M e m o r a n d u m

150.0460

To: San Diego – Auditing (REH) November 17, 1969

From: Tax Counsel (GLR) – Headquarters

Subject: S---
XXXX ---
--- ---, CA XXXXX

W--- C--- Corp.
W--- C--- Company [2]

In your memorandum of October 8, 1969, you request our opinion regarding the proper treatment of several contracts involving the sale and placement of portable classrooms as to whether they should be considered sales of tangible personal property or contracts to improve realty. We have assumed the question of whether the contracts are contracts of sale or of lease are not in issue.

You state in your letter the following facts give rise to the problem:

In 1967 and 1968 --- S--- executed a number of contracts with construction contractors for the erection of "portable" classrooms. Most of those contracts were standard lump-sum building construction contracts calling for the erection of portable classroom structures at school locations where the first need was anticipated. Such contracts obligated the contractor to complete a reasonably firm attachment to real property up to and including a connection with utility lines. You have concluded that these classrooms are portable only in the sense that the school district anticipates a probability of a removal to another location at some future date, and that we can properly look at the contractors as the consumers of materials and/or the retailers of fixtures under Ruling 11.

However, the two contractors referenced above executed three separate contracts for the erection of quantities of the portable classrooms at three "depot" locations on a mass production basis without any attachment to the realty. The three contracts involved a total of 190 classroom units. The basic contract form was the same as was used in all of the other contracts referred to above except that special condition clauses set forth below were added to distinguish these three contracts in terms of the central depot, mass production concept.

"Special Conditions

"1.04 Temporary site for construction only – standard details for the foundations, underpinning, and bracing revised. This revision provides for a minimum structure to safely support the portable buildings during their construction only.

"At a later date the buildings will be moved to other various sites by the District, at which time foundations, etc. will be installed in accordance with standard specifications, etc.

"Addendum #1

"Item #1
Contractor shall arrange a building construction sequence to enable the District to commence relocating the buildings at the rate of 2 buildings each working day starting 60 days from start of construction."

Your review of the school district's file on this subject discloses that there was a sequential removal of the completed structures from the construction depot sites on a frequency roughly conforming with the provision of addendum #1, quoted above. You feel this is important because if the total contract for 40 to 90 units per contract were considered as one sale, there would be a question as to the number of sales being sufficient to cast the contractor as a retailer. However, since the school district exercised their right to take possession on a unit by unit basis as the units were completed, combined with progress payments made on a percentage of completion basis under the more or less standard construction contract clauses, it would appear that each contract would involve at least as many sales as there were separate removals of completed structures. Under this reasoning, you feel each contractor would definitely be a retailer if the transaction is considered a sale of personal property.

Although we do not have the entire contract before us, it is my tentative opinion that the contract for the depot classrooms is one contract of sale and not as you indicate "a sale for each separate removal." Accordingly, I would suggest you check to see if there were a sufficient number of other sales made by the contractor to make him a retailer.

We next turn our attention to the question of whether the classrooms are tangible personal property.

When the question regarding the classification of portable classrooms as tangible personal property or improvements to realty first arose, we were primarily concerned with the method of attachment in deciding this question. We reviewed the plans and specifications of such contracts and found that generally they were placed on foundations and piers equivalent to a housing structure. They were not merely placed on skids, such as a corn crib, nor were they free moving as a mobile home. They were, in fact, placed on a solid foundation with electrical and

plumbing hookups and bolted to the mud sills as a regular house. It was under thes circumstances that we concluded, as you did, they were contracts to improve real property.

These same principles are not involved in the three contracts in issue. It is of note that (1) the contractors are to erect the structures on foundations which are designed solely to support the portable buildings during construction, (2) there is no permanent attachment to the realty either by foundation or by utility connection at the time the contractors complete the construction, and (3) the school district is solely responsible for moving the structures to the location of the first intended use and arranging for the final attachment to the realty and utilities.

Under these circumstances, it is my opinion these three contracts are for the sale of tangible personal property rather than an improvement to realty.

For your general information, I am enclosing a copy of a letter written to our Santa Rosa office regarding the classification of classrooms.

GLR:lt
Enclosure