# M e m o r a n d u m

**400.0080**

To: Los Angeles – Auditing (LJR) Date: January 7, 1955

From: Headquarters – Sales Tax Counsel (WWM)

Subject: [X] Account No. -- - XXXXX

I have reviewed the file and have discussed with Mr. Stetson and the other members of the legal staff the problem of whether taxpayer should be considered as a retailer or consumer under its contract with the two Kansas companies.

Please refer once more to the taxpayer's letter of June 17, 1953. The impression we received from that letter is that taxpayer, at the time it consulted the local office, really thought it was a consumer of packing materials under the contract. And it appears it was further so advised by the local office, which may have informed it that it should report the cost of such packing materials to it on Line 2 of its own return as self-consumed merchandise.

Apparently taxpayer was also informed that it would be perfectly proper for it to reimburse itself for this additional expense, just as it reimburses itself for any other expense of doing business. Taxpayer apparently misunderstood the advice given and construed it to mean that it was really making taxable sales to the Kansas companies.

As indicated in taxpayer's letter of June 17, it further appears that, while taxpayer made a separately stated charge for the packing materials, that charge was no greater than the cost to it of the materials.

It is our view that taxpayer is really a consumer under these conditions. The Kansas customers did not really bargain for specific materials. See in this connection your answer to Question 3 in your memorandum of September 23, 1954, in reply to our memorandum of May 25, 1954. Therefore, even though a separate charge was made for the materials, we do not believe this should result in regarding taxpayer as a retailer of the materials. See the second paragraph of Mr. Stetson's letter of May 15, 1950, to [A] and [B]. The fact that a separate charge was made for "reimbursement" merely appeared to result by chance and not because taxpayer and its out-of-state customers really thought there was any sale of personal property involved. Furthermore, the fact that taxpayer's billing was made at cost of materials is some indication that a sale of personal property was not intended but that it was merely recovering one of its expenses of performing a packing service.

In review, we apparently do not have a situation here where taxpayer and its customer originally bargain for a sale of personal property.

We would appreciate your comments concerning the foregoing discussion. After we review the audit and your comments, we may deem it advisable to inform the taxpayer that it might best pay sales tax to its vendor with respect to packing materials purchased to carry out these contracts. Based on the foregoing assumptions, we do not believe it is entitled to any further refund with respect to materials used under these contracts.

If taxpayer purchases identical materials to pack these machine parts and to pack the furniture which it apparently sells, it would be in order for taxpayer to purchase all of the materials on a tax-free for resale basis with the understanding that it is a consumer thereafter of that which is used to pack the machine parts. Whether taxpayer wishes to recover this additional expense of doing business from the Kansas companies is, of course, its own affair.

W. W. Mangels

WWM: ja

We would like to add that we understand taxpayer's principal activity is packing and moving furniture of others in intra-state commerce. We understand it also makes a separate charge for materials in this activity, but that such charge is at cost to it. We again assume the customer has not bargained for specific materials.

Under these facts, we feel taxpayer is a consumer of the packing materials.

W. W. M.