

M e m o r a n d u m**480.0400**

To: Ms. Shirley Johnson
Audit Evaluation and Planning

Date: October 16, 1992

From: David H. Levine
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Subject: Annotation 515.0620

The back up memorandum to Annotation 515.0620 indicates that a person who contracted to design a machine to process onions was a seller because the contract was for the sale of a specific item of tangible personal property as opposed to the "mere rendition of research and development services." This, of course, is not enough. A single sale of tangible personal property does not a "seller" make, without regard to whether R & D is involved.

This does not mean that I disagree with the annotation's conclusion that the person was a seller, but the reason that conclusion was correct is that the contract shows that the person in question was going into the business of selling tangible personal property. For example, here if the purchaser was satisfied with the first machine, the contract contemplated that the purchaser would purchase at least four more machines. I believe that this is sufficient to conclude that the purchaser was in the business of selling tangible personal property, that is, a seller, but that is not what the annotation indicates. Further, even if the person had no contract at all, he or she could still be in the business of selling tangible personal property if that was the person's intent (e.g., a new hardware store, open for business but as of yet lacking any customers, is nevertheless in the business of selling tangible personal property).

A more serious problem is the conclusion with regard to whether the person in question was a retailer. The annotation states that, although the person was a seller required to hold a seller's permit, it would not be liable for tax unless and until it became a retailer. To be charitable, this makes no sense at all, unless, of course, the conclusion is based on Revenue and Taxation Code section 6015 as it existed prior to 1949. At that time, section 6015 defined retailer as "[e]very person engaged in the business of making sales at retail.... " Perhaps this means what the annotation says, but the annotation was written 16 years after this provision was changed to its current wording: "Every seller who makes any retail sale " Thus, once we conclude that a person is a seller, that person is automatically a retailer whenever he or she makes a retail sale. Since the annotation seems to be contrary to this, or at a minimum is thoroughly confusing, it should be deleted.

The explanation for deletion could simply be that parts are confusing and parts are wrong.

cc: Mr. Gary J. Jugum
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