

**M e m o r a n d u m****150.0298**

To: Mr. Donald F. Brady

October 26, 1979

From: Gary J. Jugum

Subject: O--- A---, Inc.

SS --- XX-XXXXXX

This is in response to your request of October 22, 1979, that we review the conclusions stated in our memorandum of June 21, 1974, with respect to the application of the tax to certain transactions involving the referenced taxpayer. Our memorandum of June 21, 1974, was directed to the Out-of-State district office.

On pages 4 and 5 of our earlier memorandum, we concluded that certain sales by O--- K--- A--- to O--- A---, Inc. were taxable retail sales of tangible personal property. We further concluded that certain sales by taxpayer to O--- K--- A--- were likewise taxable sales of tangible personal property.

O--- K--- A--- was the lessor to O--- A---, Inc., of a building and of certain machinery and equipment items installed therein. Pursuant to the lease agreement concerning the machinery and equipment, O--- A---, Inc., was authorized to remove items of equipment (with title passing to O--- A---) provided equipment of equal value was substituted (with title passing to O--- K--- A---) for the equipment which was removed.

We think that the answers given in our earlier memorandum were correct, but that the reasoning was incorrect.

In our memorandum of 1974 we focused upon Revenue and Taxation Code Section 6016.3. In fact, we should have focused upon paragraph (c) of our Regulation 1596, "Buildings and Other Property Affixed to Realty."

Section 6016.3 was added to the Sales and Use Tax Law in August 1965 at the time lease transactions first became subject to the sales tax. The purpose of Section 6016.3 was to distinguish lease transactions which qualified as sales of tangible personal property from lease transactions which constituted leases of realty. The purpose of Section 6016.3 was not to assist in identifying those transactions involving transfer of full ownership (title) of property affixed to realty which were to be taxed as sales of tangible personal property. Section 6016.3 perhaps has some implication on this point, at least to the extent that a leased fixture qualifying as tangible personal property under Section 6016.3 may be sold by the lessor to a third party during the course of a lease which will continue in effect after the transfer of ownership. It would appear

that the implication of Section 6016.3 would be that the sale of the property under these circumstances would be a sale of tangible personal property.

Be all this as it may, the problem of the sale (title transfer) in place of property affixed to realty was a question which predated the August 1965 lease amendments and which is conceptually unrelated thereto. The Board's position on this question is stated in Regulation 1596, paragraph (a), insofar as structures are concerned, and in paragraph (c), insofar as fixtures and machinery and equipment are concerned. The basic rule stated in the first sentence of paragraph (c) is that "the transfer 'in place' of affixed fixtures, machinery and equipment, or draperies is taxable as a sale of personal property when removal of the fixtures, machinery or equipment, or draperies is contemplated by the contract of sale." This rule is applied without regard to Section 6016.3 Paragraph (c) of Regulation 1596 goes on to specify other instances in which the transfer (title transfer) in place of affixed fixtures will be taxable as a sale of personal property notwithstanding the fact that the property will remain in place after the sale. The rule stated in the second sentence of paragraph (c) is subject to an additional, unstated, limitation as provided in Annotation 150.0360 and in Field Audit Manual Section 1002.27. The limitation is that if the owner of the affixed item sells the item to the lessor of the land, the transaction is not taxable as a sale of personal property.

Looking at the transactions involving the referenced taxpayer, we are of the opinion that the sale by O--- K--- A--- to the taxpayer was a sale of tangible personal property because removal of the property was contemplated at the time of sale. The sale was a sale of tangible personal property notwithstanding the fact that the property was never classified as "leased fixtures" while in place and under lease. The property was not "leased fixtures" because the lessor of the property was also lessor of the building. We note that it appears that the sale of this property did not qualify as an "occasional sale." Presumably O--- K--- A--- held a sales permit or had made sales of such number, scope and character to have required the holding of a permit.

We are also of the opinion that the sale by taxpayer of the replacement property to O--- K--- A--- was a sale of tangible personal property. Neither Section 6016.3 nor Regulation 1596 were intended to cover this situation. The property in question appears to have been machinery and equipment. Taxpayer sold the equipment to O--- K--- A--- and installed the equipment. This was a sale of tangible personal property to be installed and not a sale of property "in place." If taxpayer had installed the property and had retained title to the property for some time, subsequently transfer ownership to O--- K--- A---, then the rules outlined in Regulation 1596 would have come into play. The sale of the property by taxpayer to O--- K--- A--- was a taxable sale of tangible personal property notwithstanding the fact that the property never became "leased fixtures" under Section 6016.3.

GJJ:ba