

M e m o r a n d u m**190.0020**

To: San Diego – District Principal Auditor

Date: November 29, 1966

From: Tax Counsel (EHS) – Headquarters

Subject: R. W. S--- & Company
P. O. Box XXXX
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SR FH XX XXXXXX

Thank you for your comments of November 21, 1966, on the letter from the above named taxpayer of November 2, to which we replied on November 16.

Whether property installed by a contractor remains real or personal property as between the parties or for purposes of the Uniform Commercial Code is not, in my opinion, the controlling consideration in determining the application of tax under ruling 11. It may surprise you to not, as it did me when I had occasion some time ago to examine ruling 11 with a similar problem in mind, that nowhere in ruling 11 is there any mention of real or personal property, except new paragraph (g), added after the change in the law, effective September 17, 1965, relating to transmission lines.

Thus, a particular item of property installed by a contractor could be “materials” or “fixtures,” regardless of whether after affixation it may be personal property as between the parties or for the purpose of security agreements under the Uniform Commercial Code. In other words, the physical facts of attachment to real property govern for purposes of ruling 11. It has even been contended that a transmission tower, for example, although personal property for property tax purposes, and prior to September 17, 1965, for sales tax purposes, should be regarded as an item consumed by the erecting contractor because the contract meets the definition of a “construction contract” in ruling 11.

The definition says nothing about real or personal property and, therefore, the argument was that the sale of the materials to the contractor should be taxable as a retail sale to a construction contractor even though remaining personal property. This we were unable to accept because of our determination that transmission lines were personal property for sales tax as well as property tax purposes, which was in part, at least, based upon the necessity for consistency as between property taxes, except when the statute makes a distinction as it does now in regard to transmission and distribution lines.

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Principal Auditor
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I believe, however, that this illustration points up the fact that a proper interpretation of ruling 11 is not necessarily contingent upon the classification as between the parties or in security agreements given to those items meeting the definitions of "materials" and "fixtures" in ruling 11. Therefore, I would still adhere to the position which we have maintained historically that a contractor cannot properly buy "installed" materials and/or fixtures for resale. Nor do I believe that the recent Standard Oil case (Standard Oil Co. v. State Board of Equalization, 232 A.C.A. 126) requires a different view of the application of tax under ruling 11 than we have taken in the past. True, this decision is very much in point when we are seeking to determine the status of item affixed to real property when sold from a lessee to another lessee, because in that case we are not concerned with the definitions set forth in ruling 11. I do not believe we ever felt that the Standard Oil decision, which merely affirmed our long-standing prior position, would have any bearing on the application of ruling 11.

Perhaps rather than our writing again to the R. W. S--- Company, it might be better for your office to contact Mr. G--- in regard to his problem.

EHS:fb