

STATE OF CALIFORNIA

190.2230

BOARD OF EQUALIZATION

In the Matter of the Petition)
for Redetermination of State) DECISION AND RECOMMENDATION
and Local Sales and Use Taxes:)
))
G--- P---) Acct. No. SN -- XX-XXXXXX
))
Petitioner)
_____)

The above entitled matter came on regularly for hearing on October 12, 1976 in [city], California. Joseph Manarolla, Hearing Officer.

Appearing for Petitioner: A--- R. W---, Law Offices of
---, ---, --- & ---
F--- G---, President
E--- G---, Secretary-Treasurer
W--- E. C---, Attorney at Law
Interested party representing A---
P--- with permission of Petitioner

Appearing for the Board: Client Ostrom, Supervising Auditor
F. J. Toepfer, Auditor

Protested Items

| | <u>Measure of Tax</u> |
|--|-------------------------------|
| | State, County BART & Local |
| B. Cost of material, fixtures and pool sweeps subject to BART tax at 1/2% | \$837,746.00 |
| C. Gross profit on retail sales of Pool-Sweep pool cleaners which are classified as tangible personal property and not material or fixtures under Regulation 1521. | \$85,307.00 |
| Failure to file penalty. | |

Petitioner's Contentions

1. Petitioner originally protested Item B, above, however, subsequent to the hearing in letter dated October 7, 1976, the protest of this item was withdrawn.

2. The Board of Equalization has erroneously asserted the sales tax on pool sweeps which constitutes a tax on real property.
3. That the penalty applied in any event be deleted pursuant to the relief provisions of Section 6592 of the Revenue and Taxation Code.

Summary of Petition

Petitioner is a corporation engaged in the construction of swimming pools and the furnishing and installation of accessories thereto under lump sum contracts.

The protested item involves the classification of a portion of a pool cleaning system which consists of a pool sweep head which floats in the pool, a feeder hose which carries water from a fitting at the edge of the pool to the floating head and two sweep hoses connected to the floating head, one of which is designed to clean the floor of the pool and the other the pool sides. The floating head is activated by water pumped by a booster pump (a part of the total system) through the feeder hose, the head then transports the sweep hoses, one end of which remains free, to all areas of the pool to perform the cleaning process. The cleaning system also contains a motor to drive the pump, the necessary electrical wiring and switches and underground water piping from the pump to the edge of the pool. The feeder hose is connected to the water supply piping by a "quick disconnect" fitting which enables the floating unit to be readily removed if desired.

The pool sweep unit hoses are adjusted for the particular dimensions and contours of the individual pool in which the unit is to be used.

Petitioner argues and pamphlets describing the pool sweep system (copies in audit work papers) contain the statement that, "Once the Pool-Sweep System is installed, most owners leave it in the pool all the time. However, if desired, the unit can be easily removed from the pool in a matter of minutes".

The audit has classified that portion of the system which remains in the pool, the head, feeder and sweep hoses as tangible personal property rather than as an improvement to realty under Regulation 1521, on the basis that the unit is not permanently attached to realty because of the ease of detachment from the pool. The entire pool cleaning system, including the floating unit and related hoses has been regarded by Petitioner as an improvement to realty with the tax applicable in accordance with Regulation 1521 as it pertains to lump sum contracts for improvement to realty.

Analysis and Conclusions

It is undisputed that Petitioner's activities qualify it as a construction contractor performing construction contracts for the improvement of realty within the meaning of Regulation 1521. Nor is it disputed that with regard to the Pool-Sweep System, that portion embracing the motor, pump, electrical wiring and switches and the underground pipeline extending to the inside of the pool has been property classified as materials and fixtures under Regulation 1521.

The specific question presented in this petition concerns the classification of the "in water" portion of the Pool-Sweep System which consists of the feeder hose, the drive head and the sweep hoses.

The classification placed upon the questioned unit by the audit was substantially influenced by the determination of a lack of permanency of attachment based on the feature of the each of detachment inherent in the type of fitting used to connect the in-water unit to the poolside connection.

While permanency of attachment is a factor for consideration in the classification of property as a fixture, the fact that the item may be designed for easy removal, does not in itself destroy the concept of permanency.

The manner of annexation is not the sole or most important test. There are three main factors: (1) physical annexation; (2) adaptation to use with real property; (3) intention to annex to real property. Of these, intention is the most significant, but the manner of annexation and the use to which the property is put are relevant in determining such intention. (Witkin Sum. Ca. Law, 8 Ed., Vol. 3, Fixtures, § 56, and cases cited therein.)

In order for an item to be permanently affixed to realty, the annexation need not be perpetual, but is sufficient if the property shall appear to be intended to remain where fastened until worn out or replaced. (San Diego Trust and Saving Bank v. San Diego County, 16 C 2d 142; 133 ALR 416.) In the instant case the in-pool unit is attached to the realty and is an integral and essential part of the pool cleaning system. Its permanency of annexation can be derived from the apparent intention that it remain affixed in order that it facilitate the function ascribed to the total pool cleaning system until such time as it is worn out or replaced. The unit has no utility independent of the balance of the system physically attached. The fact that articles affixed are necessary or convenient to the use of the building for the purpose for which it was designed is generally treated as tending to indicate they are realty. (Southern Cal. Tel. Co. v. State Board of Equalization, 12, Cal 2d 129.)

It is concluded that the questioned swimming pool cleaning unit consisting of the drive head, the feeder hose and the sweep hose constitutes an integral part of the pool cleaning system and accordingly is classified as a fixture within the meaning of Regulation 1521.

With respect to the unprotected portion of the determined liability the penalty for failure to file returns is applicable, since Petitioner held no permit and failed to file returns in which to report the liability due.

Recommendation

Delete protested Item C and adjust the penalty for failure to file returns accordingly.

Joseph Manarolla, Hearing Officer

1/27/77

Date