section 145.4052-1(d)(6) defines "long-term lease" as any lease with a term of one year or more.

In Smith v. United States, 319 F.2d 776 (5th Cir. 1963), the court held that used Volkswagen automobiles manufactured in Germany were subject to the excise tax imposed by § 4061 (a predecessor to § 4051) when imported into the United States and sold at retail as used cars because each sale was the first sale within the United States.

Central Transport, Inc. v. United States, 1991 WL 496866 (E. D. Mich.), affirmed by CenTra, Inc. v. United States, 953 F.2d 1051 (6th Cir. 1992), involved a situation where domestically-manufactured trucks were exported tax free to Canada for sale. In Canada, the trucks were purchased by a leasing company that leased the trucks. When the leases expired the leasing company imported the trucks back into the United States and leased them to a United States company. The court held that the "first retail sale" of the trucks for purposes of § 4052 was the lease of the trucks to the United States company after the leasing company imported the trucks into the United States. The court concluded, based on the legislative history of § 4052, that the tax imposed by § 4051 applied to used vehicles and that "first retail sale" means whatever "first retail sale" occurred within the boundaries of the United States. The court reasoned that § 4052's use of the language, "after manufacture, production, or importation," signifies that the “first retail sale” is either: (1) the first retail sale after manufacture, or (2) the first retail sale after production, or (3) the first retail sale after importation, whichever first occurs in the United States. The use of the conjunctive term “or” was intended to capture the first sale in the United States of imported vehicles whether or not the vehicles had previously been sold at retail outside of the United States.

In this scenario, B is liable for the tax imposed by § 4051. The lease agreement is executed in the United States. B is the lessor of the vehicles and A is the lessee. The long-term lease of the vehicles by A from B is a treated as a taxable sale under § 145.4052-1(b)(1) because none of the exceptions contained in § 145.4052-1(a)(2) applies. It is not material whether the vehicles are new or used. <u>See</u> <u>Smith v. United States</u>, and <u>Central Transport, Inc. v. United States</u>.

<u>Scenario 1 - Law and Analysis - Question 3 – How is the tax under § 4051 calculated</u>?

Section 4052(b)(3)(A) provides that in the case of any long-term lease of an article that is treated as the first retail sale of such article, the tax is to be computed on a price equal to (i) the sum of (I) the price (determined under §§ 4051-4053 but without regard to § 4052(b)(4)) at which such article was sold to the lessor, and (II) the cost of any parts and accessories installed by the lessor on such article before the first use by the lessee or leased in connection with such long-term lease, plus (ii) an amount equal to the presumed markup percentage of the sum described in clause (i).

Section 145.4052-1(a)(2) provides that if a lease is deemed to be a taxable sale, then the liability for the entire tax arises at the time of the lease. No portion of the tax is deferred by reason of the fact that the sales price is paid in installments.

Section 145.4052-1(b)(3)(ii) provides that when a person other than a manufacturer, producer, or importer is the lessor of an article on a long-term basis (as defined in § 145.4052-1(d)(6)) and such lease is deemed to be a taxable sale under § 145.4052-1(b)(1), the tax is computed on a presumptive retail sales price as determined under § 145.4052-1(d)(5)(i). Such person is liable for the tax as if the person sold the article at retail.

Section 145.4052-1(d)(5) provides that in the case of any long-term lease of an article in which any person other than a manufacturer, producer, or importer (or related person as defined in § 145.4052-1(d)(2)(ii)) is the lessor and the long-term lease is deemed to be a taxable sale of such article under § 145.4052-1(b)(1), the tax imposed by § 4051(a)(1) is computed on a price equal to the sum of--(i) the price (as determined under § 145.4052-1(d)) at which such article was sold to the lessor plus the cost of any parts and accessories installed by the lessor (or an agent of the lessor) on such article before the first use by the lessee or leased in connection with such long-term lease, and (ii) the product of the sum described in § 145.4052-1(d)(5)(i) and the presumed markup percentage as defined in § 145.4052-1(d)(7).

In this scenario, B's tax liability under § 4051 is calculated pursuant to § 145.4052-1(d)(5) because B is not the manufacturer, producer, or importer. See also Example 4 of § 145.4052-1(e). Pursuant to § 145.4052-1(a)(2), B's liability for the tax arises when the agreement between A and B is executed.

Scenario 2 – United States Company and Foreign Company – Foreign Lease.

The facts are the same facts as in scenario 1 except that the agreement is executed in the foreign country where B is located.

Scenario 2 - Law and Analysis – Question 1 – Who is the Importer?

In this scenario, A is the importer for the reasons set forth in question 1 of scenario 1.

Scenario 2 - Law and Analysis - Question 2 – Who is liable for the tax imposed by § 4051?

Section 4052(a)(3)(A) provides that if any person uses an article taxable under § 4051 before the first retail sale of such article, then such person shall be liable for tax under § 4051 in the same manner as if such article were sold at retail by him; § 145.4052-1(c)(1) provides that the use of an article will be deemed to be a sale of the article.

In this scenario, A is liable for the tax imposed by § 4051 because A uses the vehicles in the United States before the first retail sale of the vehicles in the United States. It is not material whether the vehicles are new or used.

Scenario 2 - Law and Analysis - Question 3 – How is the tax under § 4051 calculated?

Section 4052(a)(3)(C) provides that in the case of any person made liable for tax by § 4052(a)(3)(A) (relating to the taxable use of the article), the tax shall be computed on the price at which similar articles are sold at retail in the ordinary course of trade, as determined by the Secretary.

Section 145.4052-1(a)(3)(ii) provides that if the taxable sale of an article is a taxable use of such article under § 145.4052-1(c), the tax shall be computed on the price as determined under § 145.4052-1(c).

Section 145.4052-1(c)(5)(ii) provides that if the seller of an article regularly sells such articles at retail in arm's length transactions, tax liability on its use of any such article shall be computed on its lowest established retail price for such articles in effect at the time of the taxable use. In establishing such price, there shall be included and excluded, as applicable, the charges and readjustments specified in §§ 4216(a), 4216(f), and 6416(b)(1) as in effect at the time the tax liability on the use of the article is incurred. If the seller of an article does not regularly sell such articles at retail in arm's length transactions, a constructive price on which the tax shall be computed will be determined by the Commissioner. This price will be established after considering the selling practices and price structures of sellers of similar articles.

In this scenario, A's tax liability under § 4051 is calculated pursuant to § 145.4052-1(c)(5)(ii). Because A does not regularly sell in the United States at retail in arm's length transactions the types of vehicles that are the subject of the lease, the Commissioner will determine a constructive price on which the tax will be computed after considering the selling practices and price structures of sellers of similar vehicles.

Scenario 3 – United States Company and Foreign Company – Related Person.

The facts are the same facts as in scenario 1 except that A is a wholly-owned subsidiary of B.

Scenario 3 - Law and Analysis – Question 1 – Who is the Importer?

In Strick Corporation v. United States, 714 F.2d 1194 (3rd Cir 1983), Strick and Cotgo were United States corporations that had the same parent company. Strick manufactured truck chassis and trailers. Cotgo purchased truck chassis and trailers from Strick for the purpose of leasing them. Cotgo had no separate employees, sales force, or business location. Strick's officers and manager handled Cotgo's business operations. Most of Strick's directors were also Cotgo's directors. Strick argued that Cotgo should be disregarded as a corporate entity and that Strick should be regarded as the lessor of the trailers for purposes of the excise tax liability under § 4061 (a predecessor of § 4051). The court declined to disregard Cotgo finding that Strick and Cotgo and their parent were all corporations that were recognized as separate taxable entities. The court cited for support Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) (Sole shareholder of corporation holding real estate unable to treat gain realized by the corporation's sale of real estate as gain taxable to him as an individual.)

In this scenario, A is the importer for the reasons set forth in question 1 of scenario 1. A being wholly owned by B is immaterial. See Strick Corporation v. United States.

Scenario 3 - Law and Analysis - Question 2 – Who is liable for the tax imposed by § 4051?

B is liable for the tax imposed by § 4051 for the reasons set forth in question 2 of scenario 1. A being wholly owned by B is immaterial. See Strick Corporation v. United States. See also § 48.4101-1(a)(4) (relating to certain fuel tax registrations), which provides that each business unit that has a separate employer identification number is treated as a separate person for § 4101 purposes.

Scenario 3 - Law and Analysis - Question 3 – How is the tax under § 4051 calculated?

For purposes of determining the tax base when the tax is imposed on the manufacturer, producer, or importer, or person related to the manufacturer, producer, or importer, § 4052(b)(4)(B)(i) defines “related person” as any person who is a member of the same controlled group (within the meaning of § 5061(e)(3)) as the manufacturer, producer, or importer except as provided in § 4052(b)(4)(B)(ii) (relating to sales through a permanent retail establishment in the normal course of business).

Section 5061(e)(3)(A) provides that in the case of a controlled group of corporations, all corporations that are component members of such group shall be treated as one taxpayer. For purposes of the preceding sentence, “controlled group of corporations” has the meaning given to such term by § 1563(a), except that “more than 50 percent” shall be substituted for “at least 80 percent” each place it appears in such subsection.

Section 145.4052-1(d)(2)(ii)(A) provides that, except as provided in § 145.4052-1(d)(2)(ii)(B) (relating to sales through a permanent retail establishment in the normal course of business), “related person” means any person that is a member of the same controlled group (within the meaning of § 5061(e)(3)) as the manufacturer, producer, or importer.

Section 145.4052-1(d)(4) provides that in the case of any long-term lease (as defined in § 145.4052-1(d)(6)) by a manufacturer, producer, importer, or a related person (as defined in § 145.4052-1(d)(2)(ii)) of an article that is deemed to be a taxable sale of such article under § 145.4052-1(b)(1), the tax imposed by § 4051(a)(1) is computed on a price equal to the sum of--(i) a constructive sales price established by the Commissioner based on the price at which such article would be sold by a manufacturer, producer, or importer in a sale other than a taxable sale (e.g., a sale to which the exceptions contained in § 145.4052-1(a)(2)(ii) applies) on the date the lease is made, and (ii) the product of the constructive sales price referred to in § 145.4052-1(d)(4)(i) and the presumed markup percentage as defined in § 145.4052-1(d)(7).

In this scenario, because A is wholly-owned by B, B is a related person to A within the meaning of § 4052(b)(4)(B)(i) and § 145.4052-1(d)(2)(ii)(A). As a result, B’s liability for the tax imposed by § 4051 is calculated pursuant to § 145.4052-1(d)(4). See also Example 7 of § 145.4052-1(e). Pursuant to § 145.4052-1(a)(2), B’s liability for the tax arises when the agreement between A and B is executed.

Please call (202) 622-3130 if you have any further questions.