



**420.0132**

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February 26, 1986

This is in reply to your December 30, 1985 letter<sup>1</sup> regarding the application of sales tax to your charges for "stock" photographs. You provided the following explanation of your business:

"...I maintain a file of original photographs of a variety of subjects. When a publisher needs a photo from my files, negotiate a price based on the intended use of the photo. I deliver the 'original photo to the publisher and, after the final product has been printed, the original photo is returned 'to me. The client has purchased specific use rights to the photo, but I hold the copyright and I may sell other use rights to another client."

Before addressing the specific transactions you listed, we note that, when you allow a client the temporary use of photographs for a charge, whether you provide the photograph directly to the client or to another person, such as a publisher, on behalf of the client, your transaction is a lease of the photograph. We are enclosing a copy of Sales and Use Tax Regulation 1660, Leases of Tangible Personal Property - In General, for your further information.

Generally, the applicable tax on leases of tangible personal property is the use tax upon the use of the property in this state by the lessee. The lesser must collect the tax from the lessee at the time rentals are paid by the Lessee (Regulation 1660 (c) (1)). Tax does not apply to a lease of tangible personal property leased in substantially the same form as acquired by the lessor as to which the lessor has paid sales tax reimbursement or has timely paid use tax measured by the purchase price of the property (Regulation 1660(c) (2)).

Applying such criteria to your leases of photographs, if you purchase a developed photograph, whether a transparency or a print, and pay sales tax reimbursement to the retailer of the photograph, tax does not apply to your lease: receipts from the lease of the photograph, since you would lease the photograph in substantially the same form as acquired.

We will assume that you do not process your own film to develop the photographs; however, if you do process your film, please notify us, so that we may give an opinion as to the application of tax.

When you take a photograph and have a laboratory process your film to develop the photograph, the application of tax depends upon whether the photograph is a print or a transparency. If the photograph is a print, tax does not apply to your lease receipts, because you lease the print in substantially the same form as you acquire it. You should pay sales tax reimbursement on your purchase of the file and the processing. If the photograph you lease is a

transparency, tax does apply to your lease receipts. A transparency is composed of the same film from which Lt is developed; consequently, you would not lease the transparency in substantially the same form as acquired. You may issue a resale certificate on your purchase of both the film and the processing.

Turning now to the specific transactions you listed, we will assume in each transaction, the tax applies to the lease receipts under the criteria explained above.

"1. the client is a publishing company, which produces a book, calendar, greeting card, or other paper product, for sale. I am paid a flat fee, e.g. '\$400 for 1-year calendar rights."

Tax applies to the total \$400 that you receive from the one-year right to use that you grant to the client.

"2. The client produces a paper product, as above, and I am paid loyalty on the sale of the product, e.g. '5% of net sales.' "

Royalty charges for the use of tangible personal property are part of the taxable sales price upon which lease receipts are taxed (See Sales and Use Tax Annotations 295.0480, 295.0520, and 295.0540). Tax applies to your royalties at the time the royalties are paid by the lessee to you (Section 6203, Revenue and Taxation Code).

"3. The client is an advertiser, who purchases the right to use a photo in an advertisement, and then pays a magazine or other medium to publish the advertisement."

Generally, tax applies to your lease of the photograph to a client to use in an advertisement; however, tax does not apply to your lease of a photograph, whether or not produced to the special order of the consumer, when the possession, but not the title of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at average intervals not exceeding three months (See Regulation 1660 (d) (2)).

You noted that some of your clients have argued that your providing photographs for a charge results in your providing a nontaxable service under Sales and Use Tax Regulation 1501, because the photograph is "an idea ... expressed in the form of tangible personal property" similar to an author's original manuscript. The California Supreme Court rejected a similar argument in the case, Simplicity Pattern Co. Inc. v. State Board of Equalization, 27 Cal.3d 900, where the court found a difference between a manuscript, which is a document valued solely as an expression of the author's thoughts, and master films, which, though having intellectual content, are physically useful.

You noted that other clients have offered you resale certificates in lieu of tax in examples 1 and 2 above. You should not accept resale certificates from clients who lease photographs from you to use in producing printed matter. In this regard, Sales and Use Tax Regulation 1540, Advertising Agencies, Commercial Artists and Designers, provides at subdivision (d), in relevant part:

"An advertising agency, artist, or designer is the consumer of property such as photographs and art which it uses in the preparation of tangible personal property as to which it is acting as a seller unless, prior to any use having been made of the property, the property is sold or becomes an ingredient or component part of other tangible personal property sold. The agency, artist, or designer may purchase for resale photographs and art which, prior to any use, are sold or become physically an ingredient or component part of other tangible personal property that is sold by the agency, artist, or designer.

"The term 'ingredient or component part of other tangible personal property' includes only those items that become physically incorporated into the property sold and not those which are merely consumed or used in the production of the property sold. A photograph, for example, does not become an ingredient or component part of property sold merely because the image of the photograph is reproduced as part of the property sold. A photograph or art is regarded as having been used when a reproduction is made from the photograph or art."

We hope this answers your questions; however, if you need further information, feel free to write again.

Very truly yours,

R. L. Dick  
Tax Counsel

RLD:sr

Enc.