

28-10-EX

**TENDERED
FOR FILING**

No. 08-5950

NOV 13 2000

IN THE UNITED STATES COURT OF APPEALS **LEONARD GREEN, Clerk**
FOR THE SIXTH CIRCUIT

WORLDWIDE EQUIPMENT, INC.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

FILED

MAR 10 2009

LEONARD GREEN, Clerk

On Appeal from the United States District Court
for the Eastern District of Kentucky

**BRIEF OF AMICI CURIAE
NATIONAL AUTOMOBILE DEALERS ASSOCIATION,
KENTUCKY COAL ASSOCIATION, WEST VIRGINIA COAL
ASSOCIATION, AND COAL OPERATORS & ASSOCIATES, INC.
IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR REVERSAL**

Mark H. Sidman
Rose-Michele Nardi
Sandra B. Vipond
WEINER BRODSKY SIDMAN KIDER PC
1300 19th Street NW, Fifth Floor
Washington, DC 20036
Telephone: (202) 628-2000
Facsimile: (202) 628-2011

Attorneys for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 08-5950

Case Name: Worldwide Equip., Inc. v. U.S.A.

Name of counsel: Mark H. Sidman, Rose-Michele Nardi, and Sandra B. Vipond

Pursuant to 6th Cir. R. 26.1, National Automobile Dealers Association

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 12, 2008 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Sandra B. Vipond

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 08-5950

Case Name: Worldwide Equip., Inc. v. U.S.A.

Name of counsel: Mark H. Sidman, Rose-Michele Nardi, and Sandra B. Vipond

Pursuant to 6th Cir. R. 26.1, Kentucky Coal Association

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 12, 2008 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

sl Sandra B. Vipond

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 08-5950

Case Name: Worldwide Equip., Inc. v. U.S.A.

Name of counsel: Mark H. Sidman, Rose-Michele Nardi, and Sandra B. Vipond

Pursuant to 6th Cir. R. 26.1, West Virginia Coal Association

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 12, 2008 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

st Sandra B. Vipond

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 08-5950

Case Name: Worldwide Equip., Inc. v. U.S.A.

Name of counsel: Mark H. Sidman, Rose-Michele Nardi, and Sandra B. Vipond

Pursuant to 6th Cir. R. 26.1, Coal Operators & Associates, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 12, 2008 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

sl Sandra B. Vipond

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

 I. The Federal Excise Tax And Off-Highway Exception 4

 II. The District Court Incorrectly Interpreted Part A
 Of The Off-Highway Exception 5

 A. Dual-Use Vehicles Are Not Disqualified
 Under Part A..... 5

 B. The “Primary Function” Standard Of The Special
 Design Test Permits More Than Incidental
 Highway Use 7

 C. A Vehicle’s Highway Use Cannot Be Considered In
 A Vacuum..... 11

 III. The District Court Offered No Analysis For Its
 Conclusion That The Subject Vehicle Was Not
 Specially Designed 15

 IV. The District Court Erred By Failing To Consider The
 Design Features Of The Body Of The Subject Vehicle 16

 V. The District Court Improperly Considered Evidence Of
 Intended Use Of The Subject Vehicle 17

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20
CERTIFICATE OF SERVICE..... 21

TABLE OF AUTHORITIES

CASES

20th Century Manufacturing Co. v. United States,
444 F.2d 1109 (Ct. Cl. 1971) 13

Dillon Ranch Supply v. United States, 652 F.2d 873 (9th Cir. 1981) 12

Florida Power & Light Co. v. United States, 56 Fed. Cl. 328 (2003) 14

Freightliner of Grand Rapids v. United States,
351 F. Supp. 2d 718 (W.D. Mich. 2004) 12

Gateway Equipment Corp. v. United States,
247 F. Supp. 2d 299 (W.D.N.Y. 2003) 6

Halliburton Co. v. United States, 611 F. Supp. 1118 (N.D. Tex. 1985) 6

Limited, Inc. v. Commissioner of Internal Revenue Serv.,
286 F.3d 324 (6th Cir. 2002) 7

Malat v. Riddle, 383 U.S. 569 (1966) 8

*Ohio Cast Products, Inc. v. Occupational Safety & Health Review
Commission*, 246 F.3d 791 (6th Cir. 2001) 9

Peerless Corp. v. United States, 185 F.3d 922 (8th Cir. 1999) 13

Schlumberger Technology Corp. and Subsidiaries v. United States,
55 Fed. Cl. 203 (Fed. Cl. 2003) 7

STATUTES

26 C.F.R. § 145.4051-1(a)(2) 4

26 C.F.R. § 48.4061(a)-1(d)(1) 6

26 C.F.R. § 48.4061(a)-1(d)(2)(ii) 4

26 U.S.C. § 4051 4
26 U.S.C. § 4053(1) 16
26 U.S.C. § 4053(2) 13
26 U.S.C. § 4061 10
26 U.S.C. § 4063(a)(1) 13

OTHER AUTHORITIES

41 Fed. Reg. 768 10
Fed. R. App. P. 32(a)(7)(B) 20
I.R.S. Gen. Couns. Mem. 34976 (Aug. 3, 1972) 10
I.R.S. Gen. Couns. Mem. 37833 (Jan. 26, 1979) 6
Rev. Rul. 2004-80, 2004-2 C.B. 164 8
Rev. Rul. 57-440, 1957-2 C.B. 721 10

INTERESTS OF AMICI CURIAE

At issue in this case is whether a particular vehicle, designed and engineered to haul extremely heavy loads of coal in the Appalachian coal fields, is an off-highway vehicle and, consequently, exempt from the otherwise applicable 12% federal excise tax.

The National Automobile Dealers Association (“NADA”) is a national association that represents approximately 20,000 new car and truck dealers. The American Truck Dealers Division of NADA (“ATD”) is composed of over 2,200 medium and heavy-duty truck dealers. Many of the vehicles sold by ATD’s members are subject to the 12% federal excise tax.

In addition to NADA, there are several trade associations representing the Appalachian coal industry that also have an interest in the issues presented in this appeal. The Kentucky Coal Association (“KCA”) is the state’s leading coal association with members representing both Eastern and Western Kentucky, surface and underground production, and union and non-union operations. The KCA is dedicated to advancing the interests of the coal industry across Kentucky.

The West Virginia Coal Association represents more than ninety percent of the state’s underground and surface coal mine production, which includes the extraction, preparation and transportation of coal. Its mission is to advocate on

behalf of the coal industry in West Virginia – the second leading coal producing state in the nation – with respect to the wide range of issues affecting the industry.

Coal Operators & Associates, Inc. (“COA”), is a trade association based in Pikeville, Kentucky, that represents companies, contractors, independents and subsidiaries of large corporations engaged in surface and underground mining, coal preparation and transportation. COA also represents businesses that supply goods and/or services to the coal industry.

As explained in more detail in the accompanying motion for leave to file, the Amici share a strong interest in ensuring that the off-highway exception is interpreted correctly and consistently in accordance with the Internal Revenue Code and applicable regulations, both with respect to the vehicle at issue in this case as well as other current and future vehicles.

SUMMARY OF ARGUMENT

The issue presented in this tax appeal is whether a vehicle used to haul coal consisting of both a Mack RD888SX chassis and an oversized, steel dump body (the “RD888SX Coal Hauler”) is an off-highway vehicle and, thus, exempt from the 12% federal retail excise tax imposed under § 4051 of the Internal Revenue Code. The district court concluded that the RD888SX Coal Hauler is an on-highway vehicle subject to the excise tax.

The Amici respectfully submit that the district court's analysis and application of the "special design" or "Part A" prong of the off-highway exception was erroneous in several respects. First, the district court improperly concluded that a "dual-use" vehicle cannot meet the off-highway exception. As explained in detail below, dual-use is a prerequisite to the application of the off-highway exception, not a disqualifying factor. Second, in contrast to the plain meaning of the word "primary," the district court incorrectly applied an "incidental" use standard to conclude that the RD888SX Coal Hauler did not meet the off-highway exception. Third, the district court's conclusion that the RD888SX Coal Hauler was not specially designed was wholly unsupported given the substantial evidence of special design features introduced by Appellant. Fourth, the district court erred by failing to analyze the special design features of the entire vehicle – chassis and body – in concluding that the RD888SX Coal Hauler did not qualify for the off-highway exception. Finally, in analyzing whether the RD888SX Coal Hauler was specially designed, the district court erred in considering evidence of intended use.

Accordingly, for all these reasons, the Court should reverse the district court's decision and vacate the judgment below.

ARGUMENT

I. THE FEDERAL EXCISE TAX AND OFF-HIGHWAY EXCEPTION

Pursuant to 26 U.S.C. § 4051, there is a 12% excise tax imposed separately on heavy truck chassis and bodies, but only if such chassis and bodies are “sold for use as a component part of a highway vehicle....” 26 C.F.R. § 145.4051-1(a)(2).

One exception to the definition of a “highway vehicle” is a vehicle that satisfies the so-called off-highway exception. The off-highway exception provides, in relevant part:

A self-propelled vehicle, or a trailer or semi-trailer, is not a highway vehicle if it is (A) specially designed for the primary function of transporting a particular type of load other than over the public highway in connection with a construction, manufacturing, processing, farming, mining, drilling, timbering, or operation similar to any one of the foregoing enumerated operations, and (B) if by reason of such special design, the use of such vehicle to transport such load over the public highways is substantially limited or substantially impaired. For purposes of applying the rule of (B) of this subdivision, account may be taken of whether the vehicle may travel at regular highway speeds, requires a special permit for highway use, is overweight, overheight or overwidth for regular use, and any other relevant considerations.

26 C.F.R. § 48.4061(a)-1(d)(2)(ii). For purposes of this brief, subsection (d)(2)(ii)(A) is referred to as “Part A” and subsection (d)(2)(ii)(B) is referred to as “Part B” of the off-highway exception. Accordingly, if a vehicle meets both Part A and Part B, it is considered an off-highway vehicle not subject to the federal excise tax.

II. THE DISTRICT COURT INCORRECTLY INTERPRETED PART A OF THE OFF-HIGHWAY EXCEPTION

A. Dual-Use Vehicles Are Not Disqualified Under Part A

In its decision, the district court incorrectly concluded that the dual-use aspect of the RD888SX Coal Hauler disqualified it from satisfying Part A of the off-highway exception. In fact, dual-use is a prerequisite to the application of the off-highway exception, not a disqualifying factor.

According to the district court, the “RD888SX is not a special off-highway design,” but “[r]ather ... is a dual use (on/off-highway) vehicle” (Summary Judgment Order, Record Entry No. 57, p. 14; ROA p. 2092). In response to Appellant’s evidence that highway use of the RD888SX Coal Hauler was uncommon and a very small percentage of the vehicle’s total operational time, the district court stated: “This position, however, ignores the reality that RD888SX would not be purchased by the majority of [Appellant’s] customers if it was unsuitable for highway use” (Summary Judgment Order, Record Entry No. 57, p. 13; ROA p. 2091). Likewise, the district court concluded: “In fact, if the RD888SX’s design did not allow for highway usage or if the vehicle was substantially impaired from travel on the public highways, it would not have been able to achieve its primary purpose....” (Summary Judgment Order, Record Entry

No. 57, p. 14; ROA p. 2092).¹

The district court's focus on the dual-use aspect of the RD888SX is misplaced. The Treasury Regulations define a "highway vehicle" as "any self-propelled vehicle... designed to perform a function of transporting a load over public highways, whether or not also designed to perform other functions...." 26 C.F.R. § 48.4061(a)-1(d)(1). Thus, if a vehicle is *not* designed for highway use, it will fall outside the regulatory definition of a highway vehicle and will not be subject to 12% excise tax. In other words, a vehicle solely designed for off-highway use is simply nontaxable. The off-highway exception comes into play only with respect to vehicles that are designed, at least to some extent, for both on-highway and off-highway use (i.e., dual-use vehicles). *See* I.R.S. Gen. Couns. Mem. 37833, at 5 (Jan. 26, 1979) (noting that "only vehicles with no or negligible utility for transporting loads on public highways fail to meet the design test in the

¹ Contrary to the district court's conclusion, highway use can be substantially impaired and still be a significant part of a vehicle's design. *Gateway Equip. Corp. v. United States*, 247 F. Supp. 2d 299, 308, 317 (W.D.N.Y. 2003) (finding both "that the unit would have no practicality if it was not designed to carry the payload to the construction site" and that highway use was substantially impaired); *Halliburton Co. v. United States*, 611 F. Supp. 1118, 1121, 1130 (N.D. Tex. 1985) (finding units "designed to travel on the highway without a special permit," but use on highway still "substantially impaired by reason of their high operating costs, limited speed and acquisition costs"). The district court declined to analyze Part B of the off-highway exception and thus did not consider evidence of the vehicle's substantial impairment for highway use or how such impairment might affect its primary purpose.

general definition of highway vehicle” and that “[t]he exceptions are provided to exclude vehicles that should not be taxed, but which meet the design test.”²

Therefore, the district court erred in focusing on the dual-use aspect of the RD888SX Coal Hauler in concluding that it did not satisfy the off-highway exception.

B. The “Primary Function” Standard of the Special Design Test Permits More Than Incidental Highway Use

The district court concluded that the RD888SX Coal Hauler did not satisfy Part A of the off-highway exception because its use on the public highways was more than “incidental.” Contrary to the district court’s conclusion, a vehicle may satisfy the off-highway exception *even when* its highway use is substantial.

Part A of the off-highway exception provides, in part, that a vehicle “is not a highway vehicle if it is (A) specially designed for the *primary* function of transporting a particular type of load other than over the public highway....” 26 C.F.R. § 48.4061(a)-1(d)(2)(ii)(A) (emphasis added). The district court incorrectly shifted the focus of its Part A analysis from the “primary function” of the

² “Revenue Rulings and General Counsel Memoranda are entitled to some deference because they are the Internal Revenue Service’s interpretation of its own regulations.” *Schlumberger Tech. Corp. and Subsidiaries v. United States*, 55 Fed. Cl. 203, 212 n.5 (2003). *See also Limited, Inc. v. Comm’r of Internal Revenue Serv.*, 286 F.3d 324, 337 (6th Cir. 2002) (noting that “this Circuit has treated revenue rulings as having persuasive authority”).

RD888SX Coal Hauler to whether its on-highway use is more than “incidental.” Although the district court stated that the United States’ estimate of highway use was “not particularly convincing,” it nonetheless concluded that it was sufficient to demonstrate use that is more than “incidental.” (Summary Judgment Order, Record Entry No. 57, p. 13; ROA p. 2091). The district court also stated that, regardless of which party’s “version of highway usage is accepted, the record does not support Plaintiff’s position that the RD888SX’s use on public highways is merely incidental.” (Summary Judgment Order, Record Entry No. 57, p. 14; ROA p. 2092).

The court’s application of an “incidental” use standard was improper and not at all supported by the plain language of the regulations. The word “primary” means “principally” or “of first importance.” *Malat v. Riddle*, 383 U.S. 569, 572 (1966); Rev. Rul. 2004-80, 2004-2 C.B. 164 (“Ruling 2004-80”), at 2. It does not mean exclusive. Ruling 2004-80, at 2. The word “incidental” is defined as “occurring merely by chance or without intention or calculation.”³ However, as noted above, the off-highway exception is relevant only to vehicles designed, at least in part, for highway use. If a vehicle were designed for highway use, the

³ Merriam-Webster’s Online Dictionary, retrieved November 11, 2008, from <http://www.merriam-webster.com/dictionary/incidental>

overwhelming likelihood is that the use of such vehicle on the public highway would exceed that occurring by chance or unintended use. Thus, if the plain language of the off-highway exception is to have meaning, it must apply to vehicles that use the public highways more than incidentally.⁴

The correct standard is not whether highway use is incidental, but whether the design of the vehicle indicates that the highway use is of secondary importance to its off-highway use. In other words, the on-highway function of a vehicle can be an important part of the vehicle's design and still satisfy Part A of the off-highway exception, so long as its off-highway function is of greater importance.⁵

The Amici acknowledge that, in cases involving the off-highway exception, courts and litigants (including Appellant) have sometimes focused on whether or not the highway use of a vehicle is incidental.⁶ However, there is no statutory or

⁴ See *Ohio Cast Products, Inc. v. Occupational Safety & Health Review Comm'n*, 246 F.3d. 791, 794 (6th Cir. 2001) (“When an agency promulgates regulations, it is bound by those regulations, and it may not attempt to subvert the rulemaking process through interpretation unsupported by the regulation’s language.”).

⁵ See Ruling 2004-80, at 2 (noting that the determination of whether a vehicle is primarily designed to carry cargo on its chassis or tow a trailer depends on “which function is of *greater importance*”) (emphasis added).

⁶ Incidental highway use certainly would support a finding that the vehicle satisfied Part A of the off-highway exception. However, the converse is not true, because the mere fact that on-highway use exceeds the incidental threshold does not establish that the vehicle in question is not “specially designed for the primary function of transporting a particular type of load other than over the public

regulatory basis for the application of an “incidental” standard. It appears that, in the context of applying the off-highway exception, the concept of incidental use had roots in Revenue Ruling 57-440, 1957-2 C.B. 721 (“Ruling 57-440). In that ruling, the IRS stated, in part, that “[a]s a general rule” an article was not subject to the excise tax under 26 U.S.C. § 4061 (the predecessor to the 26 U.S.C. § 4051 tax) if “designed ... for purposes predominantly other than the transportation of persons or property on the highway, even though *incidental* highway use may occur.” Ruling 57-440, at 2 (emphasis added).⁷ In any event, in the *Halliburton* case, the United States argued, and the court agreed, that the 1977 Treasury Regulations superceded prior interpretations of the definition of a highway vehicle. *Haliburton*, 611 F. Supp. at 1124, 1127.⁸ Accordingly, the focus on incidental

highway” 26 C.F.R. § 48.4061(a)-1(d)(2)(ii)(A). Appellant’s assertion that the highway use of the RD888SX Coal Hauler is incidental does not relieve the district court from applying the correct, broader standard.

⁷ However, in addition this “general rule,” Ruling 57-440 established the broader principle that the tax would apply only to those chassis and bodies “primarily designed for highway use.” Ruling 57-440, at 1. Thus, the primary design test in Ruling 57-440 referred to highway use, while the primary design test at issue in this case refers to off-highway use. In a 1972 General Counsel Memorandum, the IRS made clear that incidental use was not sufficient to override a primary design standard. I.R.S. Gen. Couns. Mem. 34976, at 5 (Aug. 3, 1972) (clarifying that, under the primarily designed standard, tax would not be imposed when an article was “*equally* designed for use both on and off the highway”) (emphasis added).

⁸ See also Notice of Proposed Rule Making for the 1977 Treasury Regulations, 41 Fed. Reg. 768 (Jan. 5, 1976) (acknowledging that “the amendment of the definition

highway use that apparently arose from Ruling 57-440 (or any other pre-1977 authority) is no longer applicable.

In 1977, the IRS issued new regulations, which are the subject of this case, establishing a specific exception for off-road use. The plain language of the 1977 regulations does not support an incidental highway use standard. The word “incidental” is not present in the language of the exception. Instead, the off-highway exception, as set forth in the 1977 regulations, expressly addresses the issue of highway use in Part B. Rather than adopting an incidental highway use standard, Part B adopts a standard of substantial limitation or impairment for on-highway use. Furthermore, the district court’s application of an incidental highway use standard is at odds with the plain meaning of the word “primary” in Part A. As noted above, the plain meaning of the word “primary” indicates that highway use may be more than “incidental,” so long as it is of secondary importance to its off-highway use. Accordingly, the district court should not have interpreted Part A of the off-highway exception as rejecting a vehicle that operates over the highway in more than an incidental manner.

of highway vehicle represents a substantial elaboration of the present definition of highway vehicle”).

C. A Vehicle's Highway Use Cannot Be Considered In a Vacuum

As discussed above, the court's consideration of highway use⁹ should not have focused on whether such use is "incidental," but whether the design indicates its use on the highway is secondary to its off-road use.¹⁰ Accordingly, in applying the Part A test, a court cannot consider a vehicle's actual highway use in a vacuum, but must compare it to the vehicle's actual off-road use in order to determine its primary function. This principle is consistent with the transmittal memorandum for the final draft of 1977 Treasury Regulations which stated that the off-highway exception refers to vehicles designed so that "they will spend *most of their functional time off the highway* performing tasks unrelated to highway

⁹ As a threshold matter, it is important to point out that the district court in its opinion emphasized that a customer's use of the RD888SX Coal Hauler was irrelevant for purposes of determining the application of the excise tax. (Summary Judgment Order, Record Entry No. 57, p. 6; ROA p. 2084) (*citing Dillon Ranch Supply v. United States*, 652 F.2d 873, 881 (9th Cir. 1981) and *Freightliner of Grand Rapids v. United States*, 351 F. Supp. 2d 718, 727-28 (W.D. Mich. 2004)). Nevertheless, the district court, without explanation, proceeded to rely heavily on the vehicles' use on the highway in determining that the vehicles did not satisfy Part A.

¹⁰ The district court mentions in passing that the RD888SX Coal Hauler's ability to transport coal over the public roadways "is as important" as its off-highway ability. (Summary Judgment Order, Record Entry No. 57, pp. 7, 16; ROA p. 2085, 2094). However, this is not the standard the court applies in its analysis to determine whether the RD888SX Coal Hauler satisfies Part A of the off-highway exception.

transportation, although they are capable of operating on, and will make occasional use of, the public highways.” *Gateway*, 247 F. Supp. 2d at 313.¹¹

The district court did not rely on evidence comparing on-road and off-road use in determining whether the RD888SX Coal Hauler satisfies Part A. Instead, the district court focused on the number of miles the RD888SX travels over the highway, without regard to the amount of time such vehicles spent at the jobsite. As quoted by the district court in its opinion, Appellant submitted evidence in support of its position that “[a]ny highway use was rare and that less than 5% of the trucks’ total operational time” was spent on public roads.¹² (Summary Judgment Order, Record Entry No. 57, pp. 12-13; ROA pp. 2090-2091). The district court’s opinion did not discuss any contrary evidence introduced by the United States. Rather, the district court noted that the United States provided “not particularly convincing” evidence that “the at-issue vehicles travel upwards of

¹¹ In the *Gateway* case, the court ruled that a vehicle spending “30 to 35 percent of the time traveling to and from the site” satisfied the off-highway exception. *Gateway*, 247 F. Supp. 2d at 308, 317.

¹² In applying the design standard in 26 U.S.C. § 4063(a)(1), the court in *20th Century Mfg. Co. v. United States*, 444 F.2d 1109 (Ct. Cl. 1971), stated that actual use evidence may only be used to the extent “it contradicts or corroborates: (1) the subjective testimony of the designer or other evidence of his intentions; or, more importantly, (2) objective evidence of the use to which one would most reasonably expect the units to be put after sale.” *Id.* at 1118. *See also Peerless Corp. v. United States*, 185 F.3d 922, 925 (8th Cir. 1999) (stating, in the context of 26

20,000 miles per year on the public highways.” (Summary Judgment Order, Record Entry No. 57, p. 13; ROA p. 2091). Nevertheless, the district court concluded it was “satisfied that the RD888SX travels extensively on the” roads. (Summary Judgment Order, Record Entry No. 57, p. 13; ROA p. 2091).

The district court acknowledged that Appellant cited “a number of cases [holding] that vehicles spending a significant amount of time on the public highways” satisfy the off-highway exception. (Summary Judgment Order, Record Entry No. 57, p. 13; ROA p. 2091). In contrast, the district court cites only one case, *Florida Power & Light Co. v. United States*, 56 Fed. Cl. 328 (2003), in support of using a highway mileage threshold to disqualify a vehicle from satisfying Part A of the exception. (Summary Judgment Order, Record Entry No. 57, p. 13; ROA p. 2091). Reliance on the holding in *Florida Power & Light* for this principle is misplaced in two respects. First, in that case, the court referred to the annual number of highway miles in its analysis of Part B of the off-highway exception, not Part A. *Florida Power & Light*, 56 Fed. Cl. at 333. In the case at hand, the district court never reached Part B, finding instead that the exception did not apply because the RD888SX Coal Hauler did not satisfy Part A.

U.S.C. § 4053(2), actual use evidence is proper “for the limited purpose of determining the primary function for which the trailer bodies were designed”).

Second, the district court ignores the *Florida Power & Light* court's discussion of Part A. In that case, the court specifically found that a design to meet *frequent* off-road use did *not* amount to a design for *primary* off-road use.¹³ If the reasoning of the court in *Florida Power & Light* is to be adopted, then the corollary also must be true: frequent on-highway use does not necessarily mean the truck was designed primarily for on-highway use (or that it was *not* primarily designed for off-road use).¹⁴

III. THE DISTRICT COURT OFFERED NO ANALYSIS FOR ITS CONCLUSION THAT THE SUBJECT VEHICLE WAS NOT SPECIALLY DESIGNED

The district court's determination that the RD888SX Coal Hauler was not "specially designed" relied principally on a comment by the court in *Gateway* that a dump truck is a type of vehicle that is not specially designed because it can haul a variety of loads over the highway throughout the year. (Summary Judgment Order, Record Entry No. 57, p. 9; ROA p. 2087). The district court's position appears to be that any type of vehicle similar to a dump truck, regardless of the

¹³ The *Florida Power & Light* court stated: "[A] fair reading of the affidavit indicates that plaintiff's vehicles were designed to satisfy the need for *frequent* off-road use [but] [t]hat is not the same...as saying that the vehicles were designed *primarily* for off-road use." 56 Fed. Cl. at 333.

¹⁴ See also *Century Mfg. Co. v. United States*, 444 F.2d at 1118 (noting that "frequency of actual use is not necessarily synonymous with the primary purpose for which the [item] is designed").

vehicle's design features, is incapable of satisfying Part A of the off-highway exception.

Certainly, that is not the principle set forth in the *Gateway* case. Instead, the court in *Gateway* advocates a *comparison* of the vehicle at issue with a standard dump truck (or similar vehicle) in order to determine whether the special design standard was satisfied. (Summary Judgment Order, Record Entry No. 57, p. 9, n.6; ROA p. 2087); *Gateway* at 307. Despite the substantial evidence of special design features introduced by Appellant, the district court never conducted a comparison of the characteristics of the RD888SX Coal Hauler to those of a standard dump truck. Accordingly, the district court's reliance on the *Gateway* decision is misplaced, and its conclusion with respect to the special design standard is unsupported.

IV. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER THE DESIGN FEATURES OF THE BODY OF THE SUBJECT VEHICLE

The off-highway exception provides that, “[a] self-propelled *vehicle*, or a trailer or semi-trailer,” is not subject to the excise tax if it meets the Part A and Part B tests. Unlike certain other statutory exceptions from the excise tax, which focus solely on either the body or chassis of a vehicle,¹⁵ the off-highway exception

¹⁵ *E.g.*, 26 U.S.C. § 4053(2)(A) applies to “[a]ny *body* primarily designed – to process or prepare seed, feed, or fertilizer for use on farms” (emphasis added). *See also* 26 U.S.C. § 4053(1) (camper coach bodies for self-propelled mobile homes).

applies to complete vehicles (*i.e.*, both the chassis and body). Thus, in order to determine if a particular vehicle satisfies Part A of the off-highway exception, it is necessary to look at the entire vehicle – chassis and body – to determine if the vehicle is “specially designed for the primary function of transporting a particular type of load other than over the public highway”

The Appellant introduced extensive evidence concerning the special design features of both the chassis (the Mack RD888SX) and the bodies incorporated into the RD888SX Coal Hauler. Despite this evidence, the district court’s decision focuses exclusively on design features of the RD888SX chassis and ignores entirely the design features of the body. With respect to the body, the court merely notes that “the dump body affixed to the RD888SX is capable of handling a variety of materials.” (Summary Judgment Order, Record Entry No. 57, p. 8; ROA p. 2086). That observation, however, does not address the design features of the body that support a finding under Part A that the vehicle is specially designed.

Accordingly, the district court’s failure to consider evidence of the special design features of the entire vehicle renders its Part A analysis incomplete and erroneous.

V. THE DISTRICT COURT IMPROPERLY CONSIDERED EVIDENCE OF INTENDED USE OF THE SUBJECT VEHICLE

The Appellant charged federal excise tax on its sales of the RD888SX Coal Hauler to customers who declined to sign a certificate concerning off-road use.

This certificate stated that the customer would not operate the vehicle on the highway under certain specified circumstances. (United States Motion for Summary Judgment, Declaration of Robert D. Cirilli, Record Entry No. 48, Attachment 2, Tab 17; ROA p. 809). In its decision, the district court stated that “[t]he fact that [appellant] collected taxes on certain RD888SX’s sold to customers who planned to use the vehicle on public highway evidences ... the vehicle’s objective dual use design.” (Summary Judgment Order, Record Entry No. 57, p. 10; ROA p. 2088). This statement demonstrates a misunderstanding of the application of the off-highway exception on several fronts.

First, the fact that Appellant may have erroneously collected and paid the excise tax on some sales of the RD888SX Coal Hauler has no bearing on whether such vehicle is specially designed for a primary off-road function. Second, the district court itself acknowledged that a customer’s intended use of the vehicle is irrelevant to the determination of the excise tax.¹⁶ Third, as noted above, a dual-use vehicle is precisely the type of vehicle to which the off-highway exception applies. Finally, the mere fact that a customer intended (and actually did) use the

¹⁶ “Whether a prospective purchaser signs a statement [of intended use] or not is irrelevant to th[e] determination [of whether to apply the excise tax].” (Summary Judgment Order, Record Entry No. 57, p. 10; ROA p. 2088).

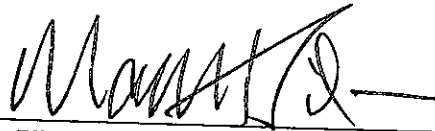
RD888SX Coal Hauler for use over the highway is insufficient to demonstrate that the vehicle does not satisfy the Part A test.

Therefore, for these reasons, the district court's focus on the intended use of the vehicle for purposes of the Part A analysis was erroneous.

CONCLUSION

For all the foregoing reasons, this Court should reverse the district court's decision and vacate the judgment below.

Respectfully submitted,

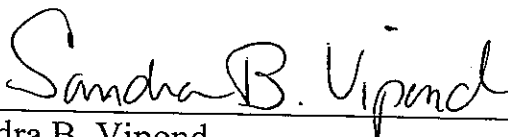


Mark H. Sidman
Rose-Michele Nardi
Sandra B. Vipond
WEINER BRODSKY SIDMAN KIDER PC
1300 19th Street, NW, Fifth Floor
Washington, DC 20036
Telephone: (202) 628-2000
Facsimile: (202) 628-2011

Attorneys for Amici Curiae
National Automobile Dealers Association,
Kentucky Coal Association, West Virginia
Coal Association, and Coal Operators &
Associates, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Amici Curiae Brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 4,621 words using proportionately spaced Times New Roman font at 14 points. The word processing software used to prepare this appeal brief was Microsoft Word.



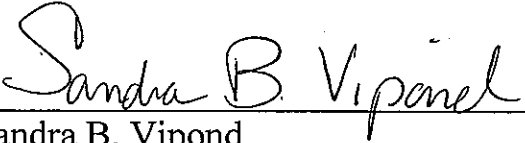
Sandra B. Vipond

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2008, I caused two copies of the foregoing Amici Curiae Brief to be served via first class mail, postage prepaid, on the following counsel of record:

Bethany B. Hauser, Esq.
Tax Division, Appellate Section
U.S. Department of Justice
P.O. Box 502
Washington, DC 20044

James E. Burke, Esq.
Sue A. Erhart, Esq.
Brenna L. Penrose, Esq.
Keating Muething & Klekamp PLL
One East Fourth Street, Suite 1400
Cincinnati, OH 45202



Sandra B. Vipond