STATE OF CALIFORNIA

BOARD OF EQUALIZATION

In the Matter of the petition for Redetermination and Claim for Refund Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
Petitioner/Claimant	)	

The above entitled matter came on regularly for hearing on Thursday, September 14, 1978, in Downey, California. James E. Mahler, Hearing Officer

Appearing for Petitioner:
_____ Attorney at Law
_____ Tax Consultant
_____ Vice President
_____ Vice President

Appearing for the Board:
Frank Mulick
Supervising Auditor

Shirley Baca, Auditor

Protest and Claim

Petitioner protests a determination of use tax deficiency for the period April 1, 1974, through March 31, 1977. The protested taxes are measured by:

	State, Local and County
Cost of materials used to fabricate and install dust control systems on U.S. Government facilities	$143,352

Petitioner also seeks a refund of tax in the estimated amount of $150,000 plus interest for "all period open to such claim."

Contentions

Petition

1. The dust control systems are "machinery and equipment" and not fixtures.

2. The items were the subject of the audit assessment and consisted entirely of sales to tax-exempt entities, the United States Government; or, in the alternative, sales for resale to another for ultimate sale to the United States Government.

Claim

1. Items of machinery, equipment, materials, fixtures, or other personalty were installed by this taxpayer in connection with sales of such installed equipment to the United States Government, its entities or other persons exempt from the imposition of use tax in the State of California. Use or sales tax has been paid on these items due to erroneous interpretation of Regulations 1521 and 1615.

2. A refund of tax is requested on certain items of machinery, equipment, materials and other personalty upon which sales or use tax was paid on the same items having been sold for resale or sold to entities exempt from the imposition of California sales or use taxes.

3. A tax was paid by this taxpayer. The measure of tax was computed on items of labor, material, transportation charges and other miscellaneous charges. A refund of tax so paid is requested on all items of labor, services, or separately stated transportation charges.

4. Claimant has regularly reported and paid an amount of sales tax on installations of industrial equipment which have been described in recent Board opinion as improvements to real property. To the extent that tax has been overpaid on the subject installations by reason of a difference in the amount of tax as it would apply pursuant to Regulation 1521, establishing the measure of tax due on construction contracts, claimant requests a refund. In all cases where the tax has been improperly collected by separate statement to the customer, the amounts so overpaid will be refunded to the customer.

5. Pursuant to the opinions of the Court of Appeal in Coast Elevator Co. v. State Board of Equalization, 2d Civil No. 4226 [44 Cal.App.3d 576], claimant asserts that he has reported and paid tax on sales of personal property under the mistaken theory that he has self-consumed the property. The opinion of the Court establishes that such self-consumption did not occur and that the items of property so reported were sold in tangible form. To the extent that such sales were sales for resale, or sales to tax-exempt entities, claimant claims a refund of all tax paid on such erroneously reported self-consumption.

Summary

_____, Inc. (hereinafter referred to as petitioner) is a California corporation engages in business primarily as a sheet metal fabricator. It also fabricates and installs dust control systems. There was a prior audit through January 1974.

The petition is concerned primarily with dust control systems which petitioner furnished and installed on United States facilities pursuant to subcontractors with companies who had price contracts with the United States Government. Petitioner purchased the materials and components used in fabricating the systems ex-tax for resale.

Apparently most of the dust control systems included a Type LP-2 intermittent dust collector. These units are about 10 feet wide and 19 feet high. They vary in length from 6 to 25 feet and in weight from 4,380 too 11,250 pounds.

The dust collector is situated on an elevated, four-legged platform with a ladder, access door and walk-ways. The top of the platform is either 12 or 17 feet from the ground. The collector sits on top of the platform, except for dust hoppers which extend about 7 feet toward the ground. Neither the collector nor the platform is ever attached to the side of a building because vibrations would weaken the wall. However, the four legs of the platform are affixed to the ground or to a concrete foundation with lag bolts.

The rest of the system consists of ducts leading from the collector to the locations in the building where the dust is collected. Since the collector and platform are installed outside the building, the ducts extend through openings in the outside wall. Inside the building, the ducts may hang from the ceiling, be attached to the walls, or lie on the floor.

The audit concluded that the dust control systems are improvements to realty, and that petitioner is liable for use tax on the materials and components used in fabricating the systems. Petitioner contends that the systems are "machinery and equipment", and not improvements to realty. in support of its position, petitioner argues that the systems may be and often are easily moved.

Analysis and Conclusion

Petition

Revenue and Taxation Code section 6384 provides:

> United States Contractors. Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state.

In order to determine whether property was purchased for use in the construction of improvements on or to real property, former Sales and Use Tax Regulation 1615 distinguished between "fixtures" and "machinery and equipment." The former were considered improvements on or to real property while the latter were not. In 1976, this distinction was substantially incorporated into subdivisions (a)(5) and (a)(6) of Regulation 1521, which provide:

> (5) FIXTURES. "Fixtures" means and includes items which are accessory to a building or other structure and do not lost their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.

(6) MACHINERY AND EQUIPMENT. "Machinery and equipment" means and includes property intended to be used in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty… A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C.

Appendix B of the regulation includes air conditioning units in the list of items typically considered fixtures. Appendix C provides that fixtures as defined in the regulation are not machinery or equipment.

Under general legal principles in this state, the classification of an item as a fixture depends on (1) the manner of its affixation to realty, (2) its adaptability to the use and purpose for which the realty is used, and (3) the intention of the party making the annexation. (San Diego First Savings Bank v. County of San Diego, 16 Cal. 2d 142.) The controlling intent is not subjective intent, but objective intent as manifested by the physical facts surrounding the annexation. (Bank of America v. County of Los Angeles, 224 Cal. App. 2d 108.

Applying these rules to the facts of this case, it is concluded that the dust control systems are fixtures and therefore improvement to real property within the meaning of Revenue and Taxation Code section 6384. The systems are installed in various types of buildings to protect the environment in the building by removing dust particles from the air. They are closely analogous to air conditioning units, which are specifically listed as fixtures in Regulation 1521. Moreover, the collector units are situated on platforms which are secured by lag bolts to the ground or foundation. The ducts extend through openings in the walls of the building and are affixed to the ceiling, walls or floor. From these facts it is apparent that the system is intended to remain in place for a substantial period of time.

Although petitioner states that the systems may be moved, this can evidently be done only by skilled personnel at substantial expense. Removability, in itself, does not change the character of what is otherwise a fixture. (Chula Vista Electric Co. v. State Board of Equalization, 53 Cal. App. 3d 445.) Stated another way, perpetual affixation to realty is not a prerequisite for classification of an item as a fixture. It is enough if the item is intended to remain where fastened until work out or obsolete, or until the purpose to which the realty is devoted has been accomplished. (San Diego First Savings Bank v. County of San Diego, supra; see also Trabue Pittman Corp. v. County of Los Angeles, 29 Cal. 2d 385.)

Since the dust control systems are improvements to realty, petitioner was a United States construction contractor when it installed the systems on United States Government facilities. (Regulation 1521(a)(3).) Accordingly, the audit properly concluded that petitioner is liable for

use tax on the materials and components used to fabricate and install the systems. (Reg. 1521(b)(1)(A).)

Claim

Petitioner's claim for refund, dated August 25, 1977, states that an "audit is currently being made to determine the overpayments" for which refund is claimed. Petitioner as yet has neither submitted the results of this audit nor identified any particular transactions for which tax was overpaid. Petitioner will be allowed 30 days from the date of this report to do so.

Recommendation

Petition

It is recommended that the taxes be redetermined without adjustment.

Claim

Allow petitioner 30 days to identify the transactions for which refund is claimed and the amounts of the overpayments, and assemble for review by our audit staff all relevant documents and other data necessary to verify the amounts of tax claimed to have been overpaid.

_____ 1/9/79

James E. Mahler, Hearing Officer Date