

**§ 270.22 Determination of wholesale price of large cigars removed before January 1, 1991.**

(a) *General rule.* All cigars of the same brand, size, and packaging are taxed at the same rate except where otherwise specifically provided. When the manufacturer establishes a suggested delivered price to retailers (wholesale price), he shall do so according to the principles in the definition of "wholesale price" in § 270.11 and in this section. "Suggested delivered price" is the price at which the manufacturer intends for the cigars to be sold to retailers, and based on which the manufacturer's price to distributors and wholesalers is established through the usual trade discount. The price at which a cigar is in fact usually sold to retailers in transactions at arm's length from the manufacturer is the best evidence of whether the manufacturer's suggested delivered price is properly set. While it is not expected that a manufacturer will exercise any control over the prices actually paid by retailers in transactions with independent distributors, it is the manufacturer's responsibility to exercise reasonable care to assure that his suggested price to retailers (wholesale price) used as the basis for tax determination is consistent with prices actually paid by retailers. (Where there is no suggested delivered price adequately supported by actual sales to retailers, see paragraph (i) of this section).

(b) *Pricing for different packaging.* If different bona fide wholesale prices are applicable to different types of packaging (e.g., boxes of 25 and boxes of 50), then the cigars in each type of packaging are taxed on the basis of their respective wholesale prices.

(c) *Pricing of seconds.* If some of an otherwise identical cigar brand and size (1) are distinctive from other such cigars because of physical imperfections, (2) are offered to the consumer through clear labeling as "imperfects", "seconds", "throw-outs", or a comparable commonly understood term, and (3) the manufacturer has a separate wholesale price for such cigars, then they are taxed on the basis of this separate wholesale price.

(d) *Combination packages.* If a manufacturer has a wholesale price for a combination package containing cigars of different sizes, the cigars are taxed based on that combination wholesale price. If there is no wholesale price for the combination, then the cigars are taxed based on their individual wholesale prices.

(e) *Promotional pricing.* Special promotional pricing arrangements, whether applicable to all or only a part of removals, do not alter the taxable wholesale price of large cigars. For the purposes of applying this rule, any temporary reduction in price is presumed to be for promotional purposes.

(f) *Removals for another person.* If a manufacturer makes taxable removals of a brand and size of cigar only for distribution by others who establish the suggested delivered price to retailers (wholesale price), then the tax is based on such wholesale price irrespective of the fact that it is not directly established by the manufacturer making the taxable removals.

(g) *Removals for sale to retailers only.* If a manufacturer makes taxable removals of a brand and size of cigars for arm's length sales to retailers only, the tax is based on the manufacturer's selling price, applying the principles of inclusion and exclusion contained in the definition of "wholesale price" in § 270.11.

(h) *Change in wholesale price.* When a manufacturer decides to change the wholesale price of a brand and size of large cigars, there may be some of these cigars which were removed before the price change decision and were tax determined on the basis of the old wholesale price, which in fact are later sold to retailers under the new wholesale price. In this situation, the cigars will be considered to have been properly tax determined, unless at the time of removal the manufacturer had reason to believe that the cigars would be sold under the new wholesale price, considering all information which was or should have been available to him. After the price change decision, cigars may properly be removed and tax determined on the basis of the old wholesale price if the manufacturer has reason to know, at the time of removal,

that they will be sold to retailers before the new wholesale price is effective. Conversely, cigars removed after a price change decision which can reasonably be expected to be sold to retailers under the new wholesale price must be tax determined on the basis of the new wholesale price, even if the removal takes place before the new wholesale price is announced or becomes effective. A price change decision is held to be made at the earliest time during the price change considerations when it might reasonably be concluded that the decision to change the price had in fact been reached.

(i) *Determination of wholesale price by Associate Director (Compliance Operations)*. The Associate Director (Compliance Operations) will determine the wholesale price for tax purposes where the manufacturer has no suggested delivered price to retailers as contemplated by the definition of "wholesale price" in §270.11 and as discussed in paragraph (a) of this section. Listings of such wholesale prices and their comparable retail prices will be published as necessary in the ATF Bulletin (see §71.41(d) of this chapter) for use by manufacturers in properly determining the tax on removals of large cigars for which there is no suggested delivered price to retailers. If a manufacturer has cigars which are not covered by the existing published listing, and for which he has no suggested delivered price to retailers, the manufacturer shall submit a written request to the Associate Director (Compliance Operations) for a determination of the wholesale price applicable to such cigars for tax purposes. If any of these cigars are removed before such determination, the manufacturer shall ascertain the wholesale price to the best of his ability based on the prices which are included in the published listing and other pertinent information available to him, and shall use that price for calculation and payment of the tax and for other tax purposes under this part, pending the determination by the Associate Director (Compliance Operations). If the wholesale price used by the manufacturer for tax payment differs from that subsequently determined by the Associate Director (Compliance Operations) to be the wholesale price

for tax purposes, then the manufacturer shall make an adjustment in his tax return to correct the amount of tax paid. Any tax adjustment shall be made on the return covering the date on which notification of the wholesale price determination was received from the Associate Director (Compliance Operations).

(5 U.S.C. 552(a) (80 Stat. 383, as amended))

[T.D. ATF-40, 42 FR 5000, Jan. 26, 1977, as amended by T.D. ATF-92, 46 FR 46921, Sept. 23, 1981; T.D. ATF-307, 55 FR 52742, Dec. 21, 1990]

**§270.22a Determination of sale price of large cigars removed on or after January 1, 1991.**

(a) *General rule*. The tax imposed on large cigars is computed based on the price for which the large cigars are sold by the manufacturer. Large cigars are taxed at a percentage of the sale price, as prescribed by §270.21. For example, for cigars removed during 1991 and 1992, if the price for which they are sold is \$235.294 per thousand or less, the tax imposed will be 10.625% of such price. For large cigars sold for a price of more than \$235.294 per thousand, the maximum tax is \$25 per thousand for removals during 1991 and 1992. A similar computation, with the increased percent figure and maximum tax rate, is applicable for removals on or after January 1, 1993.

(b) *Price for which sold*. The "price" for which cigars are sold includes the total consideration paid for the cigars. Any charge which is made incident to placing the cigars in condition ready for use is included in the sale price. Similar rules to 26 U.S.C. 4216(a) and the regulations thereunder, relating to charges to be included in the price and excluded from the price, shall apply.

(c) *Exclusions from price*. The tax imposed by 26 U.S.C. chapter 52 or section 7652 is excluded in determining the price for which large cigars are sold. The amount of any retail sales tax imposed by any state or political subdivision thereof or the District of Columbia is likewise excluded (whether the liability for such tax is imposed on the vendor or vendee), if the retail sales tax is stated as a separate charge.

(d) *Constructive sale price rules*. Rules similar to the constructive sale price