802.50

Verne, B. Michael

From: [redacted]
Sent: Monday, June 02, 2014 3:11 PM
To: Verne, B. Michael
Subject: Confidential: 802.50 allocation of goodwill - export sales question

Confidential:

Michael:

Hope all is well.

Another quick 802.50 allocation of good will of purchase price question. We are representing a technology industry client which will be an acquired firm in a transaction and, like many in this industry, has most of its products contract manufactured for it in Asia. In this case, however, the contract manufacturers ship the products to our client in the United States for final quality control testing. Thereafter, most of these products are shipped to customers abroad from our US location, while a minority are shipped to customers within the U.S. Our client does have some assets outside of the U.S. associated with its operations abroad.

The Editor's Note to Paragraph 216 of the Premerger Notification Practice Manual states that "The PNO does not consider export sales by a U.S. entity to be sales within the United States." Can you confirm that this is still the PNO's position and, if so, that the parties can use the relative percentages of the acquired entity's sales in the U.S. vs. its export sales in allocating the good will in the transaction between its domestic and foreign assets (through 802.4 in this case)? We understand that the goods are sold ex-works from the US location to customers abroad, so technically title passes to them in the US but most of the customers are located oversees and that is where most of the products are sent to directly by our client. I can send a more detailed email with citations, dollar amounts, etc. for publication as an informal interpretation, but first I wanted to just confirm whether such export sales would not be attributable under 802.50 to sales within the US from our foreign business, and that the earlier importation of the products from our contract manufacturers to our own testing plant in the US would not be deemed sales into the US attributable to our client for 802.50. If so, then we are confirming we can allocate the purchase price between the US and non-US assets of the target (under 802.4) for the purpose of determining whether the non-US assets being purchased have sales in or into the US over thresholds for applying 802.50, and thereby excluding the value of the foreign assets from the purchase price for size of transaction purposes. Obviously, we would treat any product sold to US end users after quality testing at our location as sales made in the US.

As always, I appreciate your thoughtful consideration of these issues.

Many thanks,
[redacted]

[redacted]

We agree with your take. We do not consider export sales by a US distributor to be sales in or into the US. We also do not consider imports from a third party contract manufacturer to be sales into the US attributable to the technology industry client. The allocation of goodwill you propose seems like a reasonable method.

BM
6/3/14

KW concur