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## General Counsel Memorandum 38799

Memorandum to:

GERALD G. PORTNEY

Assistant Commissioner (Technical)

Attention: Director, Individual Tax Division

In a memorandum dated December 16, 1980, the Individual Tax Division requested our reconsideration of certain views set forth in G.C.M. 38435,

\*\*\* I-266-78 (July 3, 1980), and G.C.M. 36032,

\*\*\* I-4220 (October 1, 1974, January 31, 1975).

I.R.C. § 4071(a)(1) imposes an excise tax of 9.75 cents per pound on sales by the manufacturer of tires of the type used on highway vehicles. Rev. Rul. 59-394, 1959-2 C.B. 280, holds that where a manufacturer sells a consumer a tire at a reduced price to replace one which became defective while under warranty, the manufacturer should compute excise tax on the replacement tire upon that portion of the total weight of the replacement tire which the sale price of that tire bears to the regular sale price of that type of tire. In G.C.M. 38435,

\*\*\* , supra , we took the position that the section 4071 tire tax liability on a manufacturer's retail sale of a replacement tire should not be less than normally imposed on sales of that type of tire unless the price charged on the sale of the replacement tire was below the price at which the manufacturer regularly sells that type of tire to independent dealers. We recommended that Rev. Rul. 59-394 be modified accordingly. In your memorandum to us of December 16, 1980, your office agrees with our recommended modification of Rev. Rul. 59-394 but disagrees with the particular rationale we used to support our position. You request that we modify G.C.M. 38435 so as to use a different rationale. For the reason explained below we find it unnecessary to reconsider the correctness of the rationale used in the G.C.M.

Pub. L. No. 96-596, § 4(b) (Dec. 24, 1980), 1981-4 I.R.B. 32, 35, enacted subsequent to the issuance of G.C.M. 38435,

\*\*\* and your memorandum to us of December 16, 1980, provides that tax liability on the sale of a replacement tire under warranty "shall be determined in accordance with the principles set forth in regulations and rulings relating thereto to the extent in effect on March 31, 1978 " This law precludes the Service from modifying Rev. Rul. 59-394; therefore, the recommendation in G.C.M. 38435 that Rev. Rul. 59-394 be modified is purely academic. G.C.M. 38435 is hereby revoked because it advises a modification which Pub. L. No. 96-596, § 4(b) now precludes the Service from making.

G.C.M. 36032,

\*\*\* Jan 31, 1975, *supra*, considers what is the proper method for constructing a sale price under section 4216(b)(1) for a sale at retail of articles taxable under section 4061(a) for a manufacturer who sells such articles to retail dealers and at retail but not to wholesale distributors. The G.C.M. states that Rev. Rul. 54-61, 1954-1 C.B. 259, in part, concludes that the manufacturer's highest actual price charged in sales to retail dealers of section 4061(a) articles should be used as the constructive sale price for articles sold at retail. The G.C.M. concludes that Rev. Rul. 54-61 was not affected by Pub. L. No. 85-859, § 115 (Sept. 2, 1958), 1958-3 C.B. 92, 96, which amended section 4216(b) to provide that in the case of articles sold at retail, the constructive sale price is the lower of the price for which such article is sold, or the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof. Your office objects to this conclusion because you believe that the 1958 legislation did have an effect on Rev. Rul. 54-61 in that the ruling's conclusion with respect to the tax base of a manufacturer's dealer price for its retail sales was no longer applicable after the legislative change.

Pub. L. No. 95-458, § 1 (Oct. 14, 1978), 1978-2 C.B. 367, 368, amended section 4216(b) so that it now provides, with certain exceptions, that the constructive sale price shall be a percentage of the actual selling price for section 4061(a) articles sold at retail. Thus the discussion of this issue in G.C.M. 36032,

\*\*\* is now moot as to section 4061(a) articles due to Pub. L. No. 95-458. (Because of this Code amendment, Rev. Rul. 54-61, *supra*, dealing with retail sales of section 4061(a) articles, was declared obsolete in Rev. Rul. 79-32, 1979-1 C.B. 356.)

A similar issue still arises, however, with respect to retail sales of articles taxable other than under section 4061(a)(1): automotive parts or accessories, section 4061(b); fishing equipment, section 4161(a); bows and arrows, section 4161(b); and firearms, section 4181. Rev. Rul. 80-273, 1980-2 C.B. 315, considered in G.C.M. 38325, Technical Study Project No. 75-31, I-353-79 (March 1, 1980), provides that with respect to the sale of the above types of articles at retail, where a manufacturer, producer, or importer does not sell similar articles to wholesale distributors, the constructive sale price for computing taxes imposed on articles within sections 4061(b)(1), 4161 and 4181 will be computed by using 75-percent of the actual selling price after taking into account the adjustments provided by section 4216(a) unless it can be shown on an industry-wide basis that a lower percentage should apply. The ruling thus holds that the constructive sale price would be based on a percentage of retail price and not on the price charged in the sales to retail dealers.