

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

100.0193

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination Under the) DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)
)
M--- B. B---) No. SR -- XX-XXXXXXX-010
)
)
Petitioner)

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel W. E. Burkett on June 2, 1992 in Ventura, California.

Appearing for Petitioner:

Appearance Waived.

Appearing for the
Sales and Use Tax Department:

Mr. Vinson E. Root
Senior Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1981 through December 31, 1988 is measured by:

<u>Item</u>	<u>State, Local and County</u>
Transfers of artwork subject to tax.	\$231.695

Contention of Petitioner

The service qualifies for exemption as preliminary art.

Summary

Petitioner is a commercial artist that engaged in performing artwork as an independent contractor. A prior audit has not been conducted for this permit.

The Sales and Use Tax Department (Department) determined a deficiency measured by charges to customers for artwork. The underlying method of contracting and producing the artwork and the use made thereof is set forth in a memorandum prepared by petitioner's attorney dated June 26, 1990 as follows:

“M--- B. B--- is an artist and independent contractor who contracts with the telephone company for purposes of preparing layouts of proposed ads in the yellow pages of the telephone book. Ms. B--- works principally with difficult customers of the telephone company.

“Typically Ms. B--- will get an idea from the telephone company’s customer of what they would like to have in the phone book for an ad. Thereafter she will prepare a proposed lay-out for such an ad. If the customer is not happy with the ad, everything stops here and no further action is taken. If, however, the customer is satisfied with the lay-out, this lay-out must be completed and put in the form acceptable for yellow page advertising.

“Upon acceptance by the customer, the lay-out is then forwarded by the telephone company to their ad agency. Attached thereto marked Exhibits ‘1’ and ‘2’ are typical layouts that are prepared by Ms. B---, accepted by the customer and thereafter forwarded to the telephone company’s ad agency for completion and to be finished into a form acceptable for the yellow pages.

“Upon receipt by the ad agency, they re-do the mock-up for the yellow pages and will typically use a computer for preparation of the final artwork. At this point, the lay-out prepared by Ms. B--- is simply thrown away.

“The preliminary artwork forwarded to the ad agency is not in the form of a paste-up, mechanical assembly or camera-ready copy. Obviously they must change such mock-up and change such mock-up into the final artwork acceptable for the yellow pages. An example of the final yellow page ad is attached hereto and marked as Exhibits ‘3’ and ‘4’. As can be seen, the final artwork is by no means identical to the preliminary artwork.”

Petitioner contends that her work product constitutes preliminary art prepared solely for purposes of demonstrating a layout for acceptance by the customer. That title to the artwork does not pass to the customer, and it is not used as camera ready copy for reproduction, therefore reasons that her work qualifies for exemption as preliminary art.

Petitioner’s attorney also argues that there is no sale because California Civil Code Section 988 provides that ownership of artwork cannot be transferred without a writing signed by the artist.

The Department contends that the artwork was purchased for use by the customer and where accepted is subject to tax as a sale of tangible personal property. Annotated ruling no. 100.0080 dated April 11, 1969, is cited in support of the Department’s position. The annotation reads as follows:

“The furnishing of drawings or mock-ups to clients as tangible evidence of a design or an idea constitute taxable transfers of tangible personal property. Even though the drawings or mock-ups convey an idea of the design to the clients, the clients also desire some tangible representation of that idea.”

Analysis and Conclusions

Petitioner is a commercial artist who does independent contract work for [phone company] and is paid by them on a piecework basis to prepare layouts for their customers. She is paid for her work even if the customer does not like the ad and does not want to purchase [phone company]’s advertising. The question presented in this appeal is whether these visualizations and layouts are “preliminary art” which are exempt from tax.

Initially it is noted that the artwork is tangible personal property and as such will be taxable when sold to the telephone company. (Revenue and Taxation Code Section 6066.) Sales and Use Tax Regulation 1540(b)(4)(A) contains a definition of “preliminary art” and defines when this type of artwork is nontaxable.

“Preliminary Art. ‘Preliminary art’ means roughs, visualizations, layouts and comprehensives, title to which does not pass to the client, but which are prepared by an advertising agency, commercial artist or designer 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 to be furnished by the agency, commercial artist or designer to its clients. Tax does not apply to separate charges for preliminary art except where the preliminary art becomes physically incorporated into the finished art, as, for example, when the finished art is made by inking directly over a pencil sketch or drawing, or the approved layout is used as camera copy for reproduction....”

This section provides the basis for nontaxable preliminary art, however it specifically limits when the tax will not apply. The first requirement is that title does not pass to the client; the second requirement is that the preliminary art must be prepared before a contract is entered into or approval is given for preparation of the finished art. It is the third requirement that is important to this appeal. This requirement is that the finished art is to be furnished by the agency, commercial artist, or designer who prepares the preliminary art. Petitioner merely provides artwork, but never provides any finished art. In all situations the work done by petitioner is taken by the telephone company to its ad agency for preparation of the finished art. Because petitioner does not supply the finished art, her visualizations and layouts cannot meet the definition of “preliminary art”.

Petitioner further contends that the provisions of California Civil Code Section 988 are applicable to the first requirement that title is to remain with the artist. Although it is not necessary to decide this issue as petitioner has not met the requirements for preliminary art, we note that this section was enacted to protect an artist's residual rights. It does not relate either to preliminary art or to taxation. Sales and use tax law employs relatively self-contained concepts and is shaped by its own provisions and definitions. (See United States Lines, Inc. v. State Board of Equalization, [1986] 182 CA3d 529.)

Recommendation

It is recommended that the petition be denied.

SUSAN M. WENGEL, SUPERVISING STAFF COUNSEL

October 5, 1992

DATE