

M e m o r a n d u m**330.2079****To :** Mr. Bill Stallings
--- Audit Supervisor**Date:** December 18, 1992**From :** David H. Levine
Senior Tax Counsel**Telephone:** (916) 445-5550
ATSS 485-5550**Subject:** B--- S--- Inc.
SR --- XX-XXXXXX

This is in response to your memorandum dated November 18, 1992 regarding the measure of tax on leases of chemical toilets. You note that there was a previous audit of B--- for 7/1/81 through 3/31/89 and a current audit for 7/1/89 through 6/30/92. In the current audit period, B--- separately stated the charge for cleaning services but the lease agreement was silent. I assume that your question relates only to those transactions entered into pursuant to the agreement which B--- has apparently recently revised, which you describe as follows:

"Taxpayer has submitted the attached lease agreement and delivery receipt. The statement 'Service is optional to the lessee' has been added to the lease agreement. This is the only lease agreement the lessee receives. It is usually presented to the lessee when the unit is delivered. A copy of the lease agreement is not sent to the lessee each month. Is this statement sufficient enough to consider the cleaning charges to be optional and not subject to tax?"

The agreement contains an itemization of the charges, with spaces for service, rental, tax, and total. The space for service, which is the top one, is the only space which includes an asterisk. That asterisk is clearly visible, and refers to the phrase you note, "*Service is optional to the lessee." I believe this is sufficient to regard the service as optional unless there were a provision in the agreement contrary to such a conclusion.

The agreement contains the following provision: "Lessee agrees to order sufficient service so as not to overtax the restroom unit's designed capacity. Rental service charges continue until Lessee has properly notified B--- S--- Inc. to stop service." That the lessee must obtain sufficient service based on the level of use of the unit does not make the service

mandatory unless the lessee does not have the option to obtain it from someone else. (See, e.g., BTLG Annot. 330.3360 (7/13/66).) Although this provision uses the term "order," it does not say that the lessee must obtain it from B---.

The second sentence of the provision quoted above was probably intended to cover the situation where the lessee finds it is using the units less than it had originally intended, and needs less service from B---. Of course, until B--- is notified it would continue to perform the service originally ordered. Notwithstanding the probable original intent of this provision, it is not inconsistent with the notification of B--- to cease servicing when and if the lessee obtains another person to perform the servicing.

The agreement also contains a provision stating that B--- "will furnish said unit(s) with all necessary services." This was probably included because B--- intends to provide all the services in question. However, this phrase alone does not require the lessee to obtain those services from B---, and is consistent with an interpretation that B--- agrees to be available to provide any and all of the services needed without being a provision requiring the lessee to obtain those services from B---.

It appears likely from your memorandum that all lessees obtain all the services in question from B--- since these units are being located in a remote area in which B--- is the only chemical toilet rental business. Nevertheless, if another person who was capable of performing the services in question (this might involve certain licensing requirements) moved into the area, I believe that B---'s lessees would not be in breach of the lease agreement if they contracted with the other person to provide these services. I therefore believe we should regard the services as optional.

If you have further questions, feel free to write again.

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