

M e m o r a n d u m**280.0875**

To : Mr. Ed Pedeupe
Audit Evaluation and Planning Section

Date: January 4, 1993

From : Ronald L. Dick
Senior Tax Counsel

Subject: A--- B--- Connection
SR -- XX-XXXXXX

This is in reply to your November 19, 1992 memorandum regarding the application of sales tax to charge for pagers under the following facts you provided:

"A--- is in the business of providing pager services. A--- indicates that in order to be competitive in the industry and to obtain customers for its services, it sells pagers at a discounted price. The pagers, which would normally list for \$XX.95, are discounted to \$XX.95. The pagers cost A--- \$XX.00. In addition to the separately stated charge for the pagers, the Service\Sale Agreement (sample copy attached) includes a set-up and processing fee of \$XX.95 and a first and last months upfront fee for pager service....

"Customers enter into a contract with A--- for pager service. A--- sells a pager to the customer and collects the above fees. A--- then contracts with a service provider to provide pager services to its customers. The service provider charges A--- a monthly fee for providing the service. A--- marks this fee up when it bills its customers. Thus, A--- makes its profit from the marked up monthly service fee that it charges its customers. Customers retain the pagers when service is discontinued. A--- does not receive any remuneration (i.e., commissions, rebates, etc.) from the service provider, the pager manufacturer, or any other source. Customers can cancel service at any time. Customers can purchase the pagers at the advertised price of \$37.95 even if they do not purchase the service (although we doubt that this happens very often). Customers can also purchase the service without purchasing a pager if their pagers use the same frequency as the service provider. In such cases, the customer is only charged the standard \$24.95 processing fee and the monthly service fees."

Given this information, A--- B--- requests an opinion as to the proper measure of tax. The sample copy of A---'s Agreement you sent shows the Agreement is for a month-to-month

basis. The sample has prices entered in various boxes. The box labeled "Equipment Purchase" shows \$XX.95. The box labeled "First Last" shows \$XX.00. We question whether A--- charges only \$X.00 per month for its service such that it would charge only \$XX.00 for the first and last monthly payments. The box labeled "Credit" shows \$XX.00. Apparently, A--- considers the \$XX.00 credit as a discount on the sale price of the pager, and the sale price of the pager is \$XX.95.

We disagree. The Agreement shows the sale price of the equipment to be \$XX.95. Tax should be computed on that amount, because there is no basis upon which to consider the gross receipts of A---'s sale as less than \$XX.95. The law presumes that all gross receipts are subject to tax until the contrary is established. (Rev. & Tax. Code § 6091.) A--- may sell its pagers at \$XX.95, and that amount would be the taxable gross receipts of its sale. However, the facts do not substantiate such a conclusion in this case. The sale price stated on the Agreement is the correct measure for calculation of the sales tax. (U. S. Lines v. State Board of Equalization (1986) 182 Cal.App.3d 529.)

Even if A--- rewords its Agreement to show a sale price of \$XX.95 for the pager, we would not find that evidence alone as conclusive. On the reverse of the Agreement, the "Conditions of Service and Charges" provides that the Agreement is governed by any terms of a "Tariff" or a "Conditions of Service and List of Charges" maintained in A---'s company offices. We would need to review those applicable provisions before giving a definitive answer.

RLD:sr

Memorandum

280.0875

To : Mr. Dennis Fox, Supervisor
Audit Evaluation and Planning Section - MIC:40

Date: April 2, 1993

From : Ronald L. Dick
Senior Tax Counsel

Subject: A--- B--- Connection
SR – XX-XXXXXX

This is in reply to your March 23 memorandum regarding the application of sales tax to charges by A--- B--- Connection for pagers.

As you may know, we wrote a memorandum to your section on January 4, 1993 regarding A---'s transfers of the pagers to their customers. At that time, A--- claimed that its sales price of the pager was \$XX.95. Then we did not believe A--- had presented sufficient evidence for us to conclude that the total sales price was \$XX.95. A copy of our memorandum is attached as part of the incoming correspondence from Mr. Joe Cohen.

A--- now claims that they sell their pagers for \$XX.95. That is still a question of fact. The reverse side of A---'s agreement with its customer continues to refer to the "Conditions of Service and List of Charges" to which our January 4 memorandum referred. Thus, there may be evidence to indicate a higher sales price. However, for purposes of this opinion, we will assume that A--- merely charges its customers \$XX.95 for the pagers; that is, A--- would provide a pager to a customer for \$XX.95 and not require the customer to subscribe to the pager service.

Given that A--- pays approximately \$70 for a pager and sells the pagers for approximately 25 percent of their cost, then we believe A--- B--- is the consumer of the pagers. (Cf. Sales and Use Tax Reg. 1670, Gifts, Marketing Aids, Premiums and Prizes; Sales and Use Tax Annot. 495.0160.) Accordingly, we believe that A--- B---'s measure of tax is the cost of the pagers.

RLD:sr