STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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October 20, 1993

X----------

Re: Application of Tax to Sales of
Photographic Images and Videos

Dear Mr. X----------,

This is in response to your letter dated July 21, 1993. We apologize for the delay in responding to your request for advice. Your letter consisted of a series of questions related to still photography, motion pictures and video. Below, a brief discussion of the applicable law is provided followed by answers to your specific questions.

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property. Although the sales tax is imposed upon the retailer, the retailer may collect sales tax reimbursement (usually itemized on the invoice as "sales tax") from the purchaser if the contract of sale so provides.· (Civ. Code § 1656.1.) When the sales tax does not apply, Revenue and Taxation Code section 6201 imposes a use tax on the storage, use or other consumption of tangible personal property in this state. (Rev. & Tax. Code § 6401.)

A "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. (Rev. & Tax. Code § 6007.) A purchaser who purchases property for resale in his or her regular course of business may issue the seller a resale certificate. (Regulation 1668 (copy enclosed) .)

Sales and Use Tax Law Applicable to Advertising Agencies

Your seller's permit records indicate that you are a commercial artist and that your business sells photographic images and videos. From these limited facts, I am assuming that your business is similar to an advertising agency.

The application of tax to the activities of advertising agencies is set forth in Regulation 1540, a copy' of which is enclosed. As explained in Regulation 1540, an advertising agency may act as an agent when it purchases property from a vendor or it may, instead purchase the property on its own behalf for consumption, for resale or for both.

If an advertising agency is acting as an agent of its client, then it is not considered a purchaser of that property nor is it considered a seller of that property to its client (i.e., if the agency is an agent of its client, then the client is purchasing the property directly from the vendor and there is no sale as between the advertising agency and its client). On the other hand, if the advertising agency is acting on its own behalf when it acquires property, then it is considered a purchaser. The advertising agency will ·then also be considered a seller if it sells that property to the client.

Property Acquired From Suppliers

When an advertising agency acquires property such as collateral materials, artwork, including photographs, and other production items, the advertising agency will be regarded as having purchased these items on its own behalf, unless it can establish that it was acting as an agent of its client when it made these purchases. Subdivision (a) (2) (A) of Regulation 1540 explains:

> "To establish that a particular acquisition was made as agent for its client (i) the agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent, (ii) the agency must obtain, prior to the acquisition, and retain written evidence of agent status with the client, and (iii) the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The agency may make no use of the property for its own account, such as charging the item to the account of more than one client. An advertising agency may not issue a resale certificate to the supplier. It will be presumed that an advertising agency who issues a resale certificate to its supplier is purchasing the tangible personal property on its own behalf for resale and is not acting as an agent for its client."

When the advertising agency makes a purchase as an agent of its client, the client is the purchaser directly from the supplier. That retail sale from the supplier to the client is subject to tax, but tax does not apply to the charges made by the agency to its client for reimbursement of the charges by the supplier or for the performance of the agency's services directly related to the acquisition of the property. An advertising agency is not an agent of the client when it purchases property that will be incorporated into the final product to be produced by its employees for the client. (Reg. 1540(a) (2) (B).)

If the agency is not acting as an agent for the client, then the agency is the purchaser of the property acquired from the supplier. The agency is the seller of such property which it delivers or causes to be delivered to its client. When the agency is acting on its own behalf, it may issue a resale certificate to its supplier for all property which the agency will resell to its client prior to use (which would include any property incorporated into property produced by the agency and then sold prior to any use).

Property Sold by Advertising Agency to its Clients

Advertising agencies are regarded as sellers of all tangible personal property produced or fabricated by their own employees. Advertising agencies are not considered agents of their clients when they purchase materials that will be incorporated into. items of tangible personal property prepared by their employees.

When the advertising agency bills a client, its charges may include compensation for tangible personal property sold by the agency to the client and compensation for expenses and service costs related to the production of the property. Here, tax applies to the total amount of the retail sale of the property, whether the property, as prepared by employees of the agency or acquired from an outside source.

Subdivision (b) (1) of Regulation 1540 states that tax applies to the total amount of the retail sale price of the property even though some of the charges on the billing may represent compensation for expenses incurred in and the service costs related to the production of the property[1]. This includes charges for supervision, consultation, research, postage, express,

[1] As an example, if you produce a print advertisement for a client, your charges to the client may consist of a final bill itemizing the expenses you incurred in making the ad, such as labor, models/actors fees, equipment expenses

telephone and telegram messages and travel expenses. Likewise, no deductions may be taken on account of the payment of model or talent fees, or for the cost of typography, or for the cost of other services involved in the producing of such items, even though such costs are itemized in the billing rendered to the client[2].

Given this background, I will answer your specific questions regarding the areas of still photography and motion pictures and video.

Still Photography

"1) Can one photographer purchase another photographer's photographs using a resale certificate?"

Generally, tax applies to sales of photographs. (Regulation 1528 (copy enclosed).} If the actual photograph purchased by the photographer will be resold to the client prior to any use by the photographer or if it will be incorporated into the property produced by the agency that will be resold, then the photographer can purchas0 the property ex-tax by issuing a resale certificate. If instead, the photographer makes any us~ of the photos prior to resale, such as copying the photographs; the photographer is using the photos and may not purchase them for resale.

"2) Can one photographer purchase another photographer's labor using a resale certificate?"

A resale certificate is used only when you purchase tangible personal property for resale in the regular course of business. A photographer's labor mayor may not be a "sale" or "purchase" for purposes of the Sales and Use Tax Law.

Revenue and Taxation Code section 6006(b} defines a "sale" to include" [t]he producing, fabricating, processing, printing, or imprinting of tangible personal property for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting."

If the assistant is producing tangible personal property for a consumer (such as the photographer), and the consumer will use that tangible personal property, then the assistant is selling tangible personal property at retail subject to sales tax even if the consumer provided all materials used by the assistant to produce the property.

If on the other hand, the photographer provides all materials used by the assistant to produce tangible personal property that will be sold to the client prior to any use, then there is no "retail" sale. (For example, if the photographer hires an assistant to take pictures using film provided by the photographer and the film is sold to the client prior to any use by the photographer then the producing of the film by the assistant is not a "sale" and the assistant's charge is not taxable.) To evidence the fact that the tangible personal property was not used prior to resale, the photographer should take a resale certificate from the assistant[3].

As discussed above, the full sale price of your retail sales are subject to sales tax," with no deduction for labor or material costs. Thus, if a photographer does some portion of the work

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etc. The total amount of the bill will be subject to tax (except transportation charges as discussed below). You may not deduct these expenses before calculating tax.

[2] Tax however does not apply to service charges where the service does not represent services that are a part of the sale of the tangible personal property.

[3] Since the assistant is not making a sale to the photographer, the assistant is not really making a sale for resale. Nevertheless, the best way to prove that the producing was not for a consumer is to take a resale certificate.

in producing the property you sell to your client, the fees that the photographer charges you may not be deducted from your taxable retail selling price.

"3) Photographer A has an out of state client. Photographer A hires Photographer B to shoot photos for this client. Does Photographer B charge Photographer A sales tax?"

If the photos will be resold or will be incorporated into the property to be resold, prior to any use, Photographer A may purchase them ex-tax by providing a resale certificate. If instead, Photographer A does not resell them, or uses them prior to resale, Photographer A's purchase of the photos is subject to tax. For example, if Photographer A copies the photos and sells the copies, the sale to Photographer A is a retail sale. Similarly, if Photographer A copies the photos and thereafter sells the copies and the original photos, the sale to Photographer A is a taxable retail sale.

"4) Can a photographer use his resale certificate to purchase photographic materials that are to be exclusively sold out of state?"

Yes, provided the photographer makes no use of materials prior to the resale.

"5) If a client leases the rights to reproduce photographic images, but the photographer maintains possession of the original images, does the photographer charge sales tax to the client?"

A lease of tangible personal property in California is a taxable continuing sale and purchase unless the lessor leases the property in substantially the same form as acquired and has paid sales tax reimbursement or use tax to the vendor or makes a timely election to pay use tax measured by the purchase price. (Rev. & Tax. Code §§ 6006 (g) (5), 6010 (e) (5), Reg. 1660 (copy enclosed).) A lease includes a contract under which a person secures for a consideration the temporary use of tangible personal property. (Regulation 1660(a).)

In the case of a lease that is a "sale" and a "purchase", the tax is measured by the rentals payable. Generally the applicable tax is a use tax upon the use in this state of the property by the lessee. The lessor must collect the tax from the lessee at the time the rentals are paid and give the lessee a receipt of the kind provided for in Regulation 1686.

Under the facts stated, I assume that by saying that "the photographer maintains possession of the original images" you mean that the photographer retains the negatives and transfers to the lessee a photograph, such that some tangible personal property is being transferred. If the lessee is not obligated to return the same photograph provided to the lessor, then the transfer of the photograph is a sale and subject to sales tax.

If the lessee must at the end of the lease term return that same photograph, then the transfer would be a lease. However, the transfer here will still be subject to tax under the rules stated above. To be excluded from tax, the lessor must lease the property in substantially the same form as acquired and must have paid sales tax reimbursement or use tax on the purchase price. In the case of a photograph taken by the lessor, it cannot be leased in substantially the same as acquired since it consisted of raw film when it was acquired, and the photographer therefore does not lease it in substantially the same form (as raw film). A photograph can be leased in substantially the same form as acquired if the photographer purchases a print and then leases that very same print. Thus, if the photographer himself buys raw film, takes and prints the photo, then it cannot be leased in substantially the same form as acquired and the lease of ~he photograph will be subject to tax measured by the rentals payable.

"6) If a client supplies all the photographic materials to the photographer, does the photographer charge sales tax for his labor?"

As mentioned above, sales of tangible personal property are subject to tax. Revenue and Taxation Code section 6006(b) defines a "sale" to include" [t]he producing, fabricating, processing, printing, or imprinting of tangible personal property for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting."

Under this definition, the photographer is making a "sale" of the photographs and that sale will be taxable even though all of the materials may have been provided by the client.

"7) Does a photographer's assistant have to charge the photographer sales tax for his labor?"

I assume that the assistant is not an employee of the photographer. Whether or not sales tax applies depends upon whether the assistant is making a retail sale of tangible personal property to the photographer. If the assistant produces property and then charges the photographer an amount (which includes compensation for his labor/services) then the assistant is making a sale of tangible personal property[4]. If that sale is at retail, then sales tax applies.

When the photographer resells property he purchased from an assistant prior to any use by the photographer, the photographer may purchase the property ex-tax for resale.

If the assistant does not provide any tangible personal property and does not produce any tangible personal property using materials provided by another person (e.g. the photographer), then the assistant is not selling the tangible personal property and sales tax does not apply to his charges to the photographer.

In any event, the photographer's full charge for the sale to his clients is subject to tax, with no deduction on account of the amount paid for the services provided by the assistant in the production of the property. In other words, there is no deduction of labor costs from the sales price.

"8) Does the photographer have to collect sales tax on a photographer's assistant's labor?"
As stated above, a photographer cannot deduct his labor costs from the selling price before computing sales tax. Sales tax is due on the entire selling price of retail sales of tangible personal property.

"9) On a large photography shoot, involving the labor ~of several positions hired by the photographer (i.e. make-up, production assistant, models, stylists, electricians), does the photographer have to collect sales tax on the labor of all these positions?"

As stated earlier, the measure of tax is based upon the gross receipts of a retail sale. Revenue and Taxation Code section 6012 defines "gross receipts" as the total amount of the sale without any deduction for the "cost of the materials used, labor or service cost, interest paid, losses or any other expense." (Rev. & Tax. Code § 6012{a) (2).) These positions are an expense in the creation of the property to be sold to the client and thus their costs are included in the measure of tax.

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[4] As discussed above, if the photographer provides all materials used to produce the property, the assistant is not technically "selling" to the photographer if the photographer will sell the property prior to any use. For purposes of this discussion, such contracts are equivalent to sales for resale.

This rule is further explained in Regulation 1540 which states that tax applies to the total amount of the retail sale of the property. Tax applies to charges for services rendered that represent services that are a part a sale of the property, or a labor or service cost in the production of the property.

> "10) Should sales tax be collected on postage and handling? (Postage & Handling includes cost of postage and markup on envelopes and labor.)"

Sales or use tax is imposed on all charges related to the sale of tangible personal property except those charges specifically excluded from taxation by statute. A retailer cannot avoid paying or collecting tax on part of the sales price of tangible personal property merely by stating some of them separately, such as overhead expenses of selling tangible personal property passed through to the purchasers, unless those charges are excluded from taxation by statute. Revenue and Taxation Code section 6012(c) (7) excludes from the definition of gross receipts:

> "Separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer; provided, that if the transportation is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the purchase of the property is made." (See also Rev. & Tax. Code § 6011 (c) (7), Reg. 1628.)

The charges for handling are part of the retailer's receipts from the sale of tangible personal property and may not be deducted from the measure of tax based on their being separately stated to the purchaser. (See, e.g., Rev. & Tax. Code § 6012(b) (1) (the charge for services which are part of the sale of tangible personal property are subject to tax).) Charges for handling related to the sale of tangible personal are taxable whether separately stated or not. Thus, a charge for "shipping and handling" is not alone a separate statement of shipping charges. If there is no further itemization, the charge for shipping and handling would not constitute a separate statement of transportation charges and the entire charge would be included in the measure of tax.

Although a designation for "shipping and handling" or "postage and handling" is not alone a separate statement of transportation charges, we have considered the designation "postage and handling" coupled with the actual amount of postage placed on the package mailed to a customer to constitute a separate statement of transportation charges excludable from the 101 measure of tax. (Business Taxes Law Guide Annotation 557.0450 0/1. -r (9/16/74) .) Thus, when you make a charge for "postage and handling" and the cost of the postage is clearly set forth on the package, then the postage charges are excludable from the measure of tax (up to the amount paid by the purchaser for postage and handling).

It should be noted that only the charges for the transportation of the final product to the purchaser are excluded from the measure of tax. Transportation charges incurred in the production of the property (e.g.- shipping costs for materials purchased by the agency to be incorporated into the final property) are included in gross receipts (there is no deduction from the selling price for these transportation expenses) .

Motion Pictures/Video

The application of tax to television commercials is set forth in Regulation 1529, a copy of which is enclosed. Television commercials are included in the definition of a "qualified motion picture." Tax does not apply to the transfer of all or part, or any interest in, a qualified motion

picture (including a commercial) if the transfer is prior to the date that the qualified motion picture is exhibited or broadcast to its general audience or the transfer is to any person holding either directly or indirectly, or by affiliation, any exploitation rights obtained prior to the date that the qualified motion picture is exhibited or broadcast to its general audience.

Tax also does not apply to charges for qualified production services performed by any person in any capacity in connection with the production of all or any part of a qualified motion picture. "Qualified production services" are any fabrication performed by any person in any capacity on film, tape, or other audiovisual embodiment in connection with the production of all or any part of any qualified motion picture. Regulation 1529(b) (2) contains a list of other services included within the definition of qualified production services.

Tax does apply, however, to the sale of raw film, sound tape, videotape stock, artwork and other tangible personal property to a person who produces a motion picture or performs qualified production services. (Rev. & Tax. Code § 6010.6(c) (1) and Regulation 1529(a).)

Your letter asked two specific questions relating to motion pictures/video:

> "l} Should the producer collect sales tax for equipment he rents from a production or post-production rental facility? (i.e. cameras, lighting & grip equipment, editing facilities, etc.)"

As discussed above, leases of tangible personal property are subject to tax unless the lessor leases the property in substantially the same form as acquired and has paid sales tax reimbursement or use tax to the vendor or makes a timely election to pay use tax measured by the purchase price. (Rev. & Tax. Code § § 6006 (g) (5), 6010 (e) (5) .)

Under Regulation 1529, a person who performs qualified production services is the consumer of, and not the lessor of, tangible personal property which that person uses in the performance of the services.

Thus, tax applies to the sale of equipment to a person who provides qualified production services and uses the equipment in providing those services. The person performing the services cannot issue a resale certificate when purchasing the property. However, if that person does thereafter lease such equipment (in addition to or instead of using the equipment when providing qualified production services), the leases would not be subject to tax since that person would have paid tax on purchase price and, I assume, would be leasing the property in substantially the same form as acquired.

On the other hand, if the producer always leases the equipment (as opposed to sometimes or always using the equipment to provide qualified production services), his leases are not taxable if he makes a timely election to pay tax measured by purchase price. If he does not do so, his leases are subject to tax measured by the rentals payable.

> "2) Can a producer use a resale certificate in purchasing motion picture raw stock and raw video tape for resale to either a client or another production company? If not, may he be reimbursed for the sales tax he has paid?"

Once again, a resale certificate is properly given when you intend to resell the property in the regular course of your business prior to any use by you.

Under subdivision (a) (1) of Regulation 1529, a person who produces a motion picture or performs "qualified production services" is the consumer of, and tax applies to the sale to such

persons, of raw film, sound tape, or videotape stock. Thus, a person performing qualified production services may not issue a resale certificate when purchasing tangible personal property to be used in performing the services.

If the person is not providing qualified production services, he may issue a resale certificate when purchasing tangible personal property that will be resold prior to any use or incorporated into the property to be sold prior to any use.

For your information, I am enclosing several tax tip pamphlets published by the Board along with copies of the Regulations discussed above. If you have any further questions, please do not hesitate to write again.

Sincerely,

Ms. Sukhwinder K. Dhanda
Staff Counsel

SKD:plh

Enclosures - Regulations 1528, 1529, 1540, 1628, 1660, 1668
- "Tax Tips for Advertising Agencies"
- "Tax Tips for The Graphic Arts Industry"

Bc: Oakland District Administrator - CH