

M e m o r a n d u m**330.2310.075**

To: Audit Review & Refund Unit
Attention: Mike Hilbert

December 8, 1989

From: Gary J. Jugum
Assistant Chief Counsel

Subject: B--- L--- Corporation
SS -- XX-XXXXXX

By memorandum dated March 27, 1989, Mr. David H. Levine of our office communicated with you in regard to a claim for refund of tax filed by B--- of A--- L--- Corporation. The facts related to the claim are set forth in this earlier memorandum.

We have had an opportunity to review the tax consequences of this transaction in light of further information furnished to us, in particular, photographs of the installation in question.

It is now our recommendation that the refund be granted. This supercedes our earlier recommendation.

Transactions involving sales of buildings and other property affixed to realty are governed by our Regulation 1596 and by Revenue and Taxation Code section 6016.3. The transaction in question has two aspects, a sale and a leaseback. Each transaction must be analyzed separately.

A transaction is not a sale of tangible personal property if it is a sale of an interest in real property. Paragraph (a) of Regulation 1596 provides that "the transfer of buildings or minerals or the right affixed to land is taxable as a sale of personal property [only] if, pursuant to the contract or agreement of sale, the buildings or minerals or the right are to be severed by the seller thereof." This rule is based upon the provisions of the Uniform Commercial Code identifying contracts for the sale of "goods". The facility in question is a steam generation plant. It is a building or structure or fixed work. Severance is not contemplated. Accordingly, the sale is a sale of an interest in realty.

Following the sale, the facility is then leased. The facility does not lose its character as an improvement to realty under the lease contract. It is true that the facility incorporates within it

items which would be classified as “fixtures” under our Regulation 1521 concerning construction contracts. Paragraph (c) of Regulation 1596 applies to transfers of fixtures, but the contract in question involves the lease of a building, not merely the sale or lease of fixtures. Under section 6016.3, leased fixtures are classified as “tangible personal property” unless the lessor of the fixtures is also the lessor of the realty. Here the realty is the structure, and the fixtures in question are attached to the realty. Under these circumstances, the lease is a lease of realty, not tangible personal property, and tax does not apply. Attached are two of the photographs furnished to us by taxpayer.

GJJ:sr

Attach.

cc: Mr. Donald J. Hennessy
Mr. E. L. Sorensen, Jr.
Mr. David H. Levine