

M e m o r a n d u m**190.2078**

To: Mr. J. W. Cornelius
Supervisor, Petition Section

May 24, 1991

From: Donald J. Hennessy
Senior Tax Counsel

Subject: T--- P---, Inc. – SR --- XX-XXXXXX010

Your memorandum of March 20, 1991 to Assistant Chief Counsel Gary Jugum presented the following facts:

T--- was audited for the period 7-1-96 to 6-30-89 resulting in a taxable measure of \$323,019, which was determined on December 28, 1989. A petition for redetermination was filed on January 24, 1990 protesting audit Item B, "Disallowed sales for resale to a construction contractor on an actual basis." Audit Item B consists of sales of prefabricated fireplaces and accessories to an installing construction contractor. The installing construction contractor did not have a seller's permit. The audit concluded that the entire prefabricated fireplace was "materials" within Regulation 1521. Therefore, sales to the installing contractor were deemed taxable retail sales since the contractor was the consumer of the materials furnished and installed.

The petition for redetermination argues that petitioner's sales of prefabricated fireplaces to the installing contractor qualify as sales for resale, because the fireplaces qualify as "fixtures" within Regulation 1521, and the installing contractor is the retailer, not the consumer, of such fixtures. You ask for an opinion classifying the fireplaces as either materials or fixtures.

We have studied the installation manual and other materials you enclosed with your memo. We have also attempted to verify what our position has been to this point as to whether the fireplaces are materials or fixtures. Your memo gives no indication of whether the audit treatment herein is consistent with previous audits of fireplace sellers.

The items sold as part of the fireplace package consist of a firebox, which is the chamber within which the actual burning takes place, plus an assortment of other components required to complete the installation, e.g., wall pipe, chimney pieces, fire stops, elbows, and flue supports. The complete installation would also require a framing into which the firebox and chimney must be set, with due regard for air spaces, fire stops, etc., required to satisfy building codes and prevent fires. The materials you submitted with your memo also describe T--- precut marble

facings and hearth extensions which may be part of the complete installation to give the entire job the look of a traditional fireplace, i.e., built-in as part of original construction with little prefabrication. The installation job in its entirety appears substantial, and could be either a handyman's dream or a weekend warrior's nightmare.

The only item sold in the package which presents a close question as to whether it constitutes a fixture within Regulation 1521 is the firebox section itself. The argument for the firebox as a fixture gains support from its prefabricated nature and, by analogy, to prefabricated cabinets in Regulation 1521(c)(2), the fiberglass shower stalls in Annotation 190.2160, or the mail chutes in Annotation 1900.1900.

The argument for considering the entire package as materials rests on the extensive installation required, plus the firebox arguably becoming "an integral and inseparable part of the real property" pursuant to the definition of materials in Regulation 1521(a)(4).

The decision here could go either way. I give some weight to my assumption that the audit treatment of such fireplace packages has consistently been as "materials" as in the audit herein. I also note that, in Regulation 1521(c)(2), on prefabricated cabinets, the cabinets are only fixtures when 90% of the total direct cost of labor and materials in fabricating and installing the cabinets is incurred prior to affixation to the realty. While we have not always applied this 90% rule to items other than cabinets, it is an indicator of one rule of decision we have applied in the past. There is extensive installation labor required for these fireplace packages, particularly when you consider the carpentry-like framing required, and the chimney work, all of which must be up to fire codes. Therefore, while not free from doubt, I recommend that we follow the present audit and classify these fireplace packages as entirely "materials."

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