Office of Chief Counsel
Internal Revenue Service

# memorandum

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date: May 13, 2004
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from: Edward F. Peduzzi, Jr., Associate Area Counsel, Area 2
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subject: **Mobile Machinery Exception to Definition of Highway Vehicle**

This memorandum responds to your request for assistance dated September 24, 2003. This memorandum should not be cited as precedent.

## ISSUE

What are the guidelines for allowing or denying excise tax claims based on the "mobile machinery exception" [hereinafter MME] in cases that had been placed under 1254 suspense[1] awaiting the outcome of litigation in Schlumberger Technology Corp. & Subs. v. United States, 55 Fed. Cl. 203, 2003-1 USTC (CCH) ¶ 70,200 (Fed. Cl. 2003) [hereinafter Schlumberger] and Florida Power & Light Co. v. United States, 56 Fed. Cl. 328; 2003-1 USTC (CCH) ¶ 70,208 (Fed. Cl. 2003) [hereinafter FPL]?

## CONCLUSIONS

Distilled from the discussion below, the following guidelines should be analyzed in any application of the MME:

I. All three tests enumerated in Treas. Reg. § 48.4041-8(b)(2)(i) and Treas. Reg. § 48.4061(a)-1(d)(2)(i) must be met in order for the MME to be applied to a particular highway vehicle.

A. The (A) test requires: (1) The special equipment or machinery at issue be permanently mounted on the chassis; and (2) The operation of the machinery must have no relation whatever to transportation.[2]

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[1]Under IRM sections 4.8.2.4, 4.8.2.10.1, and CCDM section 35.8.10.8, "1254 suspense" is initiated when the determination is made that an issue in nondocketed cases at the examination level is the same as the issue involved in a pending federal court tax case, and that it would be advisable to hold the disposition of the nondocketed cases in abeyance until the court case is concluded in order to establish a uniform basis for the disposition of the nondocketed cases.

[2]See Treas. Reg. § 48.4061(a)-1(a)(3)(i) for examples of machinery or equipment that contribute to the transportation function of a chassis or body and are therefore not "unrelated to transportation."

B. The (B) test requires that a vehicle's chassis must be designed to serve only as a mobile carriage for the jobsite equipment. Any other use of the vehicle, such as cargo-hauling or the addition of a pintle hook defeats the (B) test and precludes the application of the MME. The addition of a pintle hook to the chassis of a vehicle results in a modified chassis that facilitates the supplementary hauling capacity of the vehicle.

C. The (C) test requires that the chassis must not be capable of transporting any load other than the jobsite equipment without substantial structural modification. Note that if the vehicle is capable, without modification, of carrying a load in addition to the jobsite equipment, then the vehicle already fails the test under (B). The (C) test provides an additional requirement: that substantial structural modification is required for the vehicle to serve as a carrier for other cargo (assuming it does not already have the capacity to carry cargo and thereby fails the (B) test). Therefore, if the specialty equipment is taken off the chassis and the vehicle can then haul other cargo without substantial structural modification, the (C) test is not met. The ability of the vehicle to carry other cargo "efficiently" or "economically" after removal of the specialty equipment is not part of the test. The only inquiry is whether, after removal of the equipment, the chassis can be used as a component of a vehicle designed to perform a function of transportation without substantial modification.

II. PLRs and TAMs issued to another taxpayer have no precedential value.

A. Under I.R.C. § 6110(k)(3) and Treas. Reg. § 601.201(l)(6), PLRs and TAMs may not be cited or used as precedent by any taxpayer other than the taxpayer to whom the PLR or TAM was issued. Accordingly, one taxpayer cannot rely upon a PLR or TAM issued to another

B. The application of Int'l Bus. Machs. Corp. v. United States, 343 F2d. 914 (Ct. Cl. 1965) [hereinafter IBM] is strictly limited to cases in which: (1) Two or more taxpayers in direct economic competition have each applied for a ruling and only one has received a favorable ruling; and (2) The taxpayer denied the favorable ruling is arguing that the Commissioner abused his discretion under I.R.C. § 7805(b)(8) by failing to apply a new legal position only prospectively.

III. Other Points

A. Rev. Rul. 79-423, 1979-2 C.B. 386, has limited application to a MME analysis.

B. The application of Rev. Rul. 75-88, 1975-1 C.B. 341, to the cases under suspense is not appropriate.

C. The holdings in UEC Equip. Co. v. United States, 21 Cl. Ct. 244 (1990) and Utilicorp United, Inc. v. United States, 21 Cl. Ct. 423 (1990) address only the (C) test. Only if the (A) and (B) tests are satisfied, are these cases relevant to

any MME analysis.

These general guidelines apply to the analysis of any specialty equipment or machinery vehicle in deciding whether the MME applies. If further advice is needed as to any one vehicle or any one category of vehicle, this office can be approached for a field office advisory as to the specific vehicle or type, either on a formal or informal basis.

## FACTS

On January 29, 1999, the National Director of Specialty Taxes issued a memorandum requesting 1254 suspension of excise tax claims filed by taxpayers on vehicles claiming the mobile machinery exception from the definition of highway vehicle.

At the time the 1254 suspense was initiated, the Schlumberger and FPL cases had been already docketed with the issues framed. The MME issue was squarely at issue in both cases. The vehicles involved in Schlumberger were specialty service vehicles used at well sites in the oil and gas exploration industry and the vehicles involved in FPL were utility trucks used in the operation and maintenance of a power distribution system. On January 31, 2003, the opinion in Schlumberger was filed, and on April 29, 2003, the opinion in FPL was filed.

FPL is currently on appeal and oral arguments were presented on April 9, 2004. The Court of Federal Claims is withholding final judgment in Schlumberger until the appeal in FPL, dealing with the pintle hook issue, is concluded. The result in FPL should determine the final deposition of several issues in Schlumberger. We will alert you as to the further dispositions of these cases.

## DISCUSSION

The years at issue are 1991–1994. In 1991-1993, IRC § 4091 imposed a tax on diesel fuel sold by the producer thereof. In 1994, IRC § 4081 imposed a tax on the removal, entry, and sale of diesel fuel. IRC § 4041(a)(1)(A) provides for a backup tax on the sale or use of diesel fuel not previously taxed. IRC § 6427(l) allows a credit or payment with respect to the tax imposed on diesel fuel under IRC § 4081 if used in a nontaxable use. Accordingly, if a vehicle qualifies for the MME, a claim can be made under § 6427(l).

Treas. Reg. § 48.4041-8(b) provides that the term "highway vehicle" means any self-propelled vehicle, or any trailer or semi-trailer, designed to perform a function of transporting a load over highways, whether or not also designed to perform other functions, but does not include a vehicle described in paragraph (b)(2).

Treas. Reg. § 48.4041-8(b)(2)(i) (the MME) provides that a self-propelled vehicle, or trailer or semi-trailer, is not a highway vehicle if it (A) consists of a chassis to which there has been permanently mounted (by welding, bolting, riveting, or other means) machinery or equipment to perform a construction, manufacturing, processing, farming, mining, drilling, timbering, or operation similar

to any one of the foregoing enumerated operations if the operation of the machinery or equipment is unrelated to transportation on or off the public highways, (B) the chassis has been specially designed to serve only as a mobile carriage and mount (and a power source, where applicable) for the particular machinery or equipment involved, whether or not such machinery or equipment is in operation, and (C) by reason of such special design, such chassis could not, without substantial structural modification, be used as a component of a vehicle designed to perform a function of transporting any load other than that particular machinery or equipment or similar machinery or equipment requiring such a specially designed chassis.

I.R.C. § 4481(a) imposes a tax on the use of any highway vehicle which (together with the semi-trailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of at least 55,000 pounds.

I. Schlumberger

Schlumberger sought recovery of excise taxes related to diesel fuel under I.R.C. § 4041(a)(1). For purposes of the diesel fuel tax, Schlumberger argued that its vehicles should not be considered "highway vehicles" based on: (1) Application of the MME; (2) Application of the off-highway exception (Treas. Reg. § 48.4041(a)(1)-8(b)(2)(ii)); and (3) That substantially similar treatment should be accorded substantially similarly situated taxpayers. As none of the cases that had been placed in 1254 suspense claim the off-highway exception, that aspect of the court's opinion is not discussed here.

Schlumberger contended that because of the special chassis design features, the vehicles at issue met all three tests of the MME. "All [the] vehicles ... [were] specially modified" for Schlumberger. Schlumberger at 207. Despite the modifications, however, "[n]o special permits were required for any of the vehicles to operate on public roads, and all conformed to the applicable federal and state laws regarding height, weight, length, and width." Id at 207. The court disagreed with Schlumberger. "The mobile machinery exception is a three-part conjunctive test." Id at 210. "All three parts of the test must be satisfied for the exception to apply." Id.

Both Schlumberger and the government agreed that "part (A) of the mobile machinery exception is met if the equipment at issue is permanently mounted on the chassis of the vehicle and if its operation is unrelated to transportation." Id. "The parties also agreed that loading and unloading cargo is not 'unrelated to transportation.'" Id. The parties did, however, dispute the meaning of the phrase "unrelated to transportation" found in the regulations.[3] Id. at 211. The court found the requirement

[3] The court rejected Schlumberger's (A) test argument based on Rev. Rul. 81-71, 1981-1 C.B. 496, because the court found that the cranes described in the revenue ruling were highly specialized and designed with a purpose wholly unrelated to loading and unloading, and therefore satisfied the part (A) test.

that something be "unrelated" would appear to mean "'without a connection" or not connected'" Id. at 211. The court further stated that it was "not aware of any basis on which the phrase 'unrelated to transportation' could be read to mean 'not primarily related to transportation.'" Id. at 212. [4]

The (B) test of the MME requires that the chassis be specially designed to serve only as a mobile carriage and mount (and power source, where applicable) for the particular machinery or equipment involved, whether or not such machinery or equipment is in operation. Schlumberger argued that the reference to "only" in the regulation should be construed to allow the MME when the special design feature constitutes "a substantial limitation to the vehicle's utility for any other application" than as a mobile carriage for the job-site equipment. It argued that "the word 'only' must be interpreted with a 'reasonableness' standard." Id. at 212. The court again disagreed and held that "only" means "only" and that any cargo-hauling capacity results in the inapplicability of the exception. However, the special design did not have to eliminate all "nooks and crannies" where "incidental cargo" could be stored, such as tools, clothing, and safety equipment. The presence of such incidental cargo would not defeat the (B) test.

The (C) test of the MME requires that by reason of the (B) test special design, such chassis could not, without substantial structural modification, be used as a component of a vehicle designed to perform a function of transporting any load other than that particular machinery or equipment or similar machinery or equipment requiring such a specially designed chassis. The government argued that the (C) test requires that "the chassis must not be capable of transporting any load other than the work-performing equipment without substantial structural modification." Id. at 213. Schlumberger's argument relied on the "substantial structural modification" language in the (C) test and argued that the government was wrong because to focus on the cargo-hauling capacity of the vehicle would merely duplicate the (B) test. Schlumberger cited Halliburton Co., v. United States, 611 F. Supp. 1118 (N.D. Tex. 1985) for the proposition that the (C) test requires an analysis of whether, as a reasonable business matter, one would choose to rework the chassis to carry other cargo. The government argued that Schlumberger's argument did not track the regulation, was overbroad and that the critical question is whether substantial structural changes were needed to carry any other load, and not whether a business person would choose to make whatever changes are necessary.

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[4] Rev. Rul. 75-88, 1975-1 C.B. 341, holds that cranes 25 feet or less are presumed to be used for loading and unloading the vehicle upon which they are mounted and that cranes over 25 feet are presumed to be jobsite cranes. Schlumberger argued that its vehicles equipped with cranes over 25 feet met the (A) test. The court noted that Rev. Rul 75-88 involved cranes sold prior to the promulgation of the current regulation in 1977, and therefore addressed the question of whether the cranes were primarily "designed or primarily used" for loading and unloading trucks upon which they were mounted. The court further noted that the instant case was governed by the current regulation and the issue is whether in fact the crane is used for a function related to transportation, such as loading and unloading. Thus, the court found Rev. Rul. 75-88 unpersuasive for post-1977 analysis. Additionally, the court found that even if the crane trucks at issue met the (A) test, they failed both the (B) and (C) tests as being, again, "dual purpose" vehicles, which is not contemplated by the regulation.

The court agreed with the government, citing the plain language of the (C) test.[5] The court further noted that the (C) test does, in fact, incorporate a portion of the (B) test, observing that both tests relate to the capability of the vehicle to carry a load other than the specialty machinery. The court noted at page 213:

> If the vehicle is capable, without modification, of carrying a load in addition to the job-site equipment, the vehicle already fails the test under part (B). The part (C) test provides an additional requirement: that substantial structural modification be required for the vehicle to serve as a carrier for other cargo (assuming it does not already have the capacity to carry cargo and thereby fails part (B) of the test). Plaintiff's argument that the part (C) test addresses only "substantial structural modification," appears to the court to ignore one of the two prongs of the part (C) test.

The court also observed that the MME is similarly interconnected between parts (A) and (B) such that a failure to meet the part (A) test could also result in a failure to meet the part (B) test. The court gave the example of chassis-mounted equipment not permitted in part (A) which would also defeat the requirement of part (B) that "only" mobile machinery be mounted on the chassis.[6]

Additional Points Made By the Court

Validity of Economic Arguments

In an effort to meet the (B) test, Schlumberger, citing Halliburton, argued that certain tractors are "married" to individual trailers and therefore the tractor-trailer combination should be viewed as a whole. The court stated that tractors and trailers are clearly two distinct types of vehicles and must be dealt with accordingly. The court also found Schlumberger's arguments that, under the (C) test modifications were necessary to make a tractor "serve economically as a highway vehicle", to be unpersuasive. The court noted that although plaintiff's modifications may well be required for the tractor to serve "economically" as a highway vehicle, nevertheless none of the modifications were needed for the tractors to "'be used as a component of a vehicle designed to perform a function of transportation.'" Id. at 216. The court also found the economic use argument unpersuasive in ruling that the tank erector trucks failed to meet the MME. "While this use may not be the most economical use of these

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[5] The court discussed the application of Rev. Rul. 79-423, 1979-2 C.B. 386, in the analysis of whether a chassis would need substantial structural modification. One of the factors taken into consideration in this revenue ruling was whether original modifications resulted in the chassis having an asymmetric configuration for purposes of the (C) test. The court indicated that in Rev. Rul. 79-423, the only issue was whether the vehicles met the (C) test, (with the assumption that the (A) and (B) tests had been met), and thus the configuration was dispositive of the dispute. However, in Schlumberger, the court held that, whether or not the vehicles in question have an asymmetric configuration is not dispositive, because the vehicles possess significant cargo capacities.

[6] It is significant that the Schlumberger court reached its holding by focusing more on the functionality of each vehicle, in light of the requirements of the MME, regarding that vehicle's ability to transport cargo, than on the design specifications listed for each vehicle.

vehicles, the court believes it is a use sufficient to take the tank erector trucks out of compliance with part (C) of the test." Id. at 217.

Substantially Similar Treatment

Schlumberger argued that under the "equality doctrine" of IBM the court must find its vehicles are not highway vehicles. It argued that the courts in UEC Equip. Co. v. United States, 21 Cl. Ct. 244 (1990), Utilicorp United, Inc. v. United States, 21 Cl. Ct. 423 (1990), and Halliburton, have held that vehicles similar to those at issue in this case were excepted from the definition of a highway vehicle.

The court indicated that IBM did not require the court to accord similar treatment to Schlumberger's vehicles. Specifically, IBM only applies when: (1) Two or more taxpayers in direct economic competition have each applied for a ruling and only one has received a favorable ruling; and (2) The taxpayer denied the favorable ruling is arguing that the Commissioner abused his discretion under I.R.C. § 7805(b) by failing to apply a new legal position only prospectively.

UEC and Utilicorp

Schlumberger argued that the authority of UEC and Utilicorp and the two Halliburton cases controlled the MME question in that the vehicles in those cases were "substantiality identical" to Schlumberger's vehicles. In footnote 9, the court noted that the only part of the MME test that was resolved by the opinion in UEC was the (C) test. The court stated that UEC could not be applicable to the (B) test. Although the court did not mention Utilicorp in this footnote, the same reasoning could apply. UEC and Utilicorp were companion cases, and the only MME issue litigated was the (C) test.

## II. FPL

This case involved the application of the highway use tax imposed by I.R.C. § 4481(a) to trucks specially designed for the operation and maintenance of the FPL's power distribution system. "The chassis of the trucks, as supplied by the original manufacturer, included certain non-standard features . . . . Pursuant to specifications, virtually all of the vehicles at issue also were equipped with a pintle-type trailer hitch ('pintle hook') and a trailer towing package." FPL at 329.

FPL made three arguments. It argued that its vehicles: (1) Should fall under the MME or the "off-highway" exception to the definition of highway vehicle; (2) Should be exempt under the "equality doctrine" giving similar treatment to similarly situated taxpayers; and (3) Were under 55,000 pounds taxable gross weight. As in our discussion of Schlumberger, we will only discuss the holding of the court as to the application of the MME and the "equality doctrine."

The regulation analyzed in FPL, the MME to the definition of highway vehicle was Treas. Reg. § 48.4061(a)-1(d)(2)(i), is an exact duplicate of the regulation at issue in Schlumberger.

The Pintle Hook Issue

The dispute in FPL focused on the (B) test of the MME. "Specifically, the question is whether the addition of a pintle hook, and the supplementary hauling capacity thereby added to FPL's vehicles, precludes a finding that the vehicles' chassis had 'been specially designed to serve only as a mobile carriage and mount.'" Id. at 331.

FPL asserted that the chassis design of these vehicles was not influenced by the addition of a pintle hook and that therefore a "pintle hook is not considered to comprise part of the vehicle's chassis." Id. The court held that any modification incorporated into a vehicle's frame (as, for example, the permanent bolting of a pintle hook to the frame's rear cross member) that adds to the vehicle's transportation capabilities is a modification to the chassis design. The court stated:

> The addition of a pintle hook to the chassis, whether viewed as a reconfiguration of the chassis (as defendant argues) or simply as an appendage to it (as plaintiff maintains), results in a modified chassis that facilitates the vehicle's transportation of equipment and supplies in addition to its principal load. Because the chassis was designed for such a dual use, it cannot be claimed that the chassis was specially designed to serve only as a mobile carriage and mount for the particular machinery or equipment involved. Based on this reasoning, we conclude that the addition of a pintle hook precludes the application of the mobile machinery exception.

Id. at 332.

FPL claimed that an insulator washer vehicle qualified for the MME.[7] Based upon its discussion of the chassis equipped with pintle-hooks, the court held that the addition of a 1,200 gallon water tank to an insulator washer similarly fell outside the exception.

FPL referred to several PLRs issued by the IRS classifying trucks equipped with pintle hooks as non-highway vehicles. The court cited I.R.C. § 6110(k)(3) and Treas. Reg. § 601.201(l)(6) in holding that the PLRs had no precedential value because they do not represent the IRS's position as to taxpayers generally and are therefore irrelevant in the context of litigation brought by other taxpayers.

Equality of Treatment Issue.

FPL argued that other utility companies, operating as competitors of FPL and using the same or similar mobile equipment, had benefited from PLRs granting them exemption from the highway use tax. FPL argued that such disparate administration is prohibited under the holding of IBM.

Citing to I.R.C. § 6110(k)(3) and Treas. Reg. § 601.201(l)(6), the court held that

[7] FPL's insulator washer was equipped with a 75-foot boom and a high pressure water pump to feed water through a nozzle located at the end of the boom. The vehicle had a 1,200 gallon water tank mounted to its chassis.

PLRs have no precedential value and that FPL could not claim entitlement to a particular tax treatment on the basis of a ruling issued to another taxpayer. The court indicated that the IBM court was careful to point out that its decision did not intend to signal a departure from the principle "'that one taxpayer has no right to rely on an incorrect private letter ruling to another.'" FPL at 334 (*citing*, IBM at 924).

Finally, the court pointed out that the holding in IBM was strictly limited to the situation where a taxpayer applies for a ruling at the same time that other taxpayers also applied and that the first taxpayer is treated disparately in the exercise of the discretion of the Commissioner under the standards of equality and fairness incorporated in Section 7805(b).

If there are any questions as to the foregoing, please contact the undersigned at 412-644-3435.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

_______/s/______________________
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