802.4
802.50

Verne, B. Michael

From: [redacted]
Sent: Friday, June 22, 2007 2:06 PM
To: Verne, B. Michael
Cc: [redacted]
Subject: HSR - 802.4 and 802.50 analysis question

Hi Mike,

I'm working through an exemption analysis involving 802.4 (the "look-through") and 802.50 (the foreign assets exemption) and hope that you can provide a bit of clarity on "sales in or into the US" (and the "attribution" language in the examples to 802.50) for purposes of the foreign assets exemption. The transaction I'm being asked to analyze is actually a stock deal, but it doesn't meet the strict terms of 802.51 and, so, we are assessing the availability of the foreign assets exemption by virtue of the look-through.

The buyer (my firm's client) is a US issuer and the target is a foreign issuer ("S"). The majority of S's assets (manufacturing/processing facilities) are located outside of the US. S also has a some US assets (same general types of facilities).

Regarding the calculation of sales from S's non-US operations "in or into the US," our question relates to how to value intracompany sales. Some of S's sales into the US are made by S to a wholly owned US subsidiary of S ("SUSA"). S accounts for these sales in its regularly kept accounting records at a transfer price (based on S's cost of production) paid by SUSA at the time of the intracompany sale. The majority of the products S sells to SUSA are raw materials that SUSA further processes before resale, and the remainder are goods for which little or no additional processing occurs. In either case, SUSA typically holds these products in inventory for some period of time before they are resold in the US.

There is no express agreement between S and SUSA on where title to the products transfers, but we are assuming for purposes of our analysis that it transfers in the US.

In calculating the value of sales by S to SUSA, it appears to us that the sales should be valued at the intracompany transfer price paid by SUSA at the time of sale, and that the valuation should not be dependent on the price at which SUSA later sells the products to its customers. Among the reasons for this are: (a) some of the products sold intracompany are further processed in the US prior to resale; (b) SUSA holds most of these products in inventory, meaning that intracompany sales in one fiscal year do not necessarily result in resales in the same fiscal year; and (c) this is how S records the sales on its books and records.

I would appreciate it if you could confirm the above analysis is correct. If you'd like to discuss any of these points, please call either my colleague [redacted] office number) or, if he's not available, me ([redacted], cell number).

Thanks in advance for your help, Mike.

I AGREE WITH THE ANALYSIS.
BM
6/22/07

Regards,

[redacted]