

M e m o r a n d u m**190.0010**

To: Mr. Robert Imig
Torrance – Auditing

Date: October 23, 1990

From: Gary J. Jugum
Assistant Chief Counsel

Subject: R --- P--- B---, Inc.

This is in response to your memorandum of July 19, 1990. As you are aware, we intentionally delayed responding to your inquiry.

We understand that the referenced taxpayer started business in California in 1986. In the latter part of 1989, the entity reincorporated with the same principals under the name of A--- E---.

R--- was in the business of selling above-ground swimming pools with installation provided by outside subcontractors to R---. None of the installation is into the ground. The pools are obtained ex tax from the out-of-state manufacturer, P--- P---, ---, New York.

During our previous discussion, the question arose as to whether taxpayer was a construction contractor or whether taxpayer was making sales of tangible personal property.

Under our Regulation 1521, "Construction Contractors," a "construction contract is basically a contract to erect or construct any building or other structure or other improvement on or to real property. Civil Code section 660 establishes the standards for determining whether property qualifies as an improvement to realty. There is a three-part test involving intent, manner of affixation, and adaptability of the construct to the site. Consistent with our prior interpretations, we are of the opinion that contracts to furnish and install above-ground swimming pools of the type in question are contracts to sell tangible personal property, not contracts to make improvements to real property. This is consistent with the decision of the Court of Appeal in Chahine v. State Board of Equalization, 90 Daily Journal D.A.R. 8400, decided on July 25, 1990. There the court noted that the taxpayer was selling above-ground swimming pools without a permit. The tax was assessed on the retail selling price less, of course, installation. The portion of the opinion referred to was not certified for publication, but the court's analysis reflected favorably on the Board's interpretation.

Mr. R--- I---

-2-

October 23, 1990
190.0010

Herewith please find the exhibit materials which accompanied your memorandum of July 19, 1990.

GJJ:sr

Enc.