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March 30, 1993

REDACTED TEXT

Dear Mr. REDACTED TEXT:

This is in reply to your February 11, 1993 letter regarding the application of sales and use tax to charges for photography to an advertising agency. You posed the following specific questions:

"Question #1 - My client, the ad agency, buys photography for resale using their resale certificate after having a signed agreement with the ad agency customer which contains a passing of title clause in the agreement signed by both parties. Is there any question about when title passes under this circumstance and if title passes prior to use, can there be any circumstance where use tax would apply?"

Assuming that, under the terms of the title passage clause, the advertising agency transfers title to the photograph to the client prior to use, the sale of the photograph to the agency is nontaxable. Rather, tax applies to the agency's retail sale of the photograph to the client.

"Question #2 - Where title on photography is not transferred prior to use but the agency purchases the photography for resale for its customer using their resale certificate, what constitutes use other than the reproduction of the photography by the agency or for the agency?"

The Sales and Use Tax Law defines "use":

"'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business."

In other words, if the agency purchases a photograph under the agency's resale certificate, the agency's exercise of any right or power over the photograph other than the agency's sale of the photograph for incorporation into tangible personal property sold by the agency prior to use in the regular course of business is a use of the photograph for which the agency would owe use tax.

For example, if the agency were to have an 8" x 10" photograph reduced in size to 5" x 7" to incorporate into a pasteup, the advertising agency has made a use of the 8" x 10" photograph. On the other hand, if the agency were to buy an 8" x 10" photograph and incorporate that same photograph into a pasteup which the agency sells prior to use, the agency has not made a taxable use of the photograph.

In order for us to give you a specific answer, please provide us with the facts of the transaction for which you wish an opinion.

Very truly yours,

Ronald L. Dick
Senior Tax Counsel

RLD:sr