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**STATE BOARD OF EQUALIZATION**

April 4, 1972

Mr. J. P--- W---  
M---, P--- & G---  
Attorneys at Law  
--- --- Boulevard  
--- ---, CA XXXXX

SR -- XX XXXXXX  
U--- Corporation

Dear Mr. W---y:

This is in reply to your letter of February 15, 1972 concerning the sale by U--- Corporation (U---) of an energy plant located near D--- and constructed for the express purpose of producing and circulating heated and chilled water to the D--- Hotel operated by W--- Hotels Inc. (W---) on land leased by W--- from D--- owners.

The plant commenced operations January 1, 1970 and was sold in place on December 31, 1970 to D--- A--- (Buyer). By agreement, U--- continued to operate the plant.

We have reviewed the statement of facts and law involved submitted by you along with copy of service agreement entered into between U--- and W--- (Exhibit 1) contract of sale and note entered in between U--- and Buyer (Exhibit 2) and operating agreement entered into between Buyer and U---.

The term of the service agreement is for 25 years and W--- may extend the agreement for five additional terms of five years each. W--- also was granted an option to purchase the plant at the expiration of the original twenty-five year term.

The plant is located on a plant site provided by W---. No sublease of the underlying land by U--- appears, although a request for a sublease at \$1.00 per year for the entire term was requested by U---. The request apparently was not granted since it was not made a part of the agreement as contemplated, if granted. Accordingly, it appears that U--- is upon the land leased by W--- as a licensee. No grant of an easement is indicated.

Your argument basically stresses the following points in support of the nontaxability of the sale:

1. The plant building and machinery and fixtures attached thereto constitute real property.
2. No present right of removal existed at the time of sale.
3. Removal of the affixed equipment and fixtures would cause great injury to the premises (building).

It is our opinion that the determination of the application of the tax under the circumstances turns on whether or not there was the requisite present right to removal, either by express provision or by operation of law.

It is undisputed that at the time of the sale, title to the plant and equipment rested in U---. Subsequent to the sale, title to the properties vested and remains in Buyer.

Regulation 1596(c) provides, "The transfer 'in place' of affixed fixtures and machinery and equipment, is taxable as a sale of personal property when removal of the fixtures or machinery or equipment by the seller or purchaser is contemplated by the contract of sale. The transfer 'in place' of affixed fixtures and machinery and equipment owned by a lessee of land or buildings to which these items are affixed, is also taxable as a sale of personal property when the lessee-seller has the present right to remove the items either as trade fixtures under section 1019 of the Civil Code or under the express terms of the lease".

The contract of sale contemplates no removal of the items since the buyer is obligated by the terms of the agreement assigned to it contemporaneously with the sale of the plant to provide the specified services for a term of at least twenty-five years. In the event of a substantial, unremedied default by U---, W--- may terminate the agreement and shall then be obligated to purchase the plant.

The latter part of the quoted regulation speaks in terms of the sale of affixed fixtures, machinery and equipment by a "lessee-seller" of trade fixtures under Civil Code section 1019.

Initially, it appears that the relationship of U--- to W--- is that of a licensee rather than of lessee. However, a licensee who affixes improvements on land of the licensor is in a position analogous to that of a tenant and is generally held to have a right to remove the structures within a reasonable time after the termination of the license. (22 Cal. Jr. 2d Fixtures §9).

It is generally recognized that a license coupled with an interest is not revocable but continues to exist for the period contemplated by the license (Bamberger v. McKelsey, 35 Cal. 2d 607). Under the circumstances U---'s license would appear to be irrevocable for the period of the agreement term. U---'s right of removal as a licensee is by law to be exercised within a reasonable time after the expiration of the license and not during the term as permitted by section 1019 of the Civil Code.

Accordingly, it is our opinion that no present right of removal existed at the time of the sale, either by express provisions or by operation of law, for U--- as a licensee.

Even assuming that the relationship of the parties could be considered as that of lessor and lessee, the right of removal granted to the lessee under the provisions of section 1019 was superseded by the agreement.

A lessor and lessee can covenant away any right they might otherwise have under the trade fixtures rule. (Wilmerton v. Horton, 74 Cal. App. 2d 891.) Where lessee gives lessor an option to purchase improvements erected on leased premises at the end of the term, removal before expiration of the term would deprive lessor of the benefit of his bargain. (Rinaldi v. Coller, 48 Cal. 2d 276.)

We must conclude, therefore, that in either situation whether licensee or lessee, U--- under the circumstances had no present right of removal.

Because of our conclusion we believe that in the instant matter it is unnecessary to decide whether removal of the fixtures and machinery would cause serious injury to the premises (which generally is a question of fact).

It is our opinion that the sale in question did not constitute a taxable sale of personal property. The affixed property was sold "in place, removal by the seller or purchase was not contemplated by the contract of sale and the seller, whether licensee or lessee, possessed no present right of removal either by express terms of the agreement or by operation of law.

With regard to future energy plants to be constructed and operated by U---, assuming the same circumstances, it is our opinion that the same principle applies and where the plant is obligated to remain on the premises to provide service to the licensor-lessor who has an option to purchase the plant at the end of the term or to renew the term, no present right of removal is in the licensee-lessee during the term of the license-lease, absent an express right granted by the agreement.

Very truly yours,

Joseph Manarolla  
Tax Counsel

JM:smb

bc: --- --- Dist. – Dist. Prin. Auditor (JTQ) – The material is being returned to you as requested  
--- – Subdist. Admin.