

M e m o r a n d u m**495.0376**

To: Audit Review and Refunds

Date: November 1, 1985

From: E. Leslie Sorensen, Jr.

Subject: E. I. D---

SZ --- XX-XXXXXX

As requested, we have considered the issue of whether or not the agreement entitled "The D--- A--- C--- A--- Computer 1 Full Service Price Per Test Plan Agreement" is a lease of equipment and sale of test packs or merely a loan of equipment and sale of test packs. Based upon the following analysis, it is our opinion that the agreement indicates a lease of equipment and sale of test packs.

"Sale" and "purchase" are defined to include "any lease of tangible personal property in any manner or by any means whatsoever, for a consideration..." (Rev. & Tax. Code §§6006(g), 6010(e)). "Lease" is defined in the code to include rental, hire and license (Rev. & Tax. Code §6006.3). Section 1925 of the Civil Code defines a hiring as "...a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time." Regulation 1660, subsection (a) incorporates the concepts of the foregoing provisions by defining a "lease" as follows:

"The term 'lease' includes rental, hire, and license. It includes a contract under which a person secures for a consideration the temporary use of tangible personal property which, although not on his premises, is operated by, or under the direction and control of, the person or his employees...."

"Good consideration" is defined in Civil Code Section 1605 as:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is good consideration for a promise."

The general rule is that any valid promise is sufficient consideration for another promise (see Simmons v. California Institute of Technology, 34 Cal.2d 264; Chrisman v. Southern Cal. Edison Co., 83 Cal.App 249).

Section 1884 of the California Civil Code describes a “loan for use” as follows:

“A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use.” (Emphasis added.)

Applying the foregoing principles to the agreement in this matter we note that the customer promises to purchase a minimum of XX test packs per day for XXX days at a stated price per test pack. In return, the customer is entitled, among other things, to possession and use of an automatic clinical analyzer and computer. Under such circumstances, a lease of the equipment is clearly in evidence since consideration in the form of the customer’s promise to purchase a certain quantity of the test packs is given in return for possession and use of the equipment. A “loan for use” is not in evidence since D--- realizes “reward” in the form of the promise to purchase and actual purchase of the test packs.

We understand that D--- has reported tax on gross receipts from the foregoing transactions. Accordingly, tax has been reported on the proper measure. Theoretically, however, the tax should be apportioned between sales tax from sales of test packs and use tax collected based upon rentals of the equipment.

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