

**STATE BOARD OF EQUALIZATION**

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October 14, 1975

Mr. E. W--- L---  
Management Consultant  
XXXX --- Drive  
--- ---, California XXXXX

Dear Mr. L---:

This is in reply to your letter to Mr. H. L. Cohen dated August 15, 1975, in which you inquire as to tax applicable to certain sales by an advertising agency with an art department producing finished art. Your letter was referred to the undersigned for reply.

You have enclosed a sample billing for our review. The billing indicates that tax will not apply to layout charges but that tax would apply to charges for copy, finished art, and typography. The typography would be acquired from an outside supplier without payment of tax. The photostat house and the printer would treat their sales as taxable, with the agency rebilling the client for a price inclusive of the amount of tax reimbursement paid by the agency. The agency would mark up the typography charge and the photostat charge 20 percent and report tax on the markup. An agency "commission" of 20 percent of the printing charge would also be charged. Tax would not be reported on this amount.

First, under our Regulation 1540, "Advertising Agencies, Commercial Artists, and Designers," with which you are familiar, it is clear that the agency would be the retailer of the art produced by its art department. [See paragraph (a)(2)(B).] Tax would apply to charges for the art, to charges for typography incorporated into the art, and to charges for copy "written solely for use as a part of tangible personally property as to which the agency is acting as seller [i.e., the finished art]."

The charge for layout would be nontaxable if the layout were not physically incorporated into the finished art and if the agency retained evidence that the layout was ordered or produced prior to the date of approval for finished art. [See paragraph (b)(4)(A).]

Second, we assume that the agency could establish that the photostats and the printed matter were acquired by it as agent for its client.

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.

Tax would then apply to the charge made by the printer. Its sale would be regarded as a retail sale to the agent's client. The agency could rebill the client for its costs, in accordance with paragraph (b)(2).

With respect to the photostat acquisition, we are troubled by the "mark-up" on the charge made by the photostat house. The fact that the agency marks up the charge is inconsistent with its status as agent. As paragraph (a)(2)(A) provides, "...the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier." We would regard the agency as the retailer of this item where a markup is billed. Tax would apply to the agency's charge to the client, including the markup. The agency could issue a resale certificate for the item.

If the agency bills the "mark-up" as a fee for the performance of the agency's services directly related to the acquisition of the property, then we think that the agency would retain its agent status with respect to the acquisition. Tax would then apply on the sale made by the photostat house. Tax would not apply to the agency fee billed for acquiring the property.

Tax would always apply to the markup on the typography charge since that charge is merely a part of the charge for the preparation of taxable art.

Tax would not apply to the amount billed as agency commission.

We note that we are enclosing for your use a copy of our recently released pamphlet "Tax Tips for Advertising Agencies."

Very truly yours,

Gary J. Jugum  
Tax Counsel

Enclosure