

**M e m o r a n d u m****190.1780**

To: Unit 7 (FAL:JSR)

Sacramento  
December 14, 1956

From: Warren W. Mangels (JDP)

Subject: J. O. R--- Engineering Corporation  
XXX --- Avenue  
--- ---, New York

Account OS-AD-XXXXXX

In your memo of July 10 you request an opinion concerning the application of sales tax to sales of industrial ovens and dryers.

The ovens are designed and manufactured by the taxpayer and are used in the automotive, can making, sheet plastic, paper and other industries. The contracts provide that the ovens remain personalty. This is apparently a security provision to protect the seller and would not necessarily control the application of sales tax.

The materials are generally shipped f.o.b. shipping point with freight allowed to job site.

It is noted in the five contracts submitted that the taxpayer apparently charges sales tax reimbursement measured by the marked-up billing price of materials furnished under the contract. Since the charges for material are separately stated it seems proper to regard these contracts as time and material contracts, as contemplated by the second paragraph of that portion of Ruling 11 entitled "Materials Used by Contractors."

Where erection is performed by the seller it is normally figured on a straight time basis, a separate charge, with a provision that over-time and premium pay will be an additional cost. Where such over-time work is performed it is itemized on the invoice.

These installations were discussed with Mr. E. H. Stetson and Mr. J. H. Murray. It was decided that, in the main, they are materials under Ruling 11 because they constitute structures or improvements to realty.

The motors, fans, conveyors and controls, however, should be fixtures or machinery and equipment.

Since we regard the installations as materials, with the exceptions noted in the preceding paragraph, it is our opinion that, in this situation, where the contractor does not include any fabrication charges at the job site in the measure of his own sales tax reimbursement, such charges should not be included in the measure of tax.

The fictional sale provided for in Ruling 11, (materials used by contractors) was apparently designed to prevent unjust enrichment to the contractor where he regards himself as selling materials. Accordingly, that ruling provides that the tax will apply to the amount of the billing for materials. It seems to us, therefore, that unless the contractor includes in the measure of his own reimbursement such fabrication charges, they need not be included in the measure of the contractor's tax liability. It is our opinion that the taxpayer regards himself as selling the materials and bills his customer for sales tax reimbursement based upon the marked-up billing price. Accordingly, we shall regard the marked-up billing price as the proper measure of tax.

Whether any fabrication labor is performed at the job site on the fans, motors, conveyors, etc. conceded to be machinery and equipment or fixtures, should be left to the discretion of the auditor.

Warren W. Mangels

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