

M e m o r a n d u m**425.1140**

To: Mr. Garth Keel, Supervising Tax Auditor
San Jose Audit (GH)

Date: November 16, 1994

From: John L. Waid
Tax Counsel

Subject: SR -- XX-XXXXXX
Skin Care Products

I am answering your memorandum to me dated August 15, 1994. I apologize for the delay. It got mis-filed, and when I couldn't find it, I assumed it had gone out. It just recently turned up.

You are following upon on my letter to Ms. A--- M. G--- of H---, R--- & G--- on this taxpayer dated August 5, 1994. You suggest that Ms. G--- wanted to know if her client's sales of its products were not subject to tax rather than excluded from tax as being for resale. If I had understood that to be the import of her question I would have answered it that way. You attached copies of Ms. G---'s letter and my response.

Ms. G--- describes the taxpayer's operations as follows:

"J--- C---, Inc. is the exclusive distributor of a unique line of skin care products originally formulated by a dermatologist, and manufactured by a respected pharmaceutical company H---. The products are designed to aid in the treatment and prevention of several skin diseases and conditions, including acne, ichthyosis, psoriasis, hyper-pigmentation, seborrhea, and chronic dry skin and hypersensitivity. The products are formulated with non-comedogenic and non-irritating ingredients, and contain the patented benefits of glycolic acid. This distributorship agreement restricts the sale of these products to licensed physicians and aestheticians.

"Several formulations in the product line have been approved for sale by the U.S. Food and Drug Administration. Three products are restricted for sale only to licensed physicians due to their high glycolic acid content. None of the products require a medical prescription per se, although they are sold only by licensed skin care professionals, most frequently dermatologists and cosmetic surgeons, for the

treatment of diagnosed skin ailments. The patient receives initial treatment in the physician's office, followed by a prescribed regimen of home care, with follow-up visits as indicated in the treatment plan."

OPINION

As you know, sales to licensed physicians, surgeons, dentists, and podiatrists of medicines which are furnished to their patients for the treatment of the patient are exempt from tax. (Reg. 1591(a)(2) & (4).) I do not know what "aestheticians" are, but sales by such persons are subject to tax unless they are licensed physicians or surgeons.

Products used for cleansing and otherwise caring for the skin of patients, protecting the skin, treating skin disorders, and preventing adverse skin conditions have long been considered medicines. As long as they are sold or furnished by licensed physicians or surgeons in the course of treating their patients, such sales are exempt from tax under the above authority. Sales to walk-in customers, or to patients outside a prescribed regimen of treatment, are subject to tax. If the product is sold by persons other than those mentioned above, the sale is subject to tax unless it is sold pursuant to a prescription by a person authorized to prescribe medicines and dispensed on prescriptions filled by a registered pharmacist according to law. (Reg. 1591(a)(1).)

JLW:te