

M e m o r a n d u m**190.2107****To :** DH-Fresno District Auditing (CT)**Date:** August 23, 1994**From :** Sharon Jarvis
Staff Counsel**Subject:** P--- - --- - C--- P--- F---
SR – XX-XXXXXX

This responds to your request dated July 22, 1994 for a legal opinion on whether the above taxpayer is performing a construction contract or is selling and installing tangible personal property.

You write that P--- - --- - C--- pool fencing comes in prefabricated, plastic covered mesh sections up to 12 feet long. Generally, the taxpayer prepares for installation of the fencing by drilling holes in the cement or wood pool deck and inserting a "sleeve". The sleeves are permanently fitted into the holes. You write that the sleeves are of two types: (1) aluminum sleeves into which the fencing posts slip, and (2) polyvinyl sleeves into which the fencing posts twist and lock. The fencing and posts are "removable in minutes" by adults according to the taxpayer's promotional brochure.

You write that if the fence is installed on a wooden deck, the taxpayer must attach 4 x 4's under the deck in order to meet building codes. If the fence is to span a lawn area more than 6 feet wide, the taxpayer installs a cement curb. The curb is necessary for stability because holes are drilled into the curb to hold the sleeves and support the fence. If the fence is connected to an existing yard fence, it must be attached to a 4 x 4 fence post. Such a post will be installed if there is not one.

You write that once the fence is installed, it may be removed. To do so, the owner would disconnect the latch(s) holding the fencing together and roll up the sections. The taxpayer told you that this process would take between half an hour and one hour, depending upon the size of the fence. The taxpayer's brochure refers to the fences as "removable, mesh safety pool fences" which are "removable in minutes" in "sections [which] roll up for compact storage".

The taxpayer bills its customers a lump sum with no mention of sales tax.

Discussion

The critical issue is, as you state, whether the taxpayer's contracts to sell and install P--- - --- - C--- Pool Fences are construction contracts or contracts for the sale and installation of tangible personal property. If the contracts are construction contracts, the mesh fencing and other supplies used in performing the contracts are materials, and the taxpayer is the consumer of those materials which it furnishes and installs in the performance of the construction contracts. (Reg. 1521(b)(2)(A)(1) & Appendix A.) On the other hand, if the contracts are not construction contracts, they are contracts for the sale and installation of tangible personal property and the taxpayer is the retailer of that property. (Rev. & Tax. Code § 6015; see Reg. 1521(a)(1)(B)(1).)

In order to fall within the definition of a construction contract, the taxpayer's contracts must be contracts to make "an improvement on or to real property...." (Reg. 1521(a)(1)(A)(1).) The long-standing test for including property in the coverage of Regulation 1521 as an improvement on or to real property is that it be physically affixed to the land in the manner set forth in Civil Code section 660. (See backup opinion to BTLG Annot. 190.1090 11/1/74.) That section states that a thing is deemed affixed to land when it is attached by roots, such as trees; imbedded in it, such as walls; permanently resting upon it, such as buildings; or "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws...." (Civ. Code § 660.)

In the case of the taxpayer's P--- - --- - C--- Fences, the sleeves are permanently imbedded in or attached to cement decks or wooden decks, and contracts (or the portions of the contracts) to furnish and install the sleeves are, therefore, construction contracts. The same would be true with respect to the 4 x 4's attached to decks and existing fences, and to the cement curbs installed in lawn areas. However, the mesh fencing, posts and latches are not permanently attached to that which is permanent. Rather, they slip or twist and lock into the sleeves, and latch to each other or other fence posts. Indeed, the advertised intent is that the fencing be "removable in minutes". Since the fencing, posts and latches are not affixed to land within the meaning of Civil Code section 660, they are not improvements on or to real property as that terminology is used in Regulation 1521 to define construction contracts. Thus, the contracts (or the portions of the contracts) to furnish and install the mesh fencing, posts and latches are not construction contracts, but are contracts for the sale and installation of tangible personal property. As such, the taxpayer is the retailer of that property, and the gross receipts from sales of that tangible personal property are subject to sales tax. (Rev. & Tax. Code § 6051.) Charges for the installation of the property are not taxable. (Rev. & Tax. Code § 6012(c)(3).)

The circumstances considered in Business Taxes Law Guide Annotation 190.1090 (11/1/74) are analogous to the circumstances here. That annotation states "[v]acuum hoses which have suction inlets located at various places in a building and are designed to be easily inserted and removed from the inlets during the use of the hoses for cleaning are not affixed

to the realty and thus do not become improvements to real property on installation but remain tangible personal property. Therefore, a contract for their sale and installation is not a construction contract." Thus, property which is easily inserted and removed like the vacuum hoses or like the fencing, post and latch portions of the P--- - --- - C--- Pool Fences is not an improvement to real property under Regulation 1521, and its sale and installation is not a construction contract, but a sale and installation of tangible personal property. (See also Specialty Restaurants Corp. v. County of Los Angeles (1977) 67 Cal.App.3d 924.) The taxpayer's brochures support this conclusion.

I hope that this opinion is of assistance. Please write again if we may answer any further questions.

SJ:es

Attach.