INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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District Director

Taxpayer Name:
Taxpayer Address:

Taxpayer Identification No:
Periods Involved:
Conference Held

LEGEND:

Taxpayer =

ISSUES:

(1) Whether the described containers are portable bait containers taxable as sport fishing equipment under § 4161 of the Internal Revenue Code.

(2) Whether the described air pumps/aerators (aerators) are taxable sport fishing equipment, parts or accessories, or "fish tank aerators" for purposes of § 4161.

(3) Whether Taxpayer is entitled to relief under § 7805(b)(8) from retroactive application of any adverse holding in this technical advice memorandum.

CONCLUSIONS:

(1) The described containers are portable bait containers taxable as sport fishing equipment under § 4161.

(2) To the extent that they are sold on or in connection with the described portable bait containers, the described aerators are taxable parts or accessories for purposes of § 4161.

(3) Taxpayer is not entitled to relief under § 7805(b)(8) from retroactive application of the adverse holding in this technical advice memorandum.

FACTS:

Taxpayer is a manufacturer of sport fishing equipment that it sells to retailers and distributors. Two of the products that Taxpayer manufactures, certain containers and aerators, are at issue in this request. Taxpayer purchases plastic buckets from various manufacturers. After attaching aerators that it manufactures, Taxpayer then sells the resulting containers.

The containers are comprised of a bucket, a lid, and an aerator that is attached either to the lid or to the side of the bucket through drilled holes. They come in various sizes and shapes, including an 11 ¼ quart round pail; 5, 10, 20, 24, 30, and 35 gallon round buckets; and 23 and 40 gallon oblong buckets. The containers are not sold without aerators; further, they are not sold with any additional parts that could be viewed as fasteners necessary for permanent installation on a boat.

The aerators are varied in construction and capacity and are sold attached to the buckets, separately, or in various kit forms. Most models run on batteries although several models operate on 12 volt DC or 110 volt AC. Some models are designed to be submerged in water. Other models are designed to be externally mounted on containers. The pumps aerate from 5 - 55 gallons of water depending on the model. Taxpayer markets the aerators for use in sport fishing and advertises that certain models are designed to “save bait” and “float if dropped overboard.” Taxpayer does not currently market the aerators for use in fish tanks.

LAW AND ANALYSIS:

Section 4161(a)(1) imposes on the sale of any article of sport fishing equipment by the manufacturer, producer, or importer a tax equal to 10 percent of the price for which the article is sold.

Section 4161(a)(3) provides that in the case of any sale by the manufacturer, producer, or importer of any article of sport fishing equipment, the article shall be treated as including any parts or accessories of the article sold on or in connection therewith or with the sale thereof.

Section 4162(a) enumerates articles of sport fishing equipment taxable under § 4161(a). Section 4162(a)(6)(E) defines sport fishing equipment to include portable bait containers.

Section 48.4161(a)-3(a) of the Manufacturers and Retailers Excise Tax Regulations states that the tax attaches with respect to parts and accessories for articles specified in § 4161(a) that are sold on or in connection with the articles, or with the sale thereof, at the same rate applicable to the sale of the basic articles. The tax attaches in such cases whether or not charges for the parts or accessories are billed separately. To be considered a part or accessory for an article specified in § 4161(a), an item must be either essential to the operation of the specified article, or be designed

to directly improve the performance of the specified article, or to improve its appearance.

Section 48.0-2(a) provides general definitions applicable to all manufacturers excise taxes, unless otherwise expressly indicated. Section 48.0-2(a)(4)(i) defines the term "manufacturer" to include any person who produces a taxable article from new or raw material by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles.

Revenue Ruling 88-52, 1988-1 C.B. 356, defines certain items of sport fishing equipment that are listed in § 4162(a) and that are subject to the excise tax under § 4161(a)(1). The revenue ruling defines a portable bait container as any portable device designed or sold as an article to hold or transport bait in connection with recreational fishing activity. Examples of portable bait containers are minnow buckets, killy cars (floating cages), and grasshopper cages. The revenue ruling provides generally that an article otherwise defined therein as an article of sport fishing equipment is subject to tax under § 4161 unless the taxpayer shows that the article is primarily designed for a purpose other than recreational fishing. If, however, the article as a practical matter can be used for recreational fishing as well as another purpose, the article is subject to tax under § 4161.

Revenue Ruling 85-150, 1985-2 C.B. 260, modifying and superseding Revenue Ruling 58-606, 1958-2 C.B. 805, holds that portable bait containers are subject to the tax imposed by § 4161(a)(1) but fish tank aerators are not.

Section 7805(b)(8) provides that the Secretary may prescribe the extent, if any, to which any ruling relating to the internal revenue laws shall be applied without retroactive effect.

The manufacturers excise tax on sporting goods applies to the sale of articles of sport fishing equipment enumerated in § 4162 and to the parts or accessories sold on or in connection with taxable articles. Articles of fishing equipment not specified in § 4162(a) are not subject to tax under § 4161(a).

Portable bait containers are specifically enumerated in § 4162(a)(6)(E) and are therefore subject to tax. Devices are portable bait containers if they are specifically designed or sold as articles to hold or transport bait in connection with fishing activities. The containers at issue clearly are both designed and sold as articles to hold or transport bait.

Taxpayer refers to the containers as “live wells” and alleges that they are not taxable because they are too heavy to be portable when filled. Taxpayer also alleges that the containers are multi-purpose containers, suitable for use for such things as mixing chum, cleaning up, cleaning fish, and carrying gear, as well as for other purposes. However, Taxpayer’s advertising materials do not suggest that the products be used for such purposes. The materials refer to many of the containers as “bait

buckets" and emphasize their suitability for minnows, shrimp, leeches, shad, sardines, mullet, and shiners, all of which are baits. The materials do not generally suggest that the containers are designed for permanent installation on a boat.

Live wells are designed for permanent installation in boats, providing for circulation of fresh or salt water through hoses that fasten to the boat. The containers at issue are portable and are not designed to be permanently installed in a boat. Taxpayer's own marketing materials state that at least one container is light to carry but tough enough to sit on; another is notched so it can be secured with deck chocks. Both statements contradict any notion that the containers are sold to become a permanent part of a boat.

Taxpayer is the manufacturer of the bait containers because it combines or assembles two or more articles to produce a taxable product. Despite Taxpayer's classification of its product, the containers at issue are portable bait containers and not live wells. Therefore, based on the facts and representations made, they are subject to excise tax.

The District Director contends that Taxpayer's aerators are taxable either as an article of sport fishing equipment or as a part or accessory. Taxpayer argues that its aerators are designed as fish tank aerators. However, Taxpayer's own marketing materials disclose that the articles in question are in fact known for and sold, in part, as a component that improves the function of taxable bait containers.

Aerators are not specifically enumerated in § 4162(a). Therefore, they are not taxable articles of sport fishing equipment in and of themselves. However, the aerators improve the performance of the portable bait containers by keeping the bait alive longer when used. Therefore, we concur with the district's alternative argument that the aerators are taxable parts or accessories, but only if, as § 48.4161(a)-3(a) provides, the aerators are sold on or in connection with the portable bait containers.

CONSIDERATION OF § 7805(B)(8) RELIEF:

Taxpayer's argument for favorable § 7805(b) treatment is that in both 1993 and 1995 Taxpayer was audited and no change was proposed concerning the products at issue. Taxpayer claims that it relied in good faith on statements and information provided by the IRS and on prior IRS approval of Taxpayer's methodology resulting from the failure of the IRS to challenge Taxpayer's methodology in prior audits.

A technical advice memorandum ordinarily is applied retroactively. See section 17.02 of Rev. Proc. 2000-2, 2000-1 I.R.B. 73 at 97. Relief under § 7805(b)(8) usually is granted only if a taxpayer relied to its detriment on a published position of the IRS or on a letter ruling or technical advice memorandum issued to that taxpayer.

No ruling was issued to Taxpayer; nor does Taxpayer claim detrimental reliance on specific language in the statute, regulations, or a revenue ruling. Taxpayer's

reliance on statements allegedly made by prior agents and by the agents' failure to tax the products in prior audits is unwarranted. Therefore, Taxpayer's arguments do not support granting its request for § 7805(b)(8) relief.

CAVEAT:

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.