



100.0031

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-6450

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May 31, 1994

BURTON W. OLIVER
Executive Director

Re: SR - - - - - ABC Design

Dear Mr. ---:

This is in reply to your March 14, 1994 letter regarding the application of sales tax to your charges for designs when you transfer them by modem.

You first asked whether you are correct in assuming that your charge for the artwork is nontaxable if you deliver it by modem and your reason for that mode of delivery is solely to avoid the sales tax. Yes, you are correct. The charge is nontaxable, because the Board's legal staff has long taken the position that a person who transfers information by telecommunications does not thereby make a transfer of tangible personal property.

You asked whether other artists may depend on the information in this opinion. Revenue and Taxation Code section 6596 provides that the Board may relieve a person from the liability for sales and use tax when the person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from the Board. For purposes of the section, the Board may find the person's failure to make a timely return or payment only if the Board finds that all of the following conditions are satisfied:

“(1) The person requested in writing that the board advise him or her whether a particular activity or transaction is subject to tax under this part. The specific facts and circumstances of the activity or transaction shall be fully described in the request.

“(2) The board responded in writing to the person regarding the written request for advice, stating whether or not the described activity or transaction is subject to tax, or stating the conditions under which the activity or transaction is subject to tax.

“(3) In reasonable reliance on the board's written advice, the person did not do either of the following:

- (A) Charge or collect from his or her customers amounts designated as sales tax reimbursement or use tax for the described activity or transaction.
- (B) Pay a use tax on the storage, use, or other consumption in this state of tangible personal property.

“(4) The liability for taxes applied to a particular activity or transaction which occurred before either of the following:

- (A) Before the board rescinded or modified the advice so given, by sending written notice to the person of the rescinded or modified advice.
- (B) Before a change in statutory or constitutional law, a change in the board's regulations, or a final decision of a court, which renders the board's earlier written advice no longer valid.”

Section 6596 goes on to provide that only the person making the written request is entitled to rely on the board's written advice to that person. Although the information we provide you in this opinion of course is applicable to similar sales by other artists, only you may rely on this advice for purposes of Section 6596.

You asked what documents an artist should retain as evidence of the transmission of the image by telecommunications. As you noted, it is easier to prove that something was delivered rather than prove that it was not delivered. You also noted that it is rare for commercial artists to obtain purchase orders for their jobs. We suggest that you note on the invoice that delivery was by modem and retain a hard copy of the artwork with a dated notation of the electronic delivery.

Finally, you noted that under the “works made for hire” provisions of the federal copyright law (Title 17, U.S. Code § 201), the client is the creator of the artwork. You asked whether that fact has any bearing the taxability of the artist's charge. No, we believe that, although the client may own a copyright interest in both the image and the artwork even before the image is transmitted by modem, the artist's transmission of the image by telecommunications does not result in a transfer of tangible personal property for purposes of the Sales and Use Tax Law.

Mr. --- ---

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We hope this answers your questions; however, if you need further information, feel free to write again.

Very truly yours,

Ronald L. Dick
Senior Tax Counsel

RLD:plh

cc: Out-of-State Sacramento District Office – OH
Mr. Glenn Bystrom - MIC:43