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October 5, 1993

Ms. G--- W. J---
 P.O. Box XXXX
 ---, CA XXXXX-XXXX

Dear Ms. J---:

Re: Sales And Use Tax Issues
 for Illustrator of Publications
 SR -- XX-XXXXXX

This is in response to your letter dated February 2, 1993, which was recently received by the Legal Division wherein you requested our opinion regarding the sales and use tax consequences involving your new enterprise of doing illustrations for publication on commission. You asked our opinion regarding the three scenarios set forth below.

1. "On request, and for an agreed-upon price, I create a drawing to illustrate an article in a magazine which is published in California. My transactions are conducted by telephone and mail, but I deliver the piece to the editor on the agreed upon deadline date. Several months pass, the piece is finally used in the production of the magazine, and I submit a bill to the magazine. I also go get the original illustration, since I retained ownership and sold only the first rights of use for publication to the magazine. My county is Placer. The magazine's is Sacramento. So, since I have not relinquished the piece, nor title to the piece, do I charge tax? On which date? At what rate?"

A transfer of possession, but not title, of artwork to another person for reproduction is a lease or rental of the artwork (see Revenue and Taxation Code Section 6006.3¹). Generally, a lease is a temporary transfer of the possession of tangible personal property for consideration.

¹All further section references are to the Revenue and Taxation Code.

(See Sales and Use Tax Regulation 1660²). Unless tangible personal property is leased in substantially the same form as acquired by the lessor and the lessor has paid sales tax reimbursement or has timely paid use tax measured by the purchase price, a lease of tangible personal property is a continuing sale and purchase. The lessor must collect use tax from the lessee at the time rentals are paid and pay the tax to the state. The use tax is measured by the rentals payable. Sections 6006(g), 6006.1, 6010(e), and 6010.1 and Regulation 1660(c)(1).

Since you create your own illustrations, the lease is a continuing "sale" and "purchase" and use tax is required to be reported and paid based on rental receipts. You, as the lessor, are required to collect use tax on the rental receipts and report the amount collected in the period in which the rental receipts were received.

In California, there is a statewide tax rate of 7.25 percent. Sacramento County has a countywide taxing district, giving a total state and local tax rate in Sacramento County of 7.75 percent. The purchaser is liable for district use tax, but the retailer (lessor) must collect the district use tax. Whether a retailer is obligated to collect from the purchaser district use tax depends upon whether the retailer is "engaged in business" in the purchaser's district, as defined in Regulation 1827. In subdivision (c)(3) the definition of retailer engaged in business in a district includes, "as respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in the district."

Placer County, where your business is located, has no local taxing district. I assume that you only have one place of business. If the destination county has one or more local taxing districts, then the purchaser is liable for the district use tax(es) in effect for that county. Under Regulation 1827(c) you must collect use tax for those local taxing districts where you derive rentals from the lease of the illustrations. Even if the customer picks up the illustrations at your place of business, sales or leases to Placer County residents or to residents of other counties which have no taxing districts are only subject to the statewide 7.25 percent tax rate.

2. "I have the same scenario, except that this is a magazine produced outside California, and all dealings are by phone, mail and fax. Do I charge California sales tax?"

For out-of-state customers you indicate that you use the phone, mail and fax. We assume the illustration is delivered to the out-of-state customer by mail or common carrier to an out-of-state location. Use tax would not apply to out-of-state leases because under Section 6010.1 and Regulation 1660(c)(1), tax applies to leases of tangible personal property in this state.

Your sales of illustrations to out-of-state purchasers are exempt under Section 6396 when the illustrations, pursuant to the sales contract, are required to be shipped and are shipped to the out-of-state purchasers by your own facilities or delivery to a carrier, customs broker, or

²All further regulation references are to Sales and Use Tax Regulations.

forwarding agent, including the mails.

3. "If I relinquish rights to the piece, or if the publisher does not return it, do I then charge tax? If the publisher is in California? And what if the publisher is in another state or country?"

At the time you agree to relinquish rights to an illustration to a publisher, you are making an outright sale of the property by transferring title to the publisher. The sale is subject to tax unless the interstate shipment exemption discussed above applies to the sale. (Sections 6006(a) and 6051).

When property is sold outright (as opposed to being leased) sales tax is due for the period in which the sale was made. This is not always the same as when payment is made for an item. For example, if a customer purchased an illustration on December 31 and paid for it on January 10, the tax would be due for the reporting period ending December 31. Lease payments, in general, are treated on a cash basis and, thus, are different from sales transactions. If you first lease the property and then sell the property outright by relinquishing your rights to the property, both the rentals paid to you under the lease and the amount the publisher agrees to pay you for the relinquishment of your rights to the property are subject to tax.

Enclosed for your information are copies of the following Board pamphlets: Tax Tips for Leasing of Tangible Personal Property in California - No. 46; and Tax Tips for District Taxes - No. 44. If you need anything further, please do not hesitate to write again.

Sincerely,

Carl J. Bessent
Staff Counsel

CJB/md