

M e m o r a n d u m**100.0360**

To: Los Angeles – District Administrator (JWT)

September 22, 1967

From: Tax Counsel (RHA)

Subject: Taxability of Modeling Fees

Reference is made to your memo of August 31, 1967.

The question of taxability of modeling fees relates to the following facts as we understand them.

An advertising agency, in preparing ads for its clients, needs photographs of models. The agency engaged the services of models who are independent contractors. The models are instructed to go to a photo studio (also independent contractor) where they are photographed.

The studio charges the agency for the photos it takes, including sales tax. The agency pays the models directly. The cost of the photographs and the fees paid to the models are passed on to the agency's client and are separately stated in billings.

Ruling 2, subsection (c) provides that the tax applies to the entire amount charged for ... photographs, etc. Whether the items of property [photographs] are used for reproduction ... purposes is immaterial.

We understand the agency argues that, for purposes of engaging services of models, it is acting as a "true agent". If we were to recognize this as being true, then the charges for the models would not be taxable because the result would be the same as if the client furnished the models.

In 1949 Ruling 2 was amended to contain provisions for finding an ad agency to be a "true agent" and therefore not a retailer making sales to its client.

In 1961 the ruling was again amended. In this amendment all reference to "true agent" was deleted.

Thus, to consider an ad agency to be a true agent for one purpose and a seller for another purpose is inconsistent with the current amendment to Ruling 2 and contrary to the intent of the current amendment. As we see it, there is no basis under the present Ruling 2 on which to find the ad agency to be a “true agent” for hiring models who pose for photographs which the ad agency sells to its client, and which are taxable under subsection (c) of the ruling.

Clearly, if the ad agency employed the services of a model, took the pictures, developed them and used them in reproducing ads for the client, the charge to the client for the photographs including all costs for producing them would be taxable under subsection (c). The fact that an independent photographer takes and develops the pictures and charges the ad agency for the work is a distinction without a difference.

Summarily, it is our opinion that the cost of the models’ services, paid by the agency and passed on to the client, are a direct part of the cost of the photographs to the agency, and should be included in the measure of tax under the provisions of subsection (c) of Ruling 2.

RHA:de [1b]



STATE BOARD OF EQUALIZATION

November 13, 1967

Dear Mr. ---:

Please accept our apology for our delayed reply to your letter of September 18, 1967. This delay was caused in part by our increased work load and additional research involving Ruling 2.

The results of this research and the answers to the several questions you asked follows:

In 1949 Ruling 2 was amended to contain provisions for finding an ad agency to be a "true agent" and, therefore, not a retailer making sales to its client. In 1961 the ruling was again amended. In this amendment all reference to "true agent" was deleted.

In discussing the effect of these changes with other members of the legal staff, it was their opinion that an ad agency is not to be considered a "true agent" of its client after the 1961 amendment. Accordingly, my acknowledgment in my September 14, 1967 letter that your client was in fact acting as a true agent of his client was in error.

It is our position that ad agencies are to be regarded as retailers making sales to its clients' not true agents. However, they may purchase such items as listed in your August 11, 1967 letter ex tax for resale. In such a case they would, of course, have to remit tax to the state when they sold those items to their clients.

Since, in your client's case, it paid sales tax to its suppliers it may take a tax-paid purchase resold deduction on its tax return. However, in the future it should issue a resale certificate to its suppliers, as related above.

We agree with your conclusion regarding the taxability of the typography charge as expressed in your letter of November 1, 1967.

Under the facts presented in your letters, it is our opinion that none of the 15 percent agency commission, of \$558.01, is subject to tax.

The remaining question regards the taxability of modeling fees and endorsements fees under the following circumstances:

“Advertising agencies, on behalf of their clients, engage models to sit for photos and pay them a fee for doing so, with no sales tax paid to the model. The photographer charges a sales tax for the photos purchased. Thereafter, a plate or

cut is made which includes, among other things, the picture of the model. Question--is the model's fee subject to sales tax in and of itself and, if not, does a sales tax attach to that fee once the photo is used in a plate?

“A related but different situation (and another problem) arises when a model either does or does not get a modeling fee for the sitting for the photo but, in either event, has a contract with the agency – on behalf of the client – to receive an endorsement fee payable weekly, monthly, etc., in an amount certain for each and every use of his photo in any publication. In such event, the same cut or plate – made only once – may be used in any number of insertions in any number of media. Question--Under what circumstances, if any, is sales tax chargeable?”

Ruling 2, subsection (c) provides that the tax applies to the entire amount charged for...photographs, etc. Whether the items of the property [photographs] are used for reproduction or display purposes is immaterial.

Since the ad agency is regarded as a retailer and not a “true agent”, it is our opinion that the cost of the model's services, paid by the agency and passed on to the client, are a direct part of the cost of the photographs to the agency and should be included in the measure of tax under the provisions of subsection (c) of Ruling 2.

Very truly yours,

Glenn L. Rigby
Assistant Counsel

GLR:mh [lb]