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From: [REDACTED]

Sent: Thursday, April 26, 2018 4:20:14 PM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject: RE: marijuana industry collection issue

You requested our views on whether pursuant to I.R.C. §§ 6331 and 6335, the Service may administratively seize and sell Gas Chromatographer Mass Spectrometers (GCMS) and Liquid Chromatographer Mass Spectrometers (LCMS) used by taxpayers involved in the marijuana industry to measure cannabinoids in marijuana. As a result of the past use of such equipment, there may be marijuana residue remaining on the equipment seized by the Service. You ask whether such an administrative sale would violate federal drug paraphernalia law and the provisions of the Controlled Substances Act related to the intent to distribute controlled substances.

We conclude that GCMSs and LCMSs are not drug paraphernalia under the Drug Paraphernalia Statute, 21 U.S.C. § 863, and so there are generally no restrictions on seizure and sale of such items. The statute, which makes it unlawful to sell drug paraphernalia, generally defines drug paraphernalia as “any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter.” 21 U.S.C. § 863(d).

In Posters ‘N’ Things, Ltd. v. United States, 511 U.S. 513 (1994) the Supreme Court examined both the “primarily intended for use” and “primarily designed for use” phrases in the predecessor of section 863(d). The court held that the provision “establishes objective standards for determining what constitutes drug paraphernalia.” 511 U.S. 517. With regard to the “designed for use” prong, the Court stated that the standard referred to the design of the manufacturer, not the intent of the retailer or customer. See also Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). Similarly, the Court concluded that the term “primarily intended for use” refers generally to an item's likely use rather than the defendant's state of mind. *Id.* at 519.

In light of the Supreme Court's reasoning, we conclude that, by any objective standard, GCMSs and LCMSs are not “equipment . . . primarily intended or designed for use in

manufacturing, compounding, converting, concealing, producing, processing, preparing . . . a controlled substance.” Employing different processes, GCMSs and LCMSs are used to analyze organic material. While they can be used by those in the drug trade, they are also used in drug detection, and many other areas including airport inspections, fire investigations, explosives investigations, environmental analysis, agrichemical analysis, and identification of foreign material collected from outer space. Not only do they not qualify as drug paraphernalia under any objective criteria, they are not listed and are not at all similar to the items that are specifically listed in section 863(d), and none of the factors in section 863(e) alter our analysis.

You are also concerned that an administrative sale of spectrometers is prohibited because the devices might contain traces of marijuana residue. The administrative seizure and sale of LCMSs and GCMSs containing trace amounts of residue would likely not violate section 841(a) of Title 21, which states that:

it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(a). Arguably, a mere residual amount of a controlled substance suggests the absence of the intent to distribute.

In any case, to avoid any possibility of a criminal violation, the LCMs and GCMs should be subject to a deep cleaning prior to sale to reduce all trace residues. This will also have the beneficial purpose of increasing the bid prices at a public sale held under section 6335. These particular devices are highly specialized, and they should be inspected and cleaned to ensure that they are in the best possible condition for sale as that would maximize the value and, correspondingly, the proceeds generated. In deciding whether to seize and sell equipment such as LCMSs and GCMSs, Collection should take the costs of cleaning the equipment into consideration.

If you would like to discuss this further, please let me know.