STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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July 8, 2003

Mr. J--- H---
J--- O--- Photography
XXX --- Street
--- ---, California XXXXX

Re: J--- O--- Photography
SR -- XX-XXXXXX

Dear Mr. H---:

This responds to your letter dated June 7, 2003, addressed to Assistant Chief Counsel Janice Thurston of the State Board of Equalization's Legal Department. Your letter has been assigned to me for reply.

You stated:

> "A law firm in Oakland hired me to photograph their staff for use on their website, as well for PR and marketing materials. We agreed on terms within a written contract. I shot the photographs with a digital camera and downloaded directly into their computer at the end of each day. On two occasions, I burned CDs for them instead of direct download. My invoices itemized the various costs: Licensing fees, digital charges, rentals, travel, etc.
>
> "Should I be charging them sales tax on all, or any part of the invoice? If they return the CDs to me after downloading the files, would that make a difference?"

Discussion:

Before addressing the specific questions you asked, some background information on the Sales and Use Tax Law may be helpful. Sales tax is imposed on all retailers, measured by a percentage of gross receipts from their retail sales of tangible personal property in this state, unless the sale is specifically exempt by statute. (Rev. & Tax. Code, § 6051.) Although sales tax is imposed on the retailer, the retailer may collect sales tax reimbursement (usually itemized on the invoice as "sales tax") from the purchaser if the contract of sale so provides. (Civil Code, § 1656.1.) When sales tax does not apply, use tax applies to the storage, use or other consumption of tangible personal property purchased from any retailer for storage, use or other consumption in this state, measured by a percentage of the sales price, unless that use is specifically exempt by statute. (Rev. & Tax. Code, § 6201.) "Gross receipts" (for purposes of the sales tax) and "sales price" (for purposes of the use tax) generally include all amounts received with respect to the sale or use of tangible personal property, with no deduction for the cost of materials used, labor or service costs, or other expenses of the retailer, unless there is a specific statutory exclusion. (Rev. & Tax. Code, §§ 6011, 6012.)

As set forth above, the sales tax applies to charges for transfers of tangible personal property. When there is no tangible personal property transferred, no sales tax is owed. Regulation 1540 explains the sales tax rules for advertising agencies, commercial artists, and photographers. Subdivision (a)(7) of the regulation defines "finished art" to include photographic images. Subdivision (b)(2)(B) explains when certain transfers are not deemed to be in tangible form, as follows:

> "A transfer of electronic artwork in tangible form is a sale. However, a transfer of electronic artwork from an advertising agency or commercial artist to the client or to a third party on the client's behalf that is not in tangible form is not a sale of tangible personal property, and the charges for the transfer are not subject to tax. A transfer of electronic artwork is not in tangible form if the file containing the electronic artwork is transferred through remote telecommunications (such as by modem or over the Internet), or if the file is loaded into the client's computer by the advertising agency or commercial artist, and the client does not obtain title to or possession of any tangible personal property, such as electronic media or hard copy. If the transfer is not a transfer in tangible form because it is loaded onto the client's computer, the advertising agency or commercial artist should document that transfer by a written statement signed at the time of loading by the client and by the person who loaded the electronic artwork into the client's computer with the following or similar language: 'This electronic artwork was loaded into the computer of [client's name] by [advertising agency's or commercial artist's name], and [advertising agency's or commercial artist's name] did not transfer any tangible personal property containing the artwork, such as electronic media or hard copies, to [client's name].' When such a statement is signed at the time the file is loaded, it will be rebuttably presumed that the transfer of electronic artwork was not

transferred in tangible form. If there is no such timely completed statement, the advertising agency or commercial artist may provide other substantive evidence establishing that the artwork was not transferred in tangible form."

Thus, when you charge for photographic images for a given project, and the images are downloaded from the disk in your camera directly into your client's computer, tax will not apply to such charges.

The transfer of images on a disk, however, constitutes a transfer of tangible personal property. Therefore, charges for those transfers will be taxable.

Once you have determined that there was a transfer of tangible personal property in connection with a given project, you must determine whether all or only a portion of the invoice is taxable. In this regard, you need to establish whether the transfer was pursuant to a technology transfer agreement ("TTA"). Regulation 1540 sets forth specific rules for determining the amount received for the transfer of tangible personal property as part of a TTA. Subdivision (b)(2)(D) explains in full:

"(D) Reproduction Rights Transferred With Finished Art.

"1. Charges for the transfer of possession in tangible form to the client or to anyone else on the client's behalf of finished art for purposes of reproduction are included in the measure of tax on that sale, including all charges for the right to use that property, even though there is no transfer of title to the person reproducing the finished art, except as provided in subdivision (b)(2)(D)2.

"2. Any agreement evidenced by a writing (such as a contract, invoice, or purchase order) that assigns or licenses a copyright interest in finished art for the purpose of reproducing and selling other property subject to the copyright interest is a technology transfer agreement, as explained further in Regulation 1507. Tax applies to amounts received for any tangible personal property transferred as part of a technology transfer agreement.
Notwithstanding subdivision (b)(2)(C), tax does not apply to temporary transfers of computer storage media containing finished art transferred as part of a technology transfer agreement. Tax does not apply to amounts received for the assignment or licensing of a copyright interest as part of a technology transfer agreement. The measure of tax on the sale of finished art transferred by an advertising agency or commercial artist as part of a technology transfer agreement shall be:

"a. The separately stated sales price if the finished art is permanently transferred, or the separately stated lease price if the finished art is temporarily transferred; provided that the separately stated price is reasonable;

> "b. Where there is no such separately stated price, the separate price at which the person holding the copyright interest in the finished art has sold or leased that finished art or like finished art to an unrelated third party where: 1) the finished art was sold or leased without also transferring an interest in the copyright; or 2) the finished art was sold or leased in another transaction at a stated price satisfying the requirements of subdivisions (b)(2)(D)2.a.; or
>
> "c. If there is no such separately stated price under subdivision (b)(2)(D)2.a., nor a separate price under subdivision (b)(2)(D)2.b., 200 percent of the combined cost of materials and labor used to produce or acquire the finished art. 'Cost of materials' consists of the costs of those materials used or incorporated into the finished art, or any tangible personal property transferred as part of the technology transfer agreement. 'Labor' means any charges for labor used to create such tangible personal property where the advertising agency or commercial artist purchases such labor from a third party, or the work is performed by an employee of the advertising agency or commercial artist."

Thus, to qualify as a TTA, the agreement must be evidenced by a writing, it must assign or license a copyright interest, and the transfer must be for the purpose of reproducing and selling other property which will be subject to the copyright interest. In such a case, tax will not apply to the amount attributable to the charge for the copyright (the right to reproduce). However, tax will apply to amounts charged for the creation and transfer of the tangible personal property, which in your business is the photographic image, whether it is on a disk, slide, print, or film.

In many cases, your transfers of photographic images are not pursuant to a TTA. For example, there may be no copyright assigned, or the purchaser may not be acquiring the photographic images for the purpose of fabricating and selling other property subject to the copyright. In such cases, the full amount charged for the finished art (your photographs which are transferred) is subject to tax. Your letter states that your client (the law firm) uses the photographic images for its web site, and for public relations and marketing materials. Because the firm is not making and selling a product subject to your copyright interest in the photographic images, the transaction does not qualify as a TTA. You ask whether it makes a difference that the firm returns the disk after downloading the image. Such a temporary transfer would make the charges nontaxable only if the transaction was a TTA, but as explained above, it is not. Accordingly, all of your charges on these projects (where images are transferred on disk) are taxable.

I hope this letter sufficiently addresses your questions. If you need further assistance, please write again.

Sincerely,

Jeffrey H. Graybill
Senior Tax Counsel

JHG/sw

Enclosure: Regulation 1540, Advertising Agencies and Commercial Artists.

cc: Ms. Laura Jonoubei (MIC: 50)
District Administrator (BH)