

**STATE BOARD OF EQUALIZATION**

1020 N STREET, SACRAMENTO, CALIFORNIA
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October 24, 1989

Mr. J--- R---, President
A--- T--- I---
XXXXX --- Street
--- ---, California XXXXX

Re: SR -- XX-XXXXXX

Dear Mr. R---:

I am writing in response to your September 5, 1989 letter requesting legal advice regarding the applicability of sales tax to a designer's sales of artwork to A--- T--- I--- Inc. (ATI).

The facts as I understand them are as follows. ATI sells "computer based training materials on diskettes." ATI contracted with a designer to create a new design for the cover of the packages in which the diskettes and manuals are sold. This design was used to create camera-ready art which was photographed. The printing plates used to print the packaging were created from the negative film.

The designer seeks sales tax reimbursement from ATI on its sales of art work. However, ATI maintains that "[the] art design cost is part of the packaging cost of the product we sell, thus should be exempted from sales tax." You request clarification.

California Sales and Use Tax Law imposes a sales tax on retailers for the privilege of selling tangible personal property at retail. (Rev. & Tax. Code § 6051.) Although the legal obligation to pay sales tax is on the retailer, Civil Code Section 1656.1 provides that the retailer may seek sales tax reimbursement from the purchaser. The use tax is imposed upon the storage, use or other consumption in this state of tangible personal property purchased from any retailer. (Rev. & Tax. Code § 6201.) Unless specifically excluded or exempted from taxation by statute, all retail sales or purchases for use within this state of tangible personal property are subject to either sales or use tax.

Under the above provisions, the designer's sales of art work to ATI would generally be subject to sales tax. Regulation 1540 (enclosed) provides guidance regarding the sales and use tax obligations of advertising agencies, commercial artists and designers. Subsection (c) of Regulation 1540 is applicable to the instant situation and provides:

“The tax applies to the entire amount charged by commercial artists or designers for items of tangible personal property such as drawings, paintings, designs or sketches transferred to the client, whether or not the property is suitable for display or is useful for actual reproduction by photo-mechanical or other processes.

“Tax does not apply to separate charges for preliminary art as defined in (b)(4)(A).”

As you can see, the fact that the art purchased is not camera ready does not affect the taxability of the sale. The only art exempt from taxation is preliminary art which is defined, in relevant part, as art “title to which does not pass to the client, but which [is] prepared ... solely for the purpose of demonstrating an idea or message for acceptance by the client before a contract is entered into or before approval is given for preparation of finished art ...” According to my understanding, the preliminary art exclusion from sales and use tax is not applicable here because the artwork was sold to ATI pursuant to contract. Presumably title passed to ATI upon sale, after which ATI made use of the design to produce its packaging.

Revenue and Taxation Code Section 6364 (enclosed) provides a tax exemption for sales of containers which appears to be inapplicable to the instant facts. The design purchased by ATI is not a container nor a component part of a container but rather is only used in fabricating the container.

In conclusion, the designer is liable for tax on sales of artwork to ATI and may, pursuant to statute, seek sales tax reimbursement from ATI. Please feel free to contact us if you require further information.

Sincerely,

Stella Levy
Tax Counsel

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Enclosures