

M e m o r a n d u m

To: Mr. Joseph R. Houghton
Tax Auditor (Oakland)

Date: July 11, 1990

From: David E. Levine
Tax Counsel

Subject: REDACTED TEXT
REDACTED TEXT

This is in response to your memorandum dated April 20, 1990 regarding the application of sales tax to charges for billboard embellishments. Taxpayers provide advertising space on billboards. They also charge their customers for embellishments to the billboards. You explain that embellishments are fabrications to the special order of the taxpayer's clients which add additional temporary display space to the existing billboard structures.

Neither taxpayer charges or reports sales tax on the fabrication of these embellishments. One of the taxpayers has a clause in its embellishment contract stating "[t]hese special embellishment features remain the property of REDACTED TEXT 1, Inc. and thus no sales tax is involved." However, REDACTED TEXT 1 makes a charge on a regular basis for storage of the embellishments between campaigns. REDACTED TEXT 2 also bills the embellishments separately, but does not address the issue of sales tax on fabrication of embellishments. REDACTED TEXT 2 reuses the materials from former embellishments to fabricate new ones. Both taxpayers purchase materials for the embellishments tax paid.

You cite two annotations, 150.0400 (7/1/59) and 540.0200 (3/30/55), related to the application of sales tax to embellishments of billboards. You note that neither annotation addresses the issue of title passage to the embellishments. You believe that if there is no sale of embellishments, the transaction should be regarded as a short-term lease of the embellishments.

We disagree that if the transaction is not a sale, it is a lease. Rather, the transaction is either a sale from the billboard owner to the advertiser or is a use of the embellishment by the billboard owner. As you note, the product that the taxpayers offer is advertising space on their billboards. The reason for this is that advertisers generally have no access to or control of the billboard. Rather, the billboard is equivalent to a newspaper in which an advertiser pays for advertising without obtaining any rights to possession of the property on which the advertising is placed. Just as the advertiser has no right of access to or control of the billboard, the advertiser has no right of access to or control of the embellishments unless title to the embellishments passes to the advertiser. If title passes to the advertiser, taxpayers sell the embellishments to the advertiser. If title does not pass to the advertiser, taxpayers must be regarded as consuming the tangible personal property making up the embellishment.

You correctly note that the annotations you cite do not address the issue of title passage. However, the letters upon which these annotations are based show that title to the embellishments

passed to the advertiser. For example, the back-up letter for Annotation 150.0400 states that some of the embellishments “were actually delivered to the advertiser after the campaign.” This shows that the advertiser obtained the rights to the embellishments, and the taxpayer was regarded as selling those embellishments to the advertiser. Similarly, the back-up letter to Annotation 540.0200 makes clear that the taxpayer conceded that the embellishment belonged to the advertiser after the campaign, although it was seldom wanted by the advertiser. Since the embellishment was actually owned by the advertiser, it was immaterial that the advertiser seldom wanted it after the end of the particular advertising campaign. That is, in both of these situations, the taxpayer was regarded as selling the embellishments to the advertiser because the advertiser had the right to possession of those embellishments.

The contract for REDACTED TEXT 1 Group states that the embellishments remain the property of REDACTED TEXT 1 Group. Assuming the facts are not inconsistent with this contractual term (that is, that REDACTED TEXT 1 Group does not actually give the embellishments to the advertisers if they want them), then we conclude that REDACTED TEXT 1 Group is the consumer of the property used to make the embellishments. Tax applies to the sale of that property to REDACTED TEXT 1 Group or to the use of the materials. No tax applies to the fabrication labor.

Since REDACTED TEXT 2’s contract does not have an explicit provision regarding title to the embellishments, you must ascertain the implicit terms of the contract. That is, you must ascertain whether possession of the embellishments is given to the advertisers if desired. In the situation covered by Annotation 150.0400, less than five percent of the embellishments were actually delivered to the advertiser after the campaign. That is, even if only a few are delivered to the advertiser, this shows that the advertiser had the right to obtain possession of the embellishments (that is, that title to the embellishments passed to the advertiser). If so, sales tax applies to the charges for the embellishments. If not, REDACTED TEXT 2 is the consumer of the property used to make the embellishments and no tax applies to the fabrication labor. Since REDACTED TEXT 2 reuses the materials of used embellishments, this indicates that no sale occurs.

If you have further questions, feel free to write again

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cc: Mr. John Abbott – Annotation 150.0400 should be amended by substituting for the last sentence the following: “If the billboard owner passes title to or the right of possession of the cutouts to the advertiser, tax applies to the charges for materials contained in the cutouts together with the charges for fabrication labor in manufacturing them. If title to or right of possession if the cutouts does not pass to the advertiser, then the billboard owner is the consumer of the materials contained in the cutouts.”

Annotation 540.0200, which covers the same subject and has the same infirmity, should be deleted rather than corrected since it is located in the wrong section of the Business Taxes Law Guide.