

**M e m o r a n d u m****435.0712**

To: Auditing – Oakland (LHW)

Date: March 19, 1984

From: Gary J. Jugum

Subject: X-----

This is in response to your memorandum of February 7, 1984. We understand that in the process of a 10-day letter hearing, two points of dispute have arisen with respect to which you have deemed it desirable to seek our counsel.

First, taxpayer has a subcontract with respect to the roadway-causeway located at X-----  
----. It is your position that the causeway at X----- including that portion of roadway that can be elevated to allow ships to pass underneath, constitutes in total a fixed work. Taxpayer's position is that the roadway-causeway, when intact as a roadway, is the fixed work but that equipment used to raise and lower the roadway is not a part of the realty but is simply "machinery and equipment" necessary to accomplish the raising of the roadway to allow the ships to pass underneath. We are in agreement with your analysis. The items in question in the audit are not exempt as machinery and equipment sold to the United States but are taxable as fixtures consumed in making an improvement to real property in this state.

Second, taxpayer reworks existing dies commensurate with the advent of a new truck model year for X-----  
----- . It is your position that anything that changes, even slightly, an existing die from its old configuration constitutes taxable fabrication labor, particularly with a new model year. Not included in this view would be the simple add-on of metal to rebuild the die to its original tolerances.

Taxpayer's view is that if the die still serves its same purpose, for example, part of a die for the side of a truck, the rework does not constitute fabrication labor.

Included within the point in dispute is the taxability of changes for "relocation of tooling parts."

Business Taxes Law Guide, annotation 435.0480, provides as follows:

"Alterations. Dies used by a supplier of automobile seat springs to an automobile manufacturer are owned by the latter. Alterations in the dies by the supplier necessitated

by the yearly change in automobile models constitutes taxable fabrication labor by the supplier. A design change results in a new product being produced and the alterations go beyond the limits of reconditioning and repair."

It has been our interpretation in the past, as evidenced by the annotation, that as a general rule making alterations in a used die constitutes taxable fabrication labor because the die is used to produce a new item of property even though the property may generally be of the same type previously produced. Not every change in an existing die has been treated as fabrication labor, however. We have taken the position that rework of the type in question is not taxable when some minimal change or configuration is made in the die by means of some change in the assembly of the die. That is, if a die is "programmable," in that parts can be disassembled, rearranged, and reassembled, then we have not treated the product as a new product but as a previously finished product "tuned" to a new specification. This may be what taxpayer means by "relocation of tooling parts." If relocation of tooling parts occurs alone, we would view this as a nontaxable service charge. Where parts are added to the die, or where parts are physically reworked, the change constitutes taxable fabrication. Where there is relocation together with such a physical reworking of the die to cause it to be treated as a new product, the tax would apply to all charges made for changing the die.

GJJ/jkr