

M e m o r a n d u m**330.2078**

To: Ms. Jean McNeill
Return Review

Date: July 19, 1991

From: John L. Waid
Tax Counsel

Subject: T---, Inc.
SR -- XX-XXXXXX

The Legal Division has assigned your memorandum to it of June 12, 1991, to me for a response. You have requested advice as to whether a Determination of Tax is proper in this case.

Mr. T--- G. A---, representing the taxpayer, T---, wrote to the Department of Business Taxes, apparently in response to your letter to the taxpayer of March 14, 1991, and described the factual background of the dispute as follows:

* * *

“2. Nontaxable labor is the charge that my client, T---, Inc. charges when the customer requires additional servicing of his portable toilets. The monthly portable rental charge includes servicing once a week as part of the charge. If the client requires two or three times a week servicing an additional charge for this service is also billed. This is the fee that is included in Line 6 as nontaxable labor.”

* * *

We assume that the tangible personal property at issue herein are chemical toilets and that there is no dispute that the portion of the rental payment that covers the weekly servicing is included in T---’s measure of tax. We also assume, it appears likely, that the “additional service charge” to which Mr. A-- refers is separately stated from the rental payment.

OPINION

As you are aware, leases of chemical toilets are an exception to the general scheme whereby a lessor may elect either to pay sales tax reimbursement or use tax measured by the sales price when he purchases the item to be leased or may collect use tax measured by the rental agreement (a continuing sale and purchase). (Reg. 1660(b)(1)(E) and (c)(1). Leases of chemical

toilets are continuing sales and purchases under all circumstances and tax applies measured by the lease or rental price. (Reg. 1660(d)(1).) The rentals subject to the tax include any payments required by the lease except, among other things, separately stated optional insurance charges, maintenance or warranty contracts. (Reg. 1660(c)(1)(F).)

We believe that the rule in this case is as stated in Annotation 330.2080. Mr. A--- indicates that any servicing of the leased toilets over and above that which is included with the lease is provided only at the request of the customer and the charge is separately stated from the rental payment. Thus, the separately stated payments for the optional servicing are not included in the measure of tax.

We therefore concur with your assessment that this Determination should be cancelled.

JLW:es