



STATE BOARD OF EQUALIZATION

February 18, 1960

Gentlemen:

We have the following comments to make concerning your client's position for redetermination.

At the preliminary hearing, we first discussed music cues sold on prerecorded tape. Since petitioner provided all the materials and performed the fabrication labor even before contracting with the ultimate customer, these sales do not differ in principle from sales of merchandise off the shelf by a store and, therefore, are taxable sales. We should also point out that sales tax reimbursement was collected on this type of transaction.

The second item discussed was transactions where the music on the master cues was transferred to petitioner-furnished blank tape, but where the fabrication was not performed until after the customer contracted to acquire the fabricated tangible personal property. Again sales tax reimbursement was collected on these transactions. This is clearly a situation where there was a sale of fabricated tangible personal property and the tax applies to such a transaction.

The third item discussed was the situation where the sound transfer was made upon customer-furnished blank tape. This is one of the items which is the subject of the petition. Section 6006(b) defines a sale, for sales tax purposes, as including the fabricating of tangible personal property for a consideration for consumers who furnish the materials used in the fabricating. Therefore, such fabrication labor performed by petitioner is the proper subject of taxation.

However, it is our clear understanding that your client specifically relied on a 1948 ruling by our legal staff and subsequent interpretations thereof. It is true that in 1948 this ruling that certain charges by a sound company were not taxable was on the theory that the company was a lessor of equipment and supplied operators for the equipment, but that direction and control with, respect to the work, and responsibility for the quality of the end product, was in the customer. Even then, however, the matter was not free from doubt. In the past 10 years, changes in techniques with respect to sound transfers have occurred. Magnetic recording was introduced which rendered unnecessary certain laboratory work upon which sales tax had been paid in the past. The "direction and control" exercised by the customer has largely become an order for certain work to be done, i.e., the end result, rather than "direction and control" of the details of accomplishing the work.

Nevertheless, in view of the fact that your client relied in good faith upon our 1948 ruling, consistent with our handling of such matters with respect to other similar problems, we are not disposed to make a final determination with respect to sound track transfers occurring prior to January 1, 1959, where sales tax reimbursement was not collected by your client in reliance upon the earlier ruling. It is for this reason we shall recommend that transactions in this third category be removed from the taxable measure.

The fourth matter discussed at the hearing was the separately stated "license fee" charges shown on the invoice to the customer in connection with the three types of transactions discussed above. The conclusion appears inescapable that such charges are taxable where the basic transaction is taxable since they constituted necessary payments for the use of the property and, therefore, consideration paid for one of the basic rights inherent in the acquisition of title.

We next discussed at the hearing the categories, transfers from 1/4" tape to 1/2" tape, or to 35mm magnetic film. Petitioner paid sales tax to the state where the film or tape to which the transfer was made was furnished by petitioner, but did not pay tax where the film was furnished by the customer. For the reasons stated in the discussion concerning the transfers from master cues to blank tape, the tax is applicable to such transactions. However, for the reasons also stated above, we shall recommend an adjustment in those situations where the customer furnished the tape or film and where sales tax reimbursement was not collected.

We next discussed the matter of the "package deal". There is first the nontaxable "package deal!". This was the case where your client merely acts as supervisor for the purpose of selecting appropriate music for a picture. Magnetic film copies of the selected music are merely loaned to your customer, the producer, who "dubs" them into the picture and then returns the copies of the music, which we specifically understand have not been substantially consumed, to your client.

Next, there is the taxable "package deal" where the transferring and dubbing is done by your client and a finished sound track is delivered to the producer. This results in the sale of tangible personal property.

We next discussed the "special" which is occasionally furnished in addition to the "package deal". Your client, for example, may have contracted to furnish a "package deal" which will involve the selection of all the music for a particular picture. Before the picture is completed, sometimes even before shooting starts, the producer may decide to add a dancing sequence which was not included in the original script. In order to do this, music will be needed for the dancer. This is where the "special" comes in. Your client selects music of the desired "tempo", transfers it to a disc, and delivers it to the producer. This music is then played on the set while the dancer dances to its rhythm or "tempo". Once the dance has been photographed in the desired "tempo", any music of the same "tempo" or rhythm may be inserted in place of that which was recorded on the special disc to which the performer danced. Thus, it is not necessary that the music furnished on the "special" disc be part of the music need in the completed picture; in fact, it usually is not because usually when the music is needed, there is insufficient time to select the final music and arrange for a license for its use, so the producer uses whatever music is available at the time and selects the final music later.

We agree with your contention that the furnishing of the "special" disc is a separate transaction from the "package deal" and, therefore, only the specific charge for the "special" is taxable. The

furnishing, thereof, does not render the other charges in a nontaxable "package deal" subject to the tax.

The item editing and cutting appears clearly to be taxable since it consists of fabrication labor performed for consumers.

We are asking our district office to revise the audit in accordance with the above discussion. Undoubtedly, district office representatives will contact you in the near future.

Very truly yours,

Warren W. Mangels
Associate Tax Counsel

WWI1:s