M e m o r a n d u m

190.1473

To: San Francisco – Auditing (WRP:RSG) Date: March 22, 1971

From: Tax Counsel (JM) - Headquarters

Subject: C--- E--- Corp. S- -- XX XXXXXX
P.O. Box XXXXX
--- ---, CA XXXXX

This is in response to your memorandum of January 27, 1971 in connection with questioned items disclosed by audit in progress of above-referenced taxpayer. You have submitted numerous letters and other documentation for our consideration and opinion.

We believe that the A. Wells Peterson letter of August 14, 1967 in answer to taxpayer's somewhat unclear letter of July 14, 1967 probably sets forth the proper application of the tax in the situations as understood by Mr. Peterson. The opinion expressed in the letter appears to interpret the questions as concerning sales of tangible personal property for a delivered price rather than situations controlled by ruling 11. While taxpayer's letter mentions a "subcontract" it is used in the context of a lump-sum sales contract. The correspondence there dealt essentially with the application of tax to delivery charges in connection with property sold on a delivered price and not with the taxability of fixtures or materials in connection with a construction contract. We agree with you that there may have been a misunderstanding due to the lack of adequate information.

Be that as it may, from the additional documentation submitted by you, we also agree that the billing on taxpayer's invoice #2156 when considered in light of the supporting documentation is actually a billing for a lump-sum contract for improvement to realty. We assume the property furnished and installed is either fixtures or materials within ruling 11, with tax applying accordingly.

From taxpayer's letter to you, indexed as "A" it would appear that there is a misunderstanding on his part as to the application of the tax. As stated above, from our review of the documents attached to "A" it appears that taxpayer is performing a construction contract. The statement on the final lump-sum billing that, "above price includes tax, freight and installation" does not change the transaction to a contract of sale and does not, under the circumstances constitute an "itemization". The total lump-sum billing corresponds to the actual

contract amount to "furnish and install" the property. There appears to be no representation to the customer of tax reimbursement on a marked-up amount even though the "worksheet" prepared prior to the execution of the contract indicated consideration was given to an element of tax reimbursement of taxpayer. We assume the customer does not get a copy of the "worksheet". It should be made clear to taxpayer that there is a difference in the application of the tax depending upon whether the transactions constitutes a contract of sale or whether it is a construction contract. The documents attached to letter "A" clearly indicate a construction contract.

In regard to your second item, we have reviewed taxpayer's letter marked "B" and the attached brochure describing the dock boards.

It is our opinion that the dock boards constitute fixtures under both rulings 11 and 12, rather than machinery and equipment as contended by taxpayer. The dock boards appear to be an accessory to the building which do not lose their identity when placed or installed. They are in the nature of ramps and perform a function essential to the building are not installed to perform a manufacturing function. According to the brochure, the dock boards when not in use actually become a part of the floor of the loading dock. The illustrations and the brochure statement, "when not in use it becomes working floor space," appear to bear this out. Taxpayer's contention that the dock boards should be classified as machinery and equipment is not supported by the information submitted. The fact that the dock board is a "self contained unit, can be removed from a site within one man hour and the remaining hole filled for less than $25.00" does not in our opinion compel a conclusion that the dock board is machinery and equipment rather than a fixture.

With regard to your third item, the "conveying equipment", we find no justification for reclassifying conveyors from fixtures to machinery and equipment as requested by taxpayer in his letter "C". We consistently have held conveyors to be fixtures under both ruling 11 and ruling 12. The rulings expressly provide that conveying units are fixtures for purposes of construction contracts. We believe that the W. W. Mangels letter of April 16, 1957 which is annotated at 1896.40 of the California Tax Service properly states our position with regard to conveyors utilized in a post office mail handling system. Taxpayer's letter "C" and attachments are not persuasive that our stated position is incorrect. We believe that the rulings and annotation should be followed in the instant matter, whether the conveying units are floor mounted or supported from the ceiling. We do not believe that the temporary nature of the C--- T--- system affects the classification.

Item four, taxpayer's letter "D" and attachments concerning modification to E--- - S--- F--- System and addition of F--- C--- M--- for R--- A---, [city], appears also to be a conveying system. We are unfamiliar with the "F--- C--- M---" and it is not described in taxpayer's letter or attachments. Paragraph 6.1 of section 6 "System Operating Description" of the attachments indicates that the machine is provided by the Post Office Department and not by the taxpayer. However, we see no reason to reclassify the conveyors furnished and installed by taxpayer as

machinery and equipment. Also, if the F--- C--- M--- is an integral part of the conveying system, we believe it too should be classified as a fixture if furnished and installed pursuant to a construction contract.

We are returning taxpayer's letters and attachments to you herewith.

JM:smb
Attachments

cc: Mr. R. Nunes