MEMORANDUM IN SUPPORT

I. Introduction

Worldwide is a heavy truck dealer headquartered in Prestonsburg, Kentucky. It has facilities and conducts business in Kentucky, West Virginia, Virginia, Tennessee, and Ohio, and can trace its corporate history back to 1967. (Dotson Aff., ¶ 1.) Worldwide is an authorized dealer for new Mack, Volvo, Kenworth, and GMC trucks.1 (Dotson Aff., ¶ 2.) A significant portion of Worldwide’s business is selling and servicing trucks utilized in the coal mining industry in Eastern Kentucky, West Virginia, Virginia and, to a lesser extent, Tennessee. (Dotson Aff., ¶ 3.)

This case focuses on a uniquely configured custom-built Mack truck, the RD888SX Coal Hauler.2 The RD888SX Coal Hauler is a special, limited production,3 severe service off-road

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1 Worldwide is a privately held corporation organized under Kentucky law. Worldwide also sells all makes and models of used heavy trucks; services both new and used heavy trucks; sells parts for heavy trucks; and operates a truck leasing business.

2 Mack considers itself a “custom truck manufacturer” – which means that every truck Mack manufactures is “designed for an application from a standard set of specifications and then customized to the application.” (Hollenbeck Dep., p. 51.)
dump truck custom-built by Mack to the specifications provided by Worldwide on behalf of its customers for the off-road coal mining operations conducted in the hilly and rough terrain of the Appalachian coal fields. (Dotson Aff., ¶¶ 10, 17.) Mack halted production of the RD888SX Coal Hauler in 2004. (Dotson Aff., ¶ 28.)

Worldwide’s specific complaint is that the IRS wrongfully and illegally refuses to refund excise taxes paid under protest on 8 RD888SX Coal Hauler trucks sold by Worldwide during the tax quarter ended March 31, 2004 (Complaint, Count I).4 Worldwide unsuccessfully exhausted its administrative remedies with the IRS and then filed this litigation. The IRS has counterclaimed, seeking to impose liability on Worldwide for about 90 similar RD888SX Coal Hauler trucks sold by Worldwide from the second quarter of 1999 through the first quarter of 2003.5

The IRS maintains that the RD888SX Coal Hauler is a “highway vehicle” – when in fact it is an “off-highway vehicle” which was neither designed nor intended for use on public highways and which cannot be legally operated on any public highway in any state without a special permit.6

The general concept behind the excise tax, insofar as it relates to heavy trucks and associated products, such as tires, is simple: If the vehicle or tire is designed and sold for the

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3 Less than 1,315 RD888SX Coal Hauler trucks were built by Mack Truck during the entire 20 plus year production run. (Dotson Aff., ¶ 30.)
4 The tax on the 8 trucks in question was $119,279. All 8 units were sold to James C. Justice Company, L.L.C. The strictly off-road utilization of these units is described in both the deposition and the affidavit of Tom Lusk. (Lusk Dep., p. 29; Lusk Aff., ¶10.)
5 The IRS’ counterclaim is for $1.149 million as of November 15, 2004, plus statutory additions (interest and penalties).
6 Every state issues some type of “special permit” to allow vehicles that are too heavy and/or too wide and/or too long and/or too high to travel on public highways under certain specified conditions (safety vehicles leading and following, special markings, limited hours, limited routes, etc.). See, for example, K.R.S. 189.270. Regular, day-to-day coal hauling operations can not be conducted under special permits.
primary purpose of being used on public (and thus tax supported) roads, the excise tax applies; if, on the other hand, it is designed and sold primarily for off-road use, there is no excise tax.

The Treasury Regulations provide that a vehicle is not a highway vehicle (or is an off-highway vehicle) if it meets both the special design and substantial impairment tests. T.R. § 48.4061(a)-1(d)(2)(ii). In other words, the determination as to whether a vehicle is or is not a highway vehicle turns on the vehicle’s primary purpose, as evidenced by its design (the special design test), and its practical ability to be operated on public highways (the substantial impairment test)…

II. Statement of Facts

A. What is Worldwide and Why Is It Responsible for the Federal Excise Tax?

Worldwide is a heavy truck dealer and as such, a “Form 637 filer.” This means that Worldwide purchases complete or incomplete new truck chassis from an original manufacturer, such as Mack, without paying federal excise tax. When Worldwide sells a completed new truck or an incomplete chassis to a retail customer, it has the responsibility for determining whether the 12% excise tax is due, and if it is, charging, collecting and remitting the tax to the IRS along with a Form 720 (Federal Excise Tax Return). While Worldwide, like most dealers, passes the excise tax on to its customers, Worldwide is the party required by law to collect the excise tax. The vast majority of new trucks sold by Worldwide are highway vehicles for which Worldwide charges, collects, reports and remits the appropriate excise tax. (Dotson Aff., ¶ 5.)

The RD888SX Coal Hauler was a unique exception to the norm.

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7 In some instances, Worldwide’s customer wants to complete the vehicle (for example, by affixing a dump bed or other equipment to the chassis) on its own or through a subcontractor of its choice. (Dotson Aff., ¶ 19.)
8 Federal excise tax is imposed on the “first retail sale” of heavy trucks. 26 U.S.C. §4051(a).
9 Prior to 1983, the excise tax issue was resolved at the manufacturer level by Mack and passed through to dealers such as Worldwide. See Pub. L. No. 97-424, Sec. 512(b)(1), adding 26 U.S.C. § 4051, effective April 1, 1983.
B. Worldwide’s History with Mack Special Off-Road Coal Haulers.

Terry Dotson, the President and CEO of Worldwide, has been involved in selling special purpose heavy duty off-road dump trucks for the coal mining industry in Eastern Kentucky and West Virginia since the early 1970’s. (Dotson Dep., p. 26.) Dotson understood that what his customers wanted, specifically, was a rugged dump truck designed and built for operating off-road in the conditions typical to the region. In other words, a vehicle that could survive in the hilly, muddy, rocky Appalachian coal fields and provide an economically viable method to transport coal from the extraction point (the mine face) to the tipple or processing area. (Dotson Aff., ¶ 10.)

From the early 1970’s until 1980, the vehicle Worldwide recommended and “spec’d out” for its coal field customers was a specially designed and configured version of a Mack Model DML800. (Dotson Aff., ¶ 6.) In general, the DM800 series was a predecessor to the RD800 series. (Hollenbeck Dep., p. 35.) The DML800 variant (the “L” stood for “Logging”) was a custom designed and configured off-road vehicle based on the DM800 platform. Worldwide ordered the DML800 for its coal field customers because it included certain critical “special design” features, including: (1) A robust “65,000 lb. bogie” (the term “bogie” refers to a truck’s rear-wheel assembly composed of four wheels on two drive axles mounted to support the rear of the truck body – and to the weight bearing capacity of that assembly); (2) triple rail frames and generally bigger and heavier frame and suspension components throughout; (3) a special combination of engine, transmission and rear axle ratios needed for powering and controlling an extremely heavy truck under severe and hilly off-road conditions; (4) custom designed and manufactured oversized steel dump beds; and, (5) special off-road severe service tires.\textsuperscript{10} The combination of these special design features made the DML800 readily adaptable for use as an

\textsuperscript{10} There were other “special” specifications for the DML800 coal haulers. These were the main items.
off-road dump truck in the Appalachian coal fields. Mack sold Worldwide the DML800 exempt from excise tax because it was an “off-highway” vehicle. (Dotson Aff., ¶ 8.)

In 1980, Mack designated the unique combination of special design features for the off-highway coal hauling dump version of the DM800 series ordered by Worldwide as the “DMC800.” The “C” stood for “Coal.” (Dotson Aff., ¶ 7.) Mack adopted this new model designation so that its tax department could readily determine that there was no excise tax on the vehicle.11 (Hodel Dep., p. 64.)

The DMC800 was exempt from excise tax because, just like its sibling the DML800, it easily met the guidelines for an “off-highway vehicle.” (Dotson Aff., ¶ 8.) In plain terms, the DMC800 was exempt because it was designed and primarily intended as an off-road coal hauler…

III. Argument

A. Summary Judgment Standard

Summary judgment is proper where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “Summary judgment is appropriate if a party, after adequate opportunity for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Klemencic v. Ohio State Univ., 263 F.3d 504, 509 (6th Cir. 2001); see also Sesco v. CSX Transportation, Inc., 148 F. Supp. 2d 789, 791-792 (E.D. Ky. 2001); citing Street v. J.C. Bradford, 886 F.2d 1472, 1479 (6th Cir. 1989). Worldwide is able to meet that strict standard in this case…

11 “As I recall, the tax department asked if there was anything the sales and marketing group could do to make it easier for them to identify [whether excise tax was applicable]. So the sales department . . . actually created the DMC . . . with specific minimum components that would comply with the IRS guidelines for tax exemption . . . .” (Hodel Dep., p. 64.)

1. What Is Not Being Argued

Worldwide should highlight what it is not arguing. First, Worldwide is not arguing that the RD888SX Coal Hauler is not physically capable of being driven on public highways. It is. Virtually any self-propelled vehicle (for example, a farm tractor or even an airplane) is physically capable of being driven on a public highway. Second, Worldwide is not arguing that the RD888SX Coal Hauler is never operated on public highways. It is. Some owner/operators move their trucks by special permit, others appear to choose to take the risk of doing it illegally. (Dotson Aff., ¶ 26.) Third, Worldwide is not arguing that the RD888SX Coal Hauler cannot be licensed. It often is. Some owners/operators have obtained license plates for their trucks even though license plates are not necessary for vehicles that do not use public roads.12 And lastly, Worldwide is not arguing that the “maximum geared road speed” for the RD888SX Coal Hauler is less than 25 MPH.13 It is, in fact, 45.4 MPH. (Myers Dep., p. 21.) Under normal real life operating conditions, a typical RD888SX Coal Hauler is capable of reaching a top speed of approximately 35 to 40 MPH over a level paved or hard surface – depending on load and operating conditions – although these trucks rarely travel that fast and have a much lower average operating speed. (Dotson Aff., ¶ 25.)

2. What Is Being Argued

12 There is no mention of licensing in 26 C.F.R. 48.4061(a)-1(d)(2)(ii). If the drafters of the Treasury Regulations intended licensing as a determinative factor, it would have been mentioned, as it is in The American Jobs Creation Act of 2004 (supra, ft. nt. 27). The applicable Treasury Regulation does, however, state that one factor that can be considered for the “impairment” analysis is whether the vehicle requires a special permit for highway use – which the RD888SX Coal Hauler clearly does. And even the IRS’ own experts concede that the mere fact that a vehicle has a license plate does not make it taxable or give it legal function. (Hagelthorn Dep., p. 85; Pigman Dep., p. 64.)

13 There is no mention of “maximum geared road speed” in the Treasury Regulations. It is not mentioned in The American Jobs Creation Act of 2004 (supra, ft. nt. 27). This term is something the IRS has injected into the discussion in revenue rulings and technical advice memorandums. As this court is well aware, revenue rulings, determination letters, technical advice memorandums, and Chief Counsel’s “advice” have no precedential value. 26 U.S.C. § 6110(k)(3).
Worldwide is arguing that the RD888SX Coal Hauler satisfies the two-pronged test for the off-highway vehicle exception because, taking all the factors into account, including the genesis of the vehicle, its development history, Worldwide’s role in suggesting that Mack specially design and configure a truck based on the RD800 series base platform that would be suitable for off-highway operations in the Appalachian coal fields, and the resulting highway limiting characteristics of the vehicle that emerged from that design process, it becomes indisputably clear that the RD888SX Coal Hauler was specially designed and custom configured to be used for the purpose of transporting coal in mining operations other than over the public highways.

C. Existing Case Law is Either Supportive or Easily Distinguished


In 2 cases, the court rejected the taxpayers’ position and sided with the IRS. However, these seemingly adverse cases are easily distinguished on their facts. In both instances, the trial court concluded that highway use of the vehicle in question was an important part of the overall design. For example, in Liquid Asphalt Systems, Inc. v. United States, 555 F. Supp. 1100 (W.D.
Mo. 1992), the court concluded that a “job tanker” that was designed to deliver hot liquid asphalt to roofing job sites over public highways was a highway vehicle because “the designed transportation function for the equipment is not merely incidental, but a vital part of the overall design . . . .”\textsuperscript{14} \textit{Id.} at 1103.

Similarly, in \textit{Florida Power & Light Co. v. United States}, 56 Fed. Cl. 328 (2003), the court found that a “mobile equipment unit” used by a public utility in connection with the operation and maintenance of its power distribution system was a highway vehicle because, even though it was frequently used “off-road,” it was not “primarily [designed] for off-road use.” \textit{Id.} at 333. Further, the court went on to point out there was no evidence to suggest that the vehicle was substantially impaired or limited from highway use and, in fact, “regularly travel[ed] more than 5,000 miles per year on the public highways and require[d] no special permit to do so.” \textit{Id.}

What is beyond reasonable quibble in the case of the RD888SX Coal Hauler is that the primary function of the vehicle is \textit{off-highway} transport of coal from a mine face to a tipple or staging area – and that any use of this vehicle on public roads is merely \textit{incidental} to the truck’s primary off-highway function. And, as discussed below, the RD888SX Coal Hauler is, as a result, substantially limited or impaired from operating on public highways...

\textsuperscript{14} The court noted that the designer/president of the manufacturer of the job tanker testified that it “would be less valuable to their customers without the ability to transport liquid asphalt to the job site [over public streets].” This admission appears to have sealed the taxpayer’s fate. There will be no such evidence presented by the IRS in this case. The RD888SX Coal Hauler is not less valuable because it was designed and configured to operate off-highway.
IV. CONCLUSION

The RD888SX Coal Hauler satisfies both the special design test and the substantial impairment tests. These vehicles qualify for the “off-highway vehicle” exception. Worldwide’s claim for a refund of federal excise tax and interest should be granted and the IRS’ attempt to assess prior sales should be denied.

For all the foregoing reasons, plaintiff Worldwide Equipment respectfully requests that this court issue an order granting summary judgment in its favor on all claims and counterclaims. A proposed order granting plaintiff’s motion is attached for the court’s convenience.

Respectfully submitted,

/s/

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