



STATE BOARD OF EQUALIZATION

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January 21, 1994

BURTON W. OLIVER
Executive Director

X-----

Dear X-----,

This is in response to your letter of October 28, 1993 in which you request clarification of the application of tax to various transactions involving the sale of products to photographers.

Before answering each of your questions, it might be helpful to provide a brief background of the Sales and Use Tax Law generally as well as the tax law applicable to photographers.

Sales and Use Tax Law Generally

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property. Although the sales tax is imposed upon the retailer, the retailer may collect sales tax reimbursement (usually itemized on the invoice as "sales tax") from the purchaser if the contract of sale so provides. (Civ. Code § 1656.1.) When the sales tax does not apply, Revenue and Taxation Code section 6201 imposes a use tax on the storage, use or other consumption of tangible personal property in this state. (Rev. & Tax. Code § 6401.)

A "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. (Rev. & Tax. Code § 6007.) A purchaser who purchases property for resale in his or her regular course of business may issue the seller a resale certificate. If timely taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit¹, the resale certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax. (Regulation 1668 (copy enclosed).)

Generally, tax applies to charges for the processing and sale of photographs. (Regulation 1528 (copy enclosed).) If the actual photograph purchased by your customer will be resold to the client prior to any use by your customer or if it will be incorporated into the property produced by your customer who then resells that property, then your customer can purchase the property

¹ The Regulation provides that if the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable, or because the purchaser makes no sales in this State, the purchaser should make an appropriate notation to that effect on the certificate.

ex-tax by issuing a resale certificate. If, instead, the customer makes any use of the negatives or photos prior to resale, such as making prints or copying the photographs your customer is using the negatives and photos and may not purchase them for resale.

Your first set of questions relate to the sale of internegatives and prints.

"QUESTION: If we have a mail order customer from out of state who requests an internegative and a print, and both are shipped to that customer, are we required to charge that customer tax for the internegative and the print or just the print or are we to charge no tax at all?"

A sale in interstate commerce is exempt from sales tax if the property sold is required to be shipped out of state pursuant to the contract of sale and is shipped to a point outside this state by the retailer by facilities operated by the retailer or by common carrier. The sale of the internegative and the print may well be exempt as sales in interstate commerce. This is explained in subdivision (a) (3) (B) of Regulation 1620, a copy of which is enclosed. To support your claim that the sale was exempt, you must retain the supporting documentation described in subdivision (a) (3) (D) of Regulation 1620. However, since you make a print from the internegative prior to the exempt sale in interstate commerce, the sale to you or your use of the internegative is subject to sales or use tax. Alternatively, if you were to transfer title to the negative prior to any use, then the sale to you would be a sale for resale but your sale would be completed in this state prior to any interstate shipment. Your sale of the internegative would thus be a taxable retail sale in this state. However, the sale of the print would not be subject to tax if meeting the requirements of the interstate commerce exemption provided you do not make any use of the print in this state.

"QUESTION: If the out of state customer is a professional photographer who plans to sell the final print to his or her customer, does that change your answer to the first question?"

The analysis applicable to this question is essentially the same as above. The sale of the internegative to you or your use of it is subject to sales or use tax unless title passes prior to use. If so, your sale is subject to sales tax. Your sale of the print is not taxable if meeting the requirements of the interstate commerce exemption or if for resale.

"QUESTION: If the out-of-state customer is a professional photographer who plans to sell the final print AND the negative to his or her customer, does that change your answer to the first question?"

The same analysis as above applies and the fact that the customer will sell the print and the negative does not change the conclusion that you owe use tax on the use of the negative prior to the exempt sale in interstate commerce or, if title passes prior to use, that your sale of the internegative is subject to sales tax.

Your second set of questions relate to the application of tax to shipping charges.

"QUESTION: If we send an order through a shipping service to an out-of-state client and we charge them a COD charge, should the COD fee be taxed on that order?"

Under Regulation 1632, tax applies to any C.O.D. fees paid by the retailer's customer on taxable sales unless the C.O.D. fee is not included in the sales invoice and the carrier collects and retains the fees. Thus, if you charge a C.O.D. fee on your taxable sales, that fee is included in the measure of tax. If, however, the sale meets the requirements of the interstate commerce exemption discussed above, tax does not apply to any of your charges.

"QUESTION: If the customer is a professional customer who sells his or her work to a customer, does that change your answer to the above question?"

As the regulation states, a C.O.D. fee invoiced by the seller applicable to a taxable transaction is also taxed. Therefore, if the sale is to a customer who can issue you a proper resale certificate or if the sale is otherwise exempt from sales tax, then the C.O.D. fee would not be taxed.

You also inquire as to the application of tax to the sale of proofs. Your charges for the proofs provided to the photographer are subject to sales tax. Tax applies to all film processing charges other than separately stated charges for the negative development of customer furnished film. (Reg. 1528 (b) (3) (B).) Thus, when a photographer brings you film for developing and asks you to provide him or her with "proofs" that he will show to his customers, the processing charges as well as the charges for the proofs are subject to tax. The Board has found that photographers, when acquiring the proofs, generally intend to use them rather than acquiring them for actual resale (of the proofs themselves). If a photographer intends to resell the actual proofs, he or she may be able to purchase the proofs for resale and should provide you with a resale certificate meeting the requirements of Regulation 1668. Because the photographer customarily uses the proofs to show his or her customers and does not ordinarily sell the proofs, a resale certificate you accept should specifically state that the photographer will resell such proofs. You state that the photographer does not know in advance the number of proofs that he will ultimately sell to his customer. In the case of proofs, this often indicates that the photographer is purchasing them for use and not for resale. If, however, the photographer actually intends at the time-of the purchase to resell some of them, the photographer can purchase all of the proofs for resale. The photographer will be liable for tax on those proofs not resold but used or consumed by the photographer.

I am unclear as to the question posed by your statement that:

"We assume that the rationale behind charging sales on this type of product is as follows: 'All work produced for professional photographers is taxable except that portion of the work which becomes an ingredient or component part of the prints, enlargements, or other items sold by the photographer.' Is this an accurate statement?"

Assuming that this statement is referring to sale of the proofs, it is a partially accurate statement. Sales of proofs are subject to tax because proofs are tangible personal property being sold at retail (that is, they are not being sold for resale nor are they materials that will become an ingredient or component part of the ultimate property to be sold by the photographer). To the extent that they are sold for resale, then there being no retail sale, the sale of the proofs would not be taxed. In reference to your question as to who is responsible for knowing how many proofs will be resold, as long as it is the intent of the photographer to resell the proofs, he or she may purchase all of the proofs for resale but will then be liable for the tax on those not resold prior to any use.

Your next question relates to the resale of internegatives. You cite a statement in the Tax Tips pamphlet which states that "an internegative may be sold for resale if the photo finisher establishes: (a) that the internegative was, in fact, resold by his customer, and (b) that the internegative was sold prior to the time it was used to produce a successive product." You ask whether the Board has any method for you to use to prove that the two above requirements were met.

This language from the pamphlet is relevant when the photo finisher does not take a timely and valid resale certificate in good faith. In such circumstances, the photo finisher has the burden of proving actual resale prior to use. The best method to avoid this problem of proof is to either take a timely and valid resale certificate in good faith or regard your sale of the internegative as a taxable retail sale.

The next question posed in your letter asks:

"QUESTION: Are photo labs supposed to charge customers sales tax when the customer asks us to process color negative or black and white film but do not ask us to provide any prints at the time of processing?"

As stated earlier, tax applies to all film processing charges other than separately stated charges for the negative development of customer furnished film. Development of film by the reverse process method is not nontaxable negative development. (Reg. 1528 (b) (3) (B) . . .) If you only develop the negatives of customer furnished film, your charge is not subject to tax. If you develop film by the reverse process method, or if you develop customer furnished film and provide prints, your entire charge is subject to tax.

You also inquire as to the application of tax to slide film:

"QUESTION: On the issue of the sale of color reversal (slide) films. If a customer purchases this film for resale but only sells one slide from a roll of 36 slides, should the purchase of the unprocessed film other than the one slide be taxed. If the photographer sells only one slide off of a roll of 36 slides that were shot to sell that one slide, should the processing for the 35 other slides on the roll be taxed?"

All processing charges for this method of development are subject to tax. For the slides purchased for resale, the photographer can issue a resale certificate if he intends to resell the slides, is engaged in the business of selling tangible personal property and holds a California seller's permit. With respect to those slides purchased for resale but which are not resold, the photographer owes use tax.

If you have any further questions, please do not hesitate to write again.

Sincerely,

Ms. Sukhwinder K. Dhanda
Staff Counsel

SKD:plh

Enclosures – Regulations 1528, 1632 and 1668

Bc: Sacramento District Administrator – KH

Audit Evaluation and Planning – MIC:40

The following statement appears on page 6 of the Tax Tips for Photographers, Photo Finishers, & Film Processing Laboratories pamphlet:

“In general, sales of internegatives are taxable. Tax applies to the sale of internegatives even though the final prints are shipped in interstate commerce. An internegative may be sold for resale if the photo finisher establishes: (a) that the internegative was, in fact, resold by his customer, and (b) that the internegative was sold prior to the time it was used to produce a successive product.”

This provision seems to imply that a photo finisher must always present actual proof of resale without regard to the taking of a timely and valid resale certificate. That is, it seems to indicate that a resale certificate is never alone sufficient. We believe that the correct rule is as stated in the text of this letter and that the pamphlet should be corrected to say that unless the photo finisher takes a timely and valid resale certificate in good faith, he or she must prove that the internegative was in fact resold by the customer and that it was sold prior to the time it was used to produce a successive product.