

**STATE BOARD OF EQUALIZATION**

LEGAL DIVISION (MIC:82)
450 N STREET, SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
TELEPHONE (916) 323-3787
FAX (916) 323-3387

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Executive Director

January 28, 1997

Mr. V--- C---
--- --- --- Inc.
XXX --- ---, Suite XXXX
---, NY XXXXX

Re: Unidentified Taxpayer

Dear Mr. C---:

This is in response to your letter dated December 2, 1996 to Assistant Chief Counsel Gary J. Jugum regarding the applicability of sales and use tax to charges by an advertising agency. We understand that your client is an advertising agency that transfers both preliminary and finished art by modem. You state that a contract explicitly details this method of delivery. We understand that an acknowledgment of receipt evidences the transfer of the artwork by modem, because the recipient of the artwork acknowledges the receipt or lack of receipt of the artwork by modem. We assume that the advertising agency makes no transfer of the artwork in a physical form.

We understand that your inquiry is whether the charge for the transfer of finished art, which is transmitted by modem, is subject to California sales tax. You also ask whether the term "illustration," set forth in Business Taxes Law Guide Annotation 100.0037 (3/11/94), is merely an example of the type of property that can be transferred by modem.

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 on the retailer, the retailer may collect sales tax reimbursement from the purchaser if the contract of sale so provides. (Civ. Code § 1656.1.) A "sale" means any transfer of title or possession, in any manner or by any means whatsoever, of tangible personal property for a consideration. (Rev. & Tax. Code § 6006(a).) An advertising agency's transferring title to or possession of finished art in tangible form in any manner or by any means comes within the definition of a sale. (See Id.; Reg. 1540(b)(4)(B).)

On the other hand, the Board of Equalization has taken the position that the transfer of information, including finished art, by remote telecommunications such as modem, is not a sale of tangible personal property. Thus, tax does not apply to charges for artwork that is transferred by modem. (BTLG Annots. 100.0031 (5/31/94), 100.0037 (3/11/94).) You are correct that an “illustration” is an example of the type of property that can be transferred by modem. For example, the advertising agency could transfer the image of a photograph by means of modem, and the transfer of that image would not be subject to sales tax, as it is also not a transfer of tangible personal property.

You asked whether Regulation 1540(b)(4)(A) regarding preliminary art is applicable to finished art as well. Under Regulation 1540(b)(4)(A), if the preliminary art is prepared on data processing equipment, the advertising agency must produce a hard copy of each of the roughs, visualizations, layouts or comprehensives presented for client approval, and retain such copies in accordance with subdivision (d) of Regulation 1698. We understand that you are asking whether the advertising agency must also retain a hard copy of the finished art, when the advertising agency transmits the finished art by modem. For audit purposes, the advertising agency must retain some form of evidence to support the claim of transmittal by modem. (See BTLG Annot. 100.0031 (5/31/94).) Such evidence could include the acknowledgment of receipt indicating the recipient’s receipt of the artwork by modem. We also 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 ask:

“In the event subject client engages in this type of activity i.e., the transmission via modem, would the purchase of any tangible personal property not transferred be subject to use tax?”

We assume that you are asking whether the transfer of tangible personal property to the advertising agency for use in producing the preliminary or finished art, is subject to sales tax, even if the transfer of finished art is rendered a nontaxable transaction when it is transmitted by modem. The answer is yes. A “retail sale” 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.) To the extent that the advertising agency acts on its own behalf in acquiring the tangible personal property, it is the purchaser of the property with respect to the supplier, and tax applies to the sales of supplies to it. (Reg. 1540(a)(1).) To the extent that the advertising agency acts as an agent of its client in acquiring tangible personal property, tax applies to the vendor’s sale of the property to the client. In other words, the nontaxable nature of the transfer of finished art by modem does not render the sale of supplies and materials to either the advertising agency or its client nontaxable.

Mr. V--- C---

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January 28, 1997
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Please write again if you have further questions.

Very truly yours,

Charlotte Chyr
Tax Counsel

CC:cl

cc: Out-of-State District Administrator