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Attachment 1
March 15, 1999

ACTION ON DECISION

Subject: Oshkosh Truck Corporation v. United States,
Citation: 123 F.3d 1477 (Fed. Cir. 1997)

Issue: Whether the 12-percent excise tax imposed under I.R.C. § 4052 on the first retail sale of specially designed trucks to the United States Army is computed by adding to the vehicle sales price a "presumed markup percentage" as described in subsections (b)(3) and (4) of section 4052 and Treas. Reg. § 145.4052-1(d)(7).

Discussion: Section 4051 imposes an excise tax on the first retail sale of certain automotive articles including heavy truck chassis and bodies. Section 4052(b)(4) provides that the sales price of automotive articles sold directly from a manufacturer to an end user must reflect a "presumed markup percentage."

Section 4052(b)(3)(B) defines the term "presumed markup percentage" as the average markup percentage of retailers of articles of the type involved, determined by regulation. Treas. Reg. § 145.4052-1(d)(7), in turn, determined that the "presumed markup percentage" is four percent, except that trailers, semitrailers, and remanufactured automobile truck chassis, bodies, and tractors are subject to a presumed markup of zero.

The purpose of the presumptive markup rule is to prevent manufacturers from avoiding tax on that portion of the sales price usually attributable to the retail markup by selling directly to end users and avoiding the retail dealer. The statute provides no exceptions to that rule, but the Conference Committee report expresses a desire that the Secretary examine "the appropriateness of establishing different rates to reflect actual profit margins for different categories of taxable articles..." H.R. Conf. Rep. No. 100-27, 100th Cong., 1st Sess. 245 (1987).

The Secretary established different presumed markup percentages for three classes of vehicles: Trucks and tractors at four percent, trailers and semitrailers at zero percent, and remanufactured vehicles at zero percent. Treas. Reg. § 145.4052-1(d)(7). Different presumed markup percentages were provided only for broad categories of vehicles based on whether the categories generally are sold at retail by manufacturers.

The taxpayer manufactured and sold special purpose military trucks to the Army and paid retailers excise tax based on the actual sales price for the vehicles. The Service determined that the taxpayer should have included a presumed markup in its tax base. The taxpayer paid the deficiency and claimed a refund. After the refund claim was denied, the taxpayer commenced a refund action in the Court of Federal

Claims. That court, *sua sponte*, granted the government summary judgment and rejected the taxpayer's argument that Treas. Reg. § 145.4052-l(d)(7) was invalid as applied to the sales at issue.

The Federal Circuit reversed. The court relied on language in H.R. Conf. Rep. No. 100-27 at 261, that the presumed markup "is not to apply in situations identified in Treasury Department regulations where such a presumptive price is unnecessary to carry out the purpose of imposing tax based upon a retail, as opposed to wholesale or otherwise discounted price. The court stated that the sales by the taxpayer "are indistinguishable from the truck sales that the Secretary exempted from the markup because generally they were made by the manufacturer directly to customers and not through dealers, and hence did not involve the problem that Congress intended to reach by the markup provision." Consequently, the court held that the failure to establish additional exemptions or presumed markup percentages of zero for the vehicles in issue was an abuse of discretion.

We believe that Treas. Reg. § 145.4052-l(d)(7) reasonably implements the Congressional intent of I.R.C. § 4052. The Secretary was given the authority to establish a presumed markup percentage for computing the retailers excise tax and the discretion to examine the appropriateness of establishing different rates to reflect actual profit margins for different categories of vehicles. To be valid a regulation need not be the only, or even the best, construction of a statute. It need only be a reasonable interpretation. See Atlantic Mutual Ins, Co. v. Commissioner, 523 U.S. __, 118 S.Ct. 1413, 1418 (1998). The discretion granted by Congress did not require absolute precision by the Secretary in rule making. Regulatory classifications that are overbroad or underbroad are often necessary to the efficient administration of a tax collection system. Northern Illinois Gas Co. v. United States, 743 F.2d 539, 542-43 (1984).

Although we believe that the regulation is valid, the opinion has a limited impact on the administration of I.R.C. § 4052. In addition, the result is not inconsistent with the statute or the legislative history. Accordingly, the issue does not merit further litigation. Therefore, we will no longer maintain in litigation that a presumed markup percentage must be used in computing the vehicular excise tax on automotive articles sold to the United States directly by manufacturers when there are no retail sales outlets for such automotive articles.

Recommendation: Acquiescence in result.

Reviewers: /s/
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/s/

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