

**§ 148.1-5 Constructive sale price.**

(a) *Purpose of this section.* The purpose of this section is to set forth temporary rules to be used in determining a constructive sale price under section 4216(b) of the Internal Revenue Code, as amended by section 115 of the Excise Tax Technical Changes Act of 1958, with respect to certain sales made on and after January 1, 1959, by a manufacturer, producer, or importer. The temporary rules set forth in this section have application in the case of articles in respect of which the manufacturer's excise tax imposed under Chapter 32 of the Code is based on the price for which the article is sold.

(b) *General rule—(1) Sales at retail.* Where a manufacturer, producer, or importer sells an article at retail, and the special rule provided in paragraph (c) of this section does not apply, the basis for tax shall be the lower of: (i) the actual price for which the article is sold; or (ii) the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof. Thus, where a manufacturer, producer, or importer sells an article at retail, the tax on his retail sale ordinarily will be computed upon the highest price for which similar articles are sold by him to wholesale distributors. However, in such cases it must be shown that he has an established bona fide practice of selling such articles in substantial quantities to wholesale distributors. If he has no such sales to wholesale distributors, a fair market price will be determined by the Commissioner. In any case the price so determined shall not be in excess of the actual price for which the article is sold by him at retail.

(2) *Sales on consignment and sales otherwise than through an arm's length transaction.* For rules relating to the determination of a constructive sale price in the case of sales on consignment, or sales otherwise than through an arm's length transaction and at less than the fair market price, see paragraphs (a) and (d) of § 316.15 of Regulations 46 (26 CFR (1939) part 316), as prescribed under and made applicable to the Internal Revenue Code of 1954 by Treasury Decision 6091, 19 FR 5167, August 17, 1954.

(c) *Special rule—(1) Basis for tax.* Where a manufacturer, producer, or importer sells an article at retail, to a retailer, or to a special dealer, and the conditions specified in subparagraph (2) of this paragraph are met, a special constructive sale price rule is provided for computation of the tax. This rule provides that the tax is to be based on the lower of the following prices: (i) The actual price for which the article is sold; or (ii) the highest price for which such articles are sold by such manufacturer, producer, or importer to wholesale distributors (other than special dealers).

(2) *Conditions governing applicability of special rule.* In order to qualify for application of the special constructive sale price rule to the sale by the manufacturer, producer, or importer of an article at retail, to a retailer, or to a special dealer, the following four conditions must be satisfied.

(i) The manufacturer, producer, or importer of the article must regularly sell such articles at retail, to retailers, or to special dealers, as the case may be.

(ii) The manufacturer, producer, or importer of the article must regularly sell such articles to one or more wholesale distributors (other than special dealers) in arm's length transactions, and must establish that his prices in such cases are determined without regard to any tax benefit under this paragraph resulting from a reduction in the tax base for his sales at retail, to retailers, or to special dealers.

(iii) The normal method of sales within the industry embracing the article is not to sell at retail, or to retailers, or both.

(iv) The sale at retail, to a retailer, or to a special dealer must be an arm's length transaction.

(3) *Requests for determination.* In any case in which a manufacturer, producer, or importer desires a determination as to the application of this paragraph, he may request such a determination from the Commissioner. The request shall contain complete and detailed information with respect to each of the conditions specified in subparagraph (2) of this paragraph to assist the Commissioner in determining whether the constructive sale price provisions

of this paragraph apply, such as data which will show the normal method of sales for the article within the industry by manufacturers, producers, and importers (including the dollar volume of sales at various distribution levels), and the source of such data; evidence as to the regularity with which sales of such articles are made by the manufacturer, producer, or importer at retail, to retailers, or to special dealers; information that the prices of the manufacturer, producer, or importer to wholesale distributors have been determined without regard to any tax benefit under the special rule of this paragraph; etc.

(d) *Definitions.* For purposes of this section:

(1) *Wholesale distributors.* The term “wholesale distributors” means persons who customarily resell to others who in turn resell.

(2) *Special dealer.* The term “special dealer” means a distributor of articles taxable under section 4121 (relating to electric, gas, and oil appliances) who does not maintain a sales force to resell the article whose constructive sale price is established under paragraph (c) of this section but relies on salesmen of the manufacturer, producer, or importer of the article for resale of the article to retailers.

(3) *Industry.* (i) The term “industry” as applied to any article generally means the specific category of articles listed in Chapter 32 of the Internal Revenue Code (other than combinations) that embraces the article for which a constructive sale price is to be determined under paragraph (c) of this section. For the rule applicable to combinations of two or more articles, see subdivision (iv) of this subparagraph.

(ii) The following are examples of categories of taxable articles which comprise separate industries:

- (a) Taxable electric flatirons;
- (b) Taxable electric, gas, and oil appliances of the type used for cooking, warming, or keeping warm food or beverages for consumption on the premises;
- (c) Taxable electric direct-motor and belt-driven fans and air circulators;
- (d) Taxable electric, gas, and oil incinerator units and garbage disposal units;

(e) Taxable electric light bulbs and tubes;

(f) Taxable radio receiving sets;

(g) Taxable automobile radio receiving sets;

(h) Taxable radio and television components;

(i) Taxable musical instruments;

(j) Taxable fishing rods, creels, reels and artificial lures, baits, and flies;

(k) Taxable golf bags, balls and clubs;

(l) Taxable cameras;

(m) Taxable unexposed photographic film in rolls (including motion picture film);

(n) Taxable check writing, signing, cancelling, perforating, cutting, and dating machines, and other check protector machine devices;

(o) Taxable cash registers; and

(p) Taxable mechanical pencils, fountain pens and ball point pens.

(iii) With respect to the tax imposed by section 4061, the following categories of articles are to be considered separate industries:

(a) Taxable automobile trucks (consisting of automobile truck bodies and chassis);

(b) Taxable automobile buses (consisting of automobile bus bodies and chassis);

(c) Taxable truck and bus trailers and semitrailers (consisting of chassis and bodies of such trailers and semitrailers);

(d) Taxable tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer;

(e) All other taxable automobile chassis and bodies;

(f) Taxable trailer and semitrailer chassis and bodies suitable for use in connection with passenger automobiles; and

(g) Taxable automobile parts and accessories.

(iv) With respect to an article which is:

(a) Taxable as “Combinations of household type refrigerators and quick-freeze units” under section 4111,

(b) Taxable as “Combinations of any of the foregoing” under sections 4141 and 4191, or

(c) A combination, other than a combination referred to in (a) or (b) of this subdivision, of articles taxable under

the same section or different sections of Chapter 32 of the Code.

The industry test required by paragraph (c)(2)(iii) of this section for such article shall be met if such test is met for the article or articles which comprise more than 50 percent in value of the combination. In case of a combination consisting of a taxable article and a nontaxable article, the category for the taxable article in the combination shall constitute the industry for purposes of paragraph (c)(2)(iii) of this section.

[T.D. 6355, 24 FR 311, Jan. 14, 1959]

## PARTS 151-155 [RESERVED]

### PART 156—EXCISE TAX ON GREENMAIL

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156.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

156.6694-4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

156.6695-1 Other assessable penalties with respect to the preparation of tax returns or claims for refund for other persons.

156.6696-1 Claims for credit or refund by tax return preparers.

156.7701-1 Tax return preparer.

AUTHORITY: 26 U.S.C. 6001, 6011, 6061, 6071, 6091, 6161, and 7805.

Section 156.6060-1 also issued under 26 U.S.C. 6060(a);

Section 156.6081-1 also issued under 26 U.S.C. 6081(a);

Section 156.6109-1 also issued under 26 U.S.C. 6109(a);

Section 156.6109-2 also issued under 26 U.S.C. 6109(a);

Section 156.6695-1 also issued under 26 U.S.C. 6695(b).

SOURCE: T.D. 8379, 56 FR 65685, Dec. 18, 1991, unless otherwise noted.

#### Subpart A—Tax on Greenmail

##### § 156.5881-1 Imposition of excise tax on greenmail.

(a) *In general.* Section 5881 of the Code imposes a tax equal to 50 percent of the gain or other income realized by any person on the receipt of greenmail, whether or not the gain or other income is recognized.

(b) *Transactions occurring on or after March 31, 1988.* For transactions occurring on or after March 31, 1988, greenmail is defined as any consideration transferred by a corporation (or any person acting in concert with the corporation) to directly or indirectly acquire stock of the corporation from any shareholder if:

(1) The transferring shareholder has held the stock (as determined under section 1223) for less than two years before entering into the agreement to transfer the stock,

(2) The shareholder, any person acting in concert with the shareholder, or any person related to the shareholder or to a person acting in concert with the shareholder made or threatened to make a public tender offer for stock of the corporation at some time during the two-year period ending on the date