

CASE NO. 08-5950

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WORLDWIDE EQUIPMENT, INC.
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 04-CV-00451

**BRIEF OF MACK TRUCKS, INC. AS AMICUS CURIAE IN SUPPORT OF
APPELLANT WORLDWIDE EQUIPMENT, INC.'S APPEAL
REQUESTING REVERSAL OF THE DISTRICT COURT'S OPINION**

Lionel A. Hawse
Richard H.C. Clay
Emily K. Fritts
WOODWARD, HOBSON & FULTON, L.L.P.
2500 National City Tower
Louisville, KY 40202
Phone: 502-581-8000
Fax: 502-581-8111
lhawse@whf-law.com
rclay@whf-law.com
efritts@whf-law.com

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 Equipment, Inc. v. United States of America

Name of counsel: Lionel A. Hawse, Richard H.C. Clay, Emily K. Fritts

Pursuant to 6th Cir. R. 26.1, Mack Trucks, Inc. (Amicus Curiae)
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:

Yes. Mack Trucks, Inc. is an indirect subsidiary of AB Volvo. AB Volvo is a publicly-owned corporation organized under the laws of Sweden.

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 13, 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/ Emily K. Fritts

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.

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Mack Trucks, Inc. (“Mack”) respectfully submits this brief amicus curiae in support of Worldwide Equipment, Inc’s (“Worldwide”) appeal requesting reversal of the District Court’s Opinion that the off-highway exception to the federal excise tax laws is not applicable to certain RD888SX vehicles purchased by Worldwide.

STATEMENT OF THE AMICUS

Mack is a Pennsylvania corporation that specializes in manufacturing heavy trucks and components for those trucks. Mack is a recognized industry leader in the vocational heavy-truck industry. It is a wholly-owned subsidiary of Volvo Holding USA AB. Mack is a separate legal entity from Worldwide. Mack and Worldwide do not share any common ownership. Worldwide is an authorized distributor of Mack[®] vehicles.

At issue in the present appeal is whether certain RD888SX vehicles, purchased from Mack by Worldwide and completed by Worldwide or Worldwide’s customers for use as coal haulers, meet the off-highway exception to the federal excise tax laws applicable to heavy trucks. *See* 26 U.S.C.A. § 4051; 26 C.F.R. § 48.4061(a)-1(d)(2)(ii). Mack was the original manufacturer of the RD888SX chassis involved in this appeal. Although Mack discontinued production of the RD800 series of vehicles, Mack continues to manufacture numerous other heavy truck series.

Importantly, Mack has an interest in the uniform interpretation of federal excise tax laws applicable to heavy trucks. As noted above, Mack manufactures numerous heavy trucks, other than the RD888SX, and the off-highway exception is potentially applicable to these other trucks. As discussed at length below, Mack contends that the IRS and the District Court analyzed the wrong vehicle when applying the exception in the present case. The appropriate analysis should focus on the vehicle as configured at the time of “first retail sale,” not the vehicle series as initially developed years (even decades) before the coal haulers at issue in this appeal were configured and purchased.

The District Court’s erroneous ruling undoubtedly leads to uncertainty in the heavy truck industry. Currently, it is unclear which vehicle the IRS will review in determining taxability: the actual vehicle at the time of “first retail sale,” a base platform of the vehicle series as initially developed by the incomplete vehicle manufacturer prior to any design specifications by the customer, or a combination of both. If the off-highway exception is unclear, Mack’s customers cannot reasonably determine whether a particular vehicle is subject to the 12 percent federal excise tax. Certainly, an unexpected 12 percent increase in cost is considerable. If this law is not applied uniformly, Mack’s commercial transactions will be adversely affected.

Further, in the underlying District Court action, various representatives of Mack were deposed. In support of its argument, the IRS misinterpreted testimony from these various representatives, and the District Court relied upon the IRS' misinterpretations. Mack has a vital interest in ensuring that the testimony of its employees is not misinterpreted.

Pursuant to Fed. R. App. P. 29, Mack files this brief contemporaneously with its Motion for Leave to File.

ARGUMENT

Pursuant to 26 U.S.C.A. § 4051, a 12 percent federal excise tax is imposed on the "first retail sale" of heavy trucks, subject to several exceptions. One such exception is the off-highway exception. The test for determining the applicability of the exception requires a showing that the vehicle is:

(A) specially designed for the primary function of transporting a particular type of load other than over the public highway in connection with . . . mining, . . . 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 consideration.

26 C.F.R. § 48.4061(a)-1(d)(2)(ii). For the following reasons, Mack urges this

Court to hold that the off-highway exception test, as outlined above, must be applied to the actual vehicle at issue at the time of “first retail sale,” and is not to be applied to a base platform of the vehicle.

The IRS And The District Court Focused On The Wrong Vehicle In Applying The Off-Highway Exception Test.

First, it is important for this Court to recognize that the heavy truck industry is unique. Mack’s customers, such as Worldwide, are sophisticated purchasers. These customers provide design specifications and configure vehicles for their customers’ particular needs. These are custom-designed and custom-built vehicles and should be evaluated accordingly.

In analyzing a vehicle’s design pursuant to the off-highway exception test, design necessarily includes a customer’s specifications and configuration of the actual vehicle at issue. Heavy trucks are designed for use in specific applications. The design of the vehicle is determined by the selection of specific components. The selection of certain components to fit a customer’s needs for a particular application may limit, impair or even preclude the use of that same vehicle for other applications. In the heavy truck industry, vehicle design necessarily includes its configuration. Further, a vehicle is not complete until fully configured per the customer’s specifications.

In the present case, despite the unique nature of these vehicles, the IRS disingenuously wishes to focus its analysis on a base platform used in the original

development of the RD800 series, rather than the specific completed vehicle as configured by the retail purchaser. (*See, e.g.*, United States' Memorandum in Support of Motion for Summary Judgment, Record Entry No. 48-2, pp. 11-14, 25-28 of 38; ROA pp. 577-580, 591-594). For example, the IRS relied upon deposition testimony from Bruce Hollenbeck, Mack's Vice President of Product Planning, for the proposition that the vehicle "was not designed as an exclusively offroad vehicle." (United States' Memorandum in Support of Motion for Summary Judgment, Record Entry No. 48-2, pp. 25-26 of 38; ROA pp. 591-592). However, the IRS' argument misconstrues Mr. Hollenbeck's testimony. In fact, Mr. Hollenbeck testified that the base RD800 chassis was "designed to operate on highways and . . . designed to operate off highways . . . **depending upon specification.**" (Bruce Hollenbeck Deposition Transcript Excerpt, Record Entry No. 48-10, p. 10 of 67, lines 6-11; ROA p. 1060 (emphasis added); *see also* Hollenbeck Dep., Record Entry No. 48-10, p. 9 of 67, lines 18-23; ROA p. 1059). Clearly, the base platform was designed so that it could be completed to operate on highway or it could be completed to operate off highway, **depending upon the customer's specifications.**

There are numerous components which the customer can choose from in configuring the completed vehicle including various engines, transmissions and frame strengths. (*See* Mack Specifications, Record Entry No. 1-11, pp. 1-4 of 4;

ROA pp. 186-189). The configuration of the vehicle cannot be separated from its “design;” the two concepts are necessarily related. The IRS must analyze the design specifications and configuration of the specific vehicle claimed to be taxable, rather than analyzing a base platform as initially developed by the incomplete vehicle manufacturer.

As another example of the IRS’ error, consider the IRS’ reliance upon a Mack marketing brochure to support its contention that the RD888SX series was designed for on-highway use. (*See* United States’ Memorandum in Support of Motion for Summary Judgment, Record Entry No. 48-2, pp. 11-12 of 38; ROA pp. 577-578). However, the brochure relied upon by the IRS does not exclusively pertain to the RD888SX. (*See* Mack Brochure, Record Entry No. 48-10, p. 44 of 67; ROA p. 1094). Further, the brochure is not even exclusive to the RD800 series. Two of the vehicles on the brochure page are RD600, not RD800, vehicles. Again, it is improper for the IRS to base its argument on vehicles which are distinct from the vehicles at issue in the present action. At the series level, these chassis are a mere platform for the customer to design a completed vehicle that is appropriate for the customer’s intended application.

The District Court erroneously relied upon many arguments advanced by the IRS that pertained solely to the base platform. (Memorandum Opinion and Order, Record Entry No. 57, p. 7 of 17; ROA p. 2085). However, the off-highway

exception test must be applied to the actual vehicle at issue at the time of its retail sale. Certainly, it is inappropriate to analyze a family of vehicles to determine taxability rather than focusing on the specific vehicle at issue.

Quite simply, the vehicle to be reviewed to determine exemption (or non-exemption) from the imposition of federal excise tax must be the vehicle in its configuration as sold by Worldwide to its customer—in other words and as stated in 26 U.S.C.A. § 4051, the vehicle as sold at the time of its “first retail sale.”

CONCLUSION

For the foregoing reasons, Mack urges this Court to hold that the off-highway exception test must be applied to the actual vehicle at issue at the time of “first retail sale,” and is not to be applied to a base platform of the vehicle.

Respectfully submitted,

s/ Emily K. Fritts
Lionel A. Hawse
Richard H.C. Clay
Emily K. Fritts
WOODWARD, HOBSON & FULTON, L.L.P.
2500 National City Tower
Louisville, KY 40202
Phone: 502-581-8000
Fax: 502-581-8111
lhawse@whf-law.com
rclay@whf-law.com
efritts@whf-law.com

Counsel for Amicus Curiae, Mack Trucks, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 1,499 words using proportionately spaced Times New Roman font at 14 points. The word processing software used to prepare this Brief was Microsoft Word.

s/ Emily K. Fritts
Counsel for Amicus Curiae,
Mack Trucks, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2008, I electronically filed the foregoing document. Notice of this filing will be sent by the Court's electronic filing system to the following parties:

Bethany B. Hauser
Tax Division, Appellate Section
U.S. Department of Justice
P.O. Box 502
Washington, DC 20044
Counsel For Appellee
United States of America

James E. Burke
Sue A. Erhart
Brenna L. Penrose
One East Fourth St., Suite 1400
Cincinnati, Ohio 45202
Counsel For Appellant
Worldwide Equipment, Inc.

s/ Emily K. Fritts

Counsel for Amicus Curiae,
Mack Trucks, Inc.