STATE BOARD OF EQUALIZATION

March 25, 1966

X----------

Attention: X----------

Gentlemen:

This is to inform you of our conclusions with respect to the above named taxpayer's petition for redetermination on sales tax. We regret that we must recommend to the board that the auditor properly asserted tax on the taxpayer's charges for the processing and fabrication of concrete. However, we are instructing the auditors to make adjustments in the audit for sales for resale to the X---------- joint venture, and to treat the taxpayer as including sales tax in his charges where so provided in the sub-contract.

It is our conclusion that a taxable processing occurs when materials for concrete are batchcd. Batching involves placing rock, gravel, sand; cement, and water into ready-mix trucks in proper proportions so that the concrete will have certain characteristics and meet certain specifications. We believe the weighing and placing of the aggregates constitutes a processing and a substantial portion of the fabrication of the concrete. Mixing the aggregates in the ready-mix truck also constitutes processing and completes the manufacture of the wet concrete. The California Attorney General has twice ruled that operations performed for contractors are subject to sales tax as a processing or fabrication of tangible personal property. (20 Ops. Cal. Att'y Gen. 290; 35 Ops. Cal. Att'y Gen. 48.) The second opinion deals with the closely related subject of concrete subbase.

While the taxpayer in three of the jobs entered construction subcontracts with the general contractor, he was not a construction contractor within the meaning of ruling 11. In this regard, your memorandum of March 14, 1966, states that you believe the case of Hayward Building Co. v. State Board of Equalization (1958) 164 Cal. App. 2d 607 [P.2d 855], would have been decided differently from the facts present in this case. You list three reasons for this opinion.

First, X---------- did not own the materials. While this is a factual distinction, we do not believe it would have changed the court's decision. Section 6006 of the Revenue and Taxation Code includes in the definition of "sale" both sales of tangible personal property and processing or fabrication of such property.

Your second reason for saying that the X---------- is not controlling is "…the services actually performed by X---------- for the general contractor were services of the type that a cement contractor would perform for a general contractor…." However, in the Hayward case, the plaintiff supplied wet cement which it had batched to the general contractor's jobsite in its mixing truck. It seems to be the same service in question here.

Your third point of difference is that the taxpayer in three of the jobs had a construction subcontract with the general contractor while Hayward Building Co. furnished ready mix pursuant to purchase orders. It is our opinion that the form of contract is not controlling. For purposes of the sales tax, a construction contractor is determined by what services are performed and not by the type of contract. Ruling 11 (copy enclosed) provides:

> "(2) The term 'construction contract' as used herein means a contract for erecting, remodeling, or repairing a building or other structures on land…"

In order to qualify for the tax treatment provided by ruling 11, the contractor must perform the "erecting, remodeling, or repairing." Thus in Overly Manufacturing Co. v. State Board of Equalization (1961) 191 Cal. App. 2d 20 [12 Cal. Rptr. 391], the court states, at page 28,

> "[I]t is clear that the fact tangible personal property is supplied for the purpose of being incorporated into a structure is not sufficient to classify the supplier as a consumer of materials. He must actually engage in the service of incorporating them into the structure, and the service must be more than merely incidentally performed to accomplish the sale."

Accordingly, it is our conclusion that the taxpayer made fabrication and processing sales of tangible personal property and was not the construction contractor under ruling 11. the audit properly allowed no deduction for transportation from the batching plant to the jobsite. The materials were sold for a delivered price, and this constitutes gross receipts under § 6012(g). (Santa Clara Sand & Gravel Co. v. State Board of Equalization (1964) 225 Cal. App. 2d 676 [37 Cal. Rptr. 506.] the audit properly set up tax on sales on the X---------- job, even though the purchaser-corporation was wholly owned by the taxpayer's president and sole stockholder. The corporations are persons under § 6005 of the California Sales and Use Tax Law, and their separate corporate entities result in taxable transactions.

The auditor will make the adjustments we have indicated for both audit periods. We have asked him to let you know of the extent of the adjustments and to determine whether a board hearing is desired.

Very truly yours,

John H. Knowles
Associate Tax Counsel

JHK:md

Encl.

Cc: Pasadena – Subdistrict Administrator
Attached are copies of hearing officer's reports dated 2-25-66, which have been approved. The hearing was held in Pasadena on 1-14-66.
Also attached are the audit work papers for the period 10-1-61 to 9-30-64.