

M e m o r a n d u m**190.0040**

May 22, 1957

To: Fresno – District Tax Administrator

From: Headquarters – Sales Tax Counsel (EHS:JDP)

Subject: Furnishing and Spreading Liquid Asphalt

We wish to clarify our position regarding the selling and spreading of liquid asphalt used in road construction. Although previous correspondence may have tended to make our position appear inconsistent, we wish to set forth our understanding of the process used in applying liquid asphalt and our opinion regarding the application of the tax. There are apparently three possible methods whereby such oils may be applied to roads. I will set these methods out as I understand them.

The first method involves the mixing of liquid asphalt with the dry material, which would include such ingredients as gravel, sand and clay. This process may be performed on any area of ground which is not part of the highway. A common method of doing this is to spread the dry material upon the level ground and apply the oil to this material by means of a spreader bar attached to the back of a tank truck. A valve releases the flow of oil from the tank truck thru nozzles located in the spreader bar and thence to the dry mix. The rate of application is controlled by the speed of the tank truck. After the oil is applied, various methods of mixing are used whereby the dry mix and the oil become one conglomerate mass which may be used as a surfacing material for roads. This material may then be transported by means of dump trucks to the road bed which is to be surfaced or repaired. At that time, it will be spread upon the road bed in an even layer by various means, such as asphalt machines, tailgate spreader or by hand through the use of shovels. Thereafter, it is compacted by road rolling equipment.

The second method of applying liquid asphalt to roads is substantially similar, except in this regard. The dry mix is applied to the road surface in a layer somewhat thicker than will ultimately be used as a surface. The average width of such pile or layer of dry material would be a width identical with the width of the spreader bar mentioned in the previous paragraph. The truck containing the liquid asphalt and to which the spreader bar is attached is driven over the dry mix material which has been previously spread upon the road surface. The oil is released at a predetermined rate as previously explained. Thereafter, road equipment which includes such items as graders and disks especially designed to stir and mix such forms of earth is driven over the now saturated material to thoroughly integrate the oil with the other ingredients. After such mixing process is complete, the road mix is spread over the area of the road bed which is to be surfaced by the asphalt mix and is subsequently compacted by the use of a road roller.

The third method commonly employed by construction contractors provides for the spreading of liquid asphalt over the surface of the road bed to be surfaced or resurfaced. This liquid asphalt will remain substantially in the identical place where it falls from the spreader bar of the truck. Following this operation, a fine gravel or sand and gravel mix is then strewn upon this liquid asphalt by normal means of hand shovels. This is necessary because the liquid asphalt would adhere to the tires of any equipment which is driven upon it prior to its being covered with a dry substance. After such dry mix, as may be used, is spread over the liquid asphalt, it may be rolled or compacted by use of a roller or other compaction equipment. Following this operation the process may be repeated a number of times whereby the desired depth of the road surfacing will ultimately be applied to the road bed. In this operation the liquid asphalt remains substantially in the identical place where it first contacts the surface.

It is our opinion that appliers of liquid asphalt under the first two conditions should be regarded as retailers of such asphalt unless they have the responsibility of mixing the asphalt with the other road surfacing materials and ultimately being responsible for placing the material on the road surface in its final resting place. This would include the grading or spreading, by means of a road grader, of the road mix and probably should include the actual compacting by means of a roller. This is consistent with a memorandum written by Mr. Bill Holden, January 12, 1954, to Fresno Tax Administrator, regarding P--- S---, Inc., Account - - XXXXX.

In a letter dated January 29, 1957, from this office to Fresno Auditing, regarding M--- G. H---, the following language appears: "Upon further review of this matter, we are convinced that taxpayer should be regarded as a consumer of all road oil furnished under contracts calling for both the furnishing and the spreading of the road oil. Once the road oil is on the ground, we do not believe it can be said to be personal property, even though it is subjected to further processing in place before the road is completed" emphasis added.

In the letter reference is made to pages 431 and 534 of the index and digest. Therein it is indicated that contracts to furnish and spread road oil in this manner would be construction contracts under Ruling 11. There is an apparent inconsistency between the view expressed in Mr. Holden's memorandum and the January 29 letter.

It appears quite obvious that the third situation previously described, wherein the oil is not processed after being applied to the road bed, is clearly a construction contract and the one applying the oil is the consumer thereof.

It may be further pointed out that through various correspondence we have regarded furnishers and spreaders of oil as retailers. This was based upon our practice of regarding sellers of ready mixed concrete, poured into forms by the seller, as retailers of such concrete where they were not responsible for further processing of the concrete. However, our position regarding concrete was not sustained in a recent superior court decision.

Since we are not familiar with the precise method used by C--- T---, Tulare, we cannot determine whether they should be regarded as a consumer or retailer. However, we believe you can resolve this problem in light of the information contained herein.

E. H. Stetson

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