

**M e m o r a n d u m****330.2322**

To: Pasadena Auditing (AMB)

October 25, 1974

From: Headquarters – Legal Counsel (HLC)

Subject: A--- L---

SR -- XX XXXXXX

This is in reply to your memorandum of October 2, 1974, regarding possible rental of medical equipment by subject taxpayer and your memorandum of October 18, 1974, regarding sale of medications packed with disposable administration apparatus by taxpayer.

We understand from your first inquiry that taxpayer sells automated laboratory equipment for analyzing blood samples and chemical reagents for use in the analyses. Taxpayer also will provide the equipment to users without charge in accordance with the terms of a contract entitled "Reagent Rental Plan Agreement." On this plan the user agrees to purchase at least \$8,000 per year of reagents from taxpayer at an elevated unit price. Ownership of the equipment remains in taxpayer. The selling price of the equipment ranges from \$8,800 to \$23,745. The selling price of packaged reagents ranges from \$11.50 to \$36.00 on straight purchase and from \$60.00 to \$172.00 on the Reagent Rental Plan. There are also certain price adjustments based on the volume of reagents purchased. Taxpayer charges and collects sales tax reimbursement on the entire amount charged for reagents whether sold alone or sold at the higher price charged under the Reagent Rental Plan. Your question is whether a portion of the charge made for reagents can be considered to be actually rent for the use of the equipment.

It is our opinion that sales made under taxpayer's Reagent Rental Plan represent sales of reagents combined with a rental or use charge for the equipment that taxpayer provides to the user. The amount that would have been charged had the reagents been purchased alone represents the cost to the purchaser of the reagents. The remainder of the charge constitutes a rental fee for the use of taxpayer's equipment. Tax may apply to the rental charge, depending upon whether the equipment is "tax paid" and leased in the form acquired.

We understand from your second inquiry that taxpayer sells pre-packaged sets consisting of medication and administration apparatus (intravenous needle and airway cannula in the examples submitted.) Your question is whether the entire set can be considered to be tax exempt prescription medication or whether it is a combination of exempt and taxable items.

As to the sale of pre-packaged medication sets, it is our opinion that these constitute taxable sales.<sup>1</sup>

The terms of the Reagent Rental Plan Agreement provide that the equipment remains the property of taxpayer, that the equipment user will purchase a minimum amount of reagents, and that the reagent price will be as stated in the agreement. The transfer of physical possession of the equipment is thus neither a sale nor a gift. Since there will be a measurable increase in the amount paid by the user to taxpayer as compared to purchase of the reagents alone, this increase constitutes payment for use of the equipment, or rent. The fact that payment is, in essence, on a "per use" basis is not inconsistent with a rental situation (Bus. Taxes Law Guide Anno. 330.2740, January 27, 1966).

Regulation 1591 provides that tax does not apply to sales of medicines for treatment of human beings when the medicines are prescribed by an authorized person or furnished by an authorized person or hospital. Paragraph (c)(2) of the Regulation specifically excludes from this exemption articles "in the nature of ...instruments, apparatus, contrivances, appliances, devices or other mechanical...or physical equipment or article or the component parts and accessories thereof." The administration apparatus furnished in taxpayer's prepackaged medication sets is thus not exempt from tax. Since the apparatus is sold in combination with the medication for a lum-sum price, tax applies to the entire price of the kit.<sup>2</sup> If the price were separated between taxable and non-taxable items, tax would be applicable only to the apparatus (Bus. Taxes Law Guide Anno. 425.0510, June 30, 1972).<sup>3</sup>

HLC:rl

1 & 2. Not correct. Allocation required. See 425.0149.300

3. Annotation 425.0510 has been deleted.

DHL 3/11/98