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LEGAL DIVISION (MIC:82)
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
Telephone: (916) 324-2634
FAX: (916) 323-3387

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December 18, 1995

Mr. D--- H. W---, President
D--- H. W--- A---, Inc.
XXXX --- ---, Suite XXX
--- ---, CA XXXXX

Re: A--- C--- G---
No Seller's Permit

Dear Mr. W---:

This responds to your letter dated September 23, 1995 to Supervising Staff Counsel Ronald L. Dick concerning your client A--- C--- G--- (ACG), and the new form of outdoor events and advertising which ACG will be producing. We will address your areas of concern in the order in which you presented them.

ACG, located at XXX --- ---, [city], is a wholly owned and separate division of F---, C--- & B--- (seller's permit # SR -- XXXXXXXXXXXX). You state that ACG produces outdoor displays featuring graphics which combine traditional printed outdoor displays and projected images. The images are projected using techniques that include stills, slides, motion pictures, interactive computer projections and light shows. The graphics may be projected onto billboards or onto architectural surfaces, such as buildings, walls, bridges, etc. ACG creates and produces the graphics and may arrange for the lease of the equipment needed for the displays. You state that ACG meets the requirements under Sales and Use Tax Regulation 1540(a)(2) for acting as an agent for the sale of manufacturing aids used in production and for the lease of the projection equipment. ACG is also a seller of tangible personal property in the form of finished art used in the graphics. You inquire about the tax consequences of different circumstances, below.

A. Programmed Lighting

You describe programmed lighting as the use of automated stage lighting to produce theatrical effects. You state that a custom computer program may be used to vary the direction, intensity, and sequence of the lights used. Some projections may include a projected logo or other graphic images. "Gobos" may be inserted into light sources to project desired images. A gobo is defined as a glass or metal stencil made by lasers, and created from art work (e.g., logo sheets). Computer programs control the light source so that the projected images can appear to move and change. You ask the following questions concerning programmed lighting.

"1. Does Regulation 1502 'Computers, Programs and Data Processing' Section (2) 'Custom Programs' govern the taxability of the custom programs developed and used to control the light show? If so are all charges related to the sale or lease of the program tax exempt?"

We assume that the sale or lease of the program in question is to ACG's client. Therefore, we agree that if the computer program to control the light show qualifies as a custom program under Regulation 1502(f)(2), the charges for its sale or lease are not taxable. (Reg. 1502(f)(2)(A).) If you have questions concerning whether the program qualifies as a custom program, please send us details concerning the program so that we may assist you in answering your questions.

"2. With respect to the gobos projection method, it seems that any ACG charges for production of finished art used to produce the gobos would be taxable. However, ACG could act as an agent for the sale of special printing aids, manufacturing aids and the gobos. Is that correct?"

For purposes of this opinion letter, we assume from your question that ACG produces finished art for the client, such as a logo or other graphic image, but that a third party makes the gobo, using the finished art to do so.

Tax applies to ACG's total charges to its client for finished art produced by ACG. (Reg. 1540(b)(4)(B).) If the gobos, special printing aids or manufacturing aids are acquired from third parties by ACG as its client's agent within the meaning of Regulation 1540(a)(2)(A), then the third person supplier is the retailer of the property to ACG's client, and the taxable transaction is that sale.

“3. It seems that ACG could act as an agent for the sale or lease of any equipment, such as lights, trucks, generators, electronic equipment, tents, etc. needed for the light show. Is that correct?”

ACG may act as an agent on behalf of its client in dealing with third persons in acquiring the tangible personal property which you describe if ACG satisfies all the requirements of Regulation 1540(a)(2)(A).

B. Projected Still Image

You state that still images may be projected by a slide projector, a motion picture projector or a computer projector. You assume that Regulation 1528 governs the production of slides utilized to project the graphic images, and that Regulation 1540 governs the taxability of the use of finished art to produce the slides. You ask two questions concerning this area.

“1. If ACG acts as seller or produces the finished slide films in-house, ACG is the photographer. Regulation 1528(a)(1) states, ‘...No deduction is allowable on account of expenses such as travel time, telephone calls, rental of equipment or salaries or wages paid to assistants or models, whether or not such expenses are itemized in billings to customers.’

“a. Under this scenario, can ACG act as agent for the lease of projection equipment, trucks, generators, tents and other [tangible personal property] needed to set up and project the slides when they itemize these expenses in billings to the clients?”

Tax applies to retail sales of photographs, including slides, by ACG. (Reg. 1528(a)(1).) The sentence which you quote, above, from Regulation 1528(a)(1) concerns expenses related to producing the photograph or slide which is sold at retail. It does not apply to expenses which are not a part of the gross receipts from the sale of the photograph or slide, such as charges for services which are not a part of the sale. (Rev. & Tax. Code § 6012; Reg. 1540(b).) Since the lease is of projection equipment, trucks, generators, tents and other tangible personal property needed to set up and project the slides for the outdoor event displayed subsequent to the production of the photograph or slide, it is unrelated to the production of the slide or photograph sold. As such, unless the lease is required as a condition of the contract of sale of the photograph or slide, we do not consider the lease charges to be a part of the gross receipts from the sale of the photograph or slide. ACG may act as an agent in arranging the lease of such tangible personal property to its client if satisfying the requirements of Regulation 1540(a)(2)(A). Tax applies to the leases as provided in Regulations 1660 and 1661.

“2. If ACG buys the finished slides from an outside service, it seems that they can act as an agent for the sale of the slides from the photographer to the client. Moreover, it seems that ACG can act as agent for the lease of projection equipment, trucks, generators, etc., when they itemize these items on the billing to the client.

“a. The charges for finished art as described in [my letter’s] Paragraph, III.B ‘Slide Projector’ are taxable.”

We assume you wish to know if the conclusions which you reach, as quoted above, are correct. ACG may acquire the finished slides from an outside photographer as its client’s agent, and also may act as its client’s agent in arranging the lease of the projection equipment, trucks, generators, etc. from a third person if satisfying the requirements of Regulation 1540(a)(2)(A), as discussed earlier in A.2. ACG’s charges for finished art are taxable as discussed in A.2., above. The reimbursement for property acquired by ACG as an agent for the client should be separately invoiced, or shown separately on an invoice, to the client. (Reg. 1540(a)(2)(A).)

C. Printed Image With Projected Motion

You indicate that this display divides an outdoor display into two sections. Fifty percent of the display is a printed image, e.g., printed onto a billboard. Fifty percent of the display is a projected motion picture, e.g., projected onto the same billboard. You ask whether ACG is correct to treat the printed image portion of the display separately from the projected motion portion. We agree that the printed image portion of the display should be treated separately from the projected motion portion.

You assume that Regulation 1540 governs the application of tax to the printed image portion, and you raise five issues of concern which we state, with a response following each, below.

(1) Are charges for preliminary art tax exempt if ACG meets the requirements of Regulation 1540(b)(4)(A)?

Answer: Separate charges for preliminary art, as it is defined in Regulation 1540(b)(4)(A), are not subject to tax except where the preliminary art becomes physically incorporated into the finished art. (Reg. 1540(b)(4)(A).)

(2) Are all charges for the production of finished art taxable under Regulation 1540(b)(1), and may ACG act as an agent for the sale of manufacturing aids (e.g., photography) to the client under Regulation 1540(b)(4)“(d) [sic]”?

Answer: Tax applies to the total charges made by ACG to the client for finished art produced by ACG. (Reg. 1540(b)(4)(B).) ACG may acquire manufacturing aids, such as photo engravings, from third parties as its client's agent if satisfying the requirements of Regulation 1540(b)(2). If ACG acts as the agent for such acquisitions, the third party supplier is making the taxable retail sale to the client.

(3) May ACG act as an agent for the sale of special printing aids to the client?

Answer: Yes, as discussed above. (Reg. 1540(b); see Reg. 1541.)

(4) Are charges for the printing of the sheets pasted to the outdoor display taxable under Regulation 1541(i), and may ACG act as an agent for the sale of the printed sheets to the client?

Answer: Tax applies to charges for printing of the sheets. (Reg. 1541(a) and (i).) ACG may acquire the printed sheets from a third party as its client's agent if satisfying the requirements of Regulation 1540(b).

(5) Are charges for "the outdoor media placement of the printed sheets" excluded from tax as charges for a service? (We assume that by "placement of the printed sheets", you mean pasting the printed sheets onto a billboard which is affixed to a building or other real property.)

Answer: Charges for the pasting of the printed sheets onto a billboard affixed to real property are excluded from tax as installation labor. (Rev. & Tax. Code §§ 6011(c)(3); 6012(c)(3); Reg. 1546(a).) Without more facts, we are unable to respond as to other "outdoor media placement of the printed sheets."

D. Projected Motion

You assume that projected motion is governed by Regulation 1529 "Motion Pictures". You state that the projected motion meets the definition of "qualified motion picture" in subdivision (b)(1) of that regulation, and you contend that under these circumstances all of the "production charges" are tax exempt up to and including charges for the answer prints. We assume that you use the term "production charges" to mean charges for "qualified production services" as that term is defined in Regulation 1529(b)(2). You are correct that tax 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." (Reg. 1529(a)(3).) This includes charges for answer prints, which the regulation considers the product of qualified production services. (Reg. 1529(d)(11)(B).)

You also assert that charges for release prints are taxable, but that ACG may act as an agent for the sale of release prints to the client. The application of sales tax to the sale of release prints is the same as the application of tax to other sales of tangible personal property; that is, a sale of a release print to a person for exhibition or broadcast is a retail sale subject to sales tax. The sale of a release print for resale is not subject to tax. (Reg. 1529(b)(3)(A).) ACG may act as an agent (see earlier discussions), for the sale of a release print.

You further contend that charges for release prints which are shipped out of the state of California pursuant to a contract of sale are tax exempt under the interstate commerce rules, provided that no use was made of the release prints in this state. The controlling law is Revenue and Taxation Code section 6396 which provides an exemption from sales tax for the gross receipts from the sale of tangible personal property which, pursuant to a contract of sale, is required to be shipped and is shipped to a point outside of this state by the retailer by means of either facilities operated by the retailer, or delivery by the retailer to a carrier, customs broker or forwarding agent, for shipment to the out-of-state point. (See Reg. 1620(a)(3).) Your concern about whether ACG may act as an agent for the sale or rental of equipment needed for projection has been addressed previously in this opinion letter.

E. Projected Still Image With Projected Motion

You state that this is an outdoor display that splits the display into two sections. Fifty percent is a motion picture, while the other 50 percent is a projected still image. Your questions concern the still image and its projection. The still image may be projected by means of slides or a continuous loop of motion picture film or tape.

As you state, the slide projection has been covered under Projected Still Image (B., above). You also state that stills may be projected by means of a motion picture projector. We understand that this may be done when the media is a continuous loop of motion picture film or tape. You state that in such instances, the stills are considered the same as a motion picture, discussed under Motion Picture (D., above). We agree.

F. Interactive Motion

You state that interactive motion uses a computer and projection equipment to project live computer output onto an outdoor display. You believe that the provisions of Regulation 1502 concerning custom computer programs apply, and that the sale of a custom computer program used to generate an outdoor display is not subject to tax. You also believe that ACG may act as an agent for the sale or lease of computers, projectors and other equipment needed for the display. Please see our response to question A, above.

G. Special Client Considerations

You write that G--- O--- (GO) is a co-contractor with ACG. ACG produces and coordinates the outdoor displays for GO. There are also contractual relationships between ACG, GO and the advertisers. You have given us a sample agreement between such parties. You state:

“Paragraph 6 of the Agreement meets one requirement for establishing an ‘Agent’ relationship between ACG, GO and the advertiser according to Reg. 1540(a)(2)(A).

“Example: An advertiser, wishing to do outdoor advertising using ACG’s techniques, contracts with GO and ACG using the three-way ‘Agreement’ attached. ACG produces whatever is needed to meet the advertiser’s requirements. ACG bills GO for creative production and coordination. GO bills the advertiser for media placement.

“Does this scenario affect the tax considerations discussed above?”

For purposes of this opinion letter, we assume that, “ACG produces whatever is needed to meet the advertiser’s requirements” means that ACG is responsible either to itself provide, or to arrange as an agent of the advertiser for third parties to provide, whatever is needed to meet the advertiser’s requirements for an outdoor display of the nature discussed in this opinion letter, except for the pasting of printed sheets on billboards and the physical site of the display. We understand that GO is responsible to itself provide, or arrange as an agent of the advertiser for third parties to provide, the physical site for the actual outdoor display and the pasting of printed sheets onto billboards. We also understand that ACG may on occasion be the retail seller of tangible personal property to the advertiser, and on other occasions may be an agent of the advertiser who arranges for the sale of tangible personal property by third parties to the advertiser. From the “Agreement” (your exhibit V), we further understand that ACG and GO will each have separate contracts with the advertiser to perform the agreed work of each, but that as to payment for this work, ACG will bill GO, and GO, in turn, will bill the advertiser for both GO’s work and ACG’s work, including the sale of any tangible personal property by ACG to the advertiser. Subject to these assumptions, the scenario which you describe does not change the tax considerations discussed in this opinion letter.

Mr. D--- H. W---

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December 18, 1995
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I hope this information is of assistance. Please write again if we may answer any further questions.

Sincerely,

Sharon Jarvis
Staff Counsel

SJ:rz

cc: [city] District Administrator - --