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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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Executive Director

July 1, 1992

Mr. H--- P---
H--- P--- P---
XXXX --- Avenue
--- ---, CA XXXXX

SR – XX-XXXXXX

Dear Mr. P---:

As you know, your April 2 and April 20, 1992 letters to the State Board of Equalization have been referred to the legal staff for reply.

We understand that you are a photographer. You are represented by an agent, Ms. P--- P---. You explained that her responsibilities are to market and sell your photography to potential and actual clients. She provides the clients with estimates of the cost of the job, and she issues invoices to the client after you complete the photography. When she receives payment from the client she sends you a check for your percentage of the charge. She has been collecting sales tax reimbursement from the clients and paying the amount in full to the Board of Equalization. You do not have a written contract with her.

You also contract with the O--- agency which syndicates photographs which you have already taken. You sent a copy of your contract with the O--- agency. We note the following relevant provisions of the contract:

"1. During the term of this Agreement, O--- shall serve as Photographer's sole and exclusive worldwide representative in connection with the syndication and sale of stock photographs. In that capacity, O--- shall use its reasonable best efforts to syndicate and sell stock photographs taken by Photographer. Photographer shall not retain any other representative in connection with the syndication or sale of stock photographs during the term of this Agreement. Photographer agrees not to syndicate or sell stock photographs taken by him directly, and shall promptly refer all inquiries regarding the syndication or sale of stock photographs to O---.

"2. Photographer shall apply O--- with originals of all stock photographs which are intended for syndication or sale. All original photographs provided to O--- shall remain Photographer's property, and O--- agrees to return them to Photographer upon termination of this Agreement, if so requested. It is understood, however, that original photographs may become damaged or lost through no fault of O---, in which case O--- shall bear no responsibility for such damage or loss.

"3. During the term of this Agreement, O--- shall have the right to set the terms and conditions of all syndications and sales of Photographer's stock photographs.

"4. In consideration of the services rendered and to be rendered by O---, Photographer agrees to pay to O--- fifty percent (50%) of all monies actually received by O--- on account of syndications or sales of stock photographs taken by Photographer, which syndications or sale are negotiated or made during the term of this agreement...."

"8. The relationship between Photographer and O--- shall be that of independent contractors, and nothing contained in this Agreement shall render the relationship a joint venture, partnership or employment relationship...."

Based on the information you have provided, it appears that O--- is a consignee of your photographs. In this regard, Sales and Use Tax Regulation 1569 provides as follows:

"A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer. Tax applies to his gross receipts from such a sale...."

O--- is responsible for reporting and paying sales tax on its retail sales of your photographs.

We do not have sufficient facts regarding your contract with Ms. P--- P--- in order to provide you with a definitive answer. However, it does not appear that Ms. P--- is a consignee of your photographs under Regulation 1569. The California Sales and Use Tax Law provides a presumption that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect the property is purchased for resale. (Rev. & Tax. Code § 6091.) Accordingly, you are responsible for reporting and paying sales tax on your sales of artwork to Ms. P--- P--- unless you can prove that Ms. P--- either sells the artwork as a consignee or purchases the artwork from you for resale to her clients. If you are able to prove that Ms. P--- is the retailer of your photographs, you are

Mr. H--- P---

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entitled to a refund of the tax that you paid. On the other hand, if Ms. P--- is merely making the sales as an agent on your behalf, then you are responsible for reporting and paying the tax, and Ms. P--- is entitled to a refund of the tax paid by her.

Further, if you make sales to Ms. P--- for resale, you are required to hold a seller's permit regardless that all your sales may be for resale.

We hope this answers your question; however, if you need further information, feel free to write directly to this office.

Very truly yours,

Ronald L. Dick
Senior Tax Counsel

RLD:sr

cc: --- --- District Administrator