

M e m o r a n d u m**465.0060**

To: Petition and Refund Unit

Date: April 13, 1964

From: Tax Counsel (EHS)

Subject: "R"

Your memo of March 3, 1964 questions a proposed refund upon the basis that the taxpayer, a construction contractor, is refunding to the customer only the tax measured by the difference between the gross contract price and the taxable material cost. The writer of this memo apparently believes that the taxpayer must refund the total amount of the tax reimbursement to his customers, and to assume the tax liability on the cost of materials before any refund can be allowed.

In my opinion, this is an incorrect analysis. The "excess reimbursement", it seems to me, is the amount of reimbursement computed upon the difference between the taxable material cost and the gross contract price. In reviewing the Decorative Carpets decision, I note that the amount for which a refund was sought was, according to the stipulation of facts, "the difference between the tax on the cost to plaintiff of the carpeting and other materials used in the performance of such contracts and the sales tax reimbursement, in fact, collected from customers as a result of such contracts."

In its opinion, the California Supreme Court directed that the trial court enter judgment for plaintiff "only if it submits proof satisfactory to the court that the refund will be returned to plaintiff's customers from whom the excess payments were erroneously collected." Thus, plaintiff in that case could have secured a refund by returning to its customers only the amount of the refund sued for, and not the total amount of tax reimbursement collected. Accordingly, I believe that the refund to "R" should not be disallowed by reason of the claimant not refunding to the customer an amount in excess of that computed on the difference between the material cost and the gross contract price.

EHS:fb [lb]