

**100.0000 ADVERTISING AGENCIES, COMMERCIAL ARTISTS AND DESIGNERS—
Regulation 1540**

See also Printing and Related Arts; Service Enterprises Generally.

(Note: Prior to considering the following annotations, the status of the Advertising Agency acting as a seller, agent of client or as nonagent should be determined in accordance with Regulation 1540.)

(a) IN GENERAL

100.0010 Advertisements in the Form of Sketches. Sales tax applies to retail sales of “spec ads,” to a client which are produced prior to the sale of advertising space, even though the advertisements may be only in the form of sketches. Tax also applies to the purchase of tangible personal property used in producing the product that is sold. Only tangible personal property purchased for the purpose of being incorporated into the advertisement may be acquired without the payment of tax. 3/4/93.

100.0015 Advertising Agency Acting as Agent. An advertising agency entered into a written agreement with its clients indicating the advertising agency was the agent of the client. The agreement also provided for the agency to transfer title to all property to the client after each job was done. The agency issued resale certificates to its vendors and then marked up its cost when billing its clients on such jobs.

Under these facts, the advertising agency may have generally acted as an agent for its client by acquiring property from suppliers with a disclosed client and agency status, but it acted in a contradictory way by issuing its own resale certificate to vendors and marking up its cost when billing its clients. Also, title to these materials passed to customers when agency physically delivered them to the customer for review and approval.

Therefore, the full amount charged to the client for sales of tangible personal property is subject to sales tax, including charges for “preliminary art.” Since title passed to the preliminary art, it does not meet the definition of preliminary art contained in Regulation 1540(a)(11). 12/31/93. (Am. 2005–2).

100.0016 Advertising Agency Acting as Agent. Many advertising agencies estimate the purchases they make on behalf of their clients and bill their clients for the estimated cost of these purchases. If the advertising agency bills the client an amount including tax that is more than the amount of the invoice from the vendor to the advertising agency, is the amount in excess of the actual cost considered as a mark-up of the price for the tangible personal property that it transfers to its client? If so, under what circumstances is the advertising agency considered as the agent for its clients?

In order to qualify as an agent making purchases on behalf of its client, the advertising agency must disclose the price charged by the vendor. Sales and Use Tax Regulation 1540(c)(2)(C) explains that when an advertising agency invoices its client for tangible personal property provided by the advertising agency without separately stating the amount paid to the supplier for that property, the advertising agency is the retailer of the tangible personal property sold to its client.

When the vendor delivers the tangible personal property and then issues its invoice to the advertising agency, the operation of subdivision (c)(2)(C) is avoided by simply issuing a “final” bill to the client that separately states the amount paid by the advertising agency to the vendor. If the excess of the estimated price versus the actual price is credited back to the client, the vendor is considered to be acting as an agent and the advertising agency will have made the purchase on behalf of its client. If the overcharge is not disclosed by the advertising agency, then subdivision (c)(2)(C) will apply to make the advertising agency the retailer. The billing of the estimated cost for the tangible personal property is not the factor that makes the advertising agency the retailer in the transaction, rather, it is the failure of the advertising agency to separately state for its client the amount billed by the vendor. 4/22/03. (2004–1).

100.0030 Art Incorporated Into Printed Sales Message. Where an agency contracts to sell camera-ready art as well as a sale of a printed sales message, tax applies to the total gross receipts of the sale of camera-ready art including charges for consultation and research and charges for supervision related solely to the production of camera-ready art.

If the contract is solely for printed sales messages which qualify for the exemption under Regulation 1541.5, none of the charges for consultation, research or supervision are subject to tax. 10/14/93.

100.0030.800 Artwork and/or Negatives Sold to Lessor. When artwork and/or negatives are sold to a lessor without payment of sales tax, the lease by the lessor to a lessee would be subject to the tax.

If the lessor desires to pay tax on its acquisition and thus avoid tax on the lease transaction, the measure of tax with respect to the acquisition would include all amounts required to be paid by the lessor, including the amount paid for any reproduction rights. 12/12/90.

100.0031 Artwork Transferred by Modem. When artwork is transferred by modem, tax does not apply regardless of the reason for using this method of transmission. The artist must retain some form of evidence to support the claim of transmittal by modem. It is immaterial that under federal copyright law the buyer may be regarded as the owner of copyright interest in the artwork prior to transmission. 5/31/94.

100.0032 Artwork Shipped Outside the State. An artist sells and leases her artwork to persons who reproduce it on prints, posters and jigsaw puzzles. Typically, a copy of the original artwork in the form of a photograph or transparency is furnished to the buyer. The buyers are all located outside California. The artist is required to ship the photographs or transparencies to the buyer at the buyer’s out-of-state location.

While the sale of the artwork would be taxable if delivery were made to the buyer in California, these sales are exempt sales in interstate or foreign commerce. 2/24/94.

100.0032.250 Evidence Artwork was Transferred by Modem. The transfer of artwork by remote telecommunications, such as modems, is not a sale of tangible personal property. Thus, tax does not apply to charges for artwork that is transferred by modem. The advertising agency must retain some form of evidence to support the claim of transmittal by modem. Such evidence could include the acknowledgment of receipt indicating the recipient’s receipt of the artwork by modem. It is also suggested that the seller, advertising agency, state on the invoice that delivery was by modem and retain a hard copy of the artwork with a dated notation of the electronic delivery. 1/28/97.

[100.0032.700](#) **Lease and Sublease of Intermediate Products.** An advertising agency leases photographs and illustrations from photographers for use as manufacturing aids to produce finished art. The advertising agency's use of a title passage clause in its contracts with clients is inappropriate when it uses the leased photographs in preparing property it sells to its clients because, by leasing the photographs and illustrations from photographers, the advertising agency does not have title to the photograph to pass to client.

If the advertising agency acts as an agent to its client under Regulation 1540(a)(2)(A), it may lease the photographs and illustrations from the photographer on behalf of the clients. In that case, the agency should pay use tax to the lessor on behalf of the client. The agency's reimbursement for the lease should be listed and priced separately from the agency's charge for the final product.

An advertising agency who wishes not to act as an agent on behalf of the client but rather to sublease the property to the client may timely pay use tax to the photographer (lessor) and, prior to making any use of the property, lease the property to the client in substantially the same form as acquired. If it does so, its sublease to the client is not taxable. The advertising agency may alternatively issue a resale certificate to the lessor and, prior to making any use of the property, sublease the property to the client, collecting use tax from the client on that sublease. In the latter event, the advertising agency's sublease of the property is subject to use tax regardless that the agency's sale of the final product to the client is exempt from tax (i.e., sales in interstate commerce) or is a nontaxable sale for resale. When the advertising agency acts as the seller, the following clause between the agency and its clients would be acceptable evidence that the property was subleased to the client prior to use by the advertising agency:

“It is expressly understood that, when the agency leases from lessors intermediate products, such as photographs and illustrations, the agency subleases such property to you prior to any use by the agency whether or not the agency transfers possession of the property to you. Any use of the leased property by the agency is on your behalf.” 7/17/97.

[100.0032.875](#) **Licensing Agent—Providing Artwork.** A taxpayer is a licensing agent for owners of certain intellectual property rights such as cartoon characters (properties). Under the various license agreements with the owners of the properties, the taxpayer's art department agrees to provide artwork incorporating the properties for use by licensees. Under the agreements, all uses of the properties by third party licensees shall insure to the benefit of the owner. The taxpayer shall not have any interest or property rights in any of the properties. Under the various licensing agreements (except one), the taxpayer receives a licensing fee of 40% of the gross receipts paid by licensees. In the one exception, the taxpayer will receive a five percent increase in the royalty payments if its art department provides any artwork.

Under the contracts with the owner of the properties, the taxpayer is providing both a service and a sale of tangible personal property (artwork). Since the taxpayer provides a variety of services to the owner for a fee and does not separately state a charge for the artwork, the portion of the fee attributable to the sale of artwork is subject to tax on the fair retail selling price of such property. (Regulation 1540(b)(2)(C).)

In the case where there is a five percent increase in the licensing agent fees when artwork is provided, the increased amount is consideration for the transfer of the artwork and, therefore, it is the measure subject to sales tax. 2/28/95. (Am. 2004-1).

100.0033 Management Fee. An advertising agency entered into a contract to provide advertising materials. It was not designated as an agent of the client. The contract provided that the agency was to pay all bills incurred in the advertising program and the client was to reimburse it monthly for those costs plus the sum of \$2800 which was designated as the monthly guaranteed compensation for the term agreement.

The agency was the retailer of the advertising material which it furnished under this contract. The \$2800 “guaranteed compensation” was a part of its gross receipts. Therefore, it should be pro-rated between the sales of taxable tangible personal property and non-taxable sales (i.e., printed sales messages) in order to determine the appropriate measure of tax. 4/16/91.

100.0034 News Releases and Copywriting. A public relations firm which writes news releases and writes the words for brochures, but does not provide artwork or printing is not engaged in the type of activities that require the holding of a seller’s permit. 8/19/88.

100.0034.200 Outdoor Displays and Projected Images. A taxpayer is in the business of producing outdoor displays featuring graphics which combine traditional printed outdoor displays and projected images. The images are projected using techniques that include stills, slides, motion pictures, interactive computer projections and light shows. The graphics may be projected onto billboards or onto architectural surfaces, such as buildings, walls, bridges, etc. The taxpayer creates and produces the graphics and may arrange for the lease of the equipment needed for the displays.

The tax consequences of the different circumstances involved in outdoor events are as follows:

(1) Programmed lighting. This is the use of automated stage lighting to produce theatrical effects. Custom computer program may be used to vary the direction, intensity, and sequence of the lights used. Some projections may include a projected logo or other graphic images. “Gobos” may be inserted into light sources to project desired images. A gobo is defined as a glass or metal stencil made by lasers and created from artwork (e.g., logo sheets). Computer programs control the light source so that the projected images can appear to move and change.

If the computer program to control the light show qualifies as a custom program under Regulation 1502(f)(2), the charges for its sale or lease are not taxable.

With respect to the gobos projection method, the taxpayer produces finished art for the client, such as a logo or other graphic image, but a third party makes the gobo, using the finished art. Tax applies to the taxpayer’s charges to its client for finished art produced by the taxpayer. (Regulation 1540(b)(4)(B).) If the gobos, special printing aids, or manufacturing aids are acquired from third parties by the taxpayer as its client’s agent within the meaning of Regulation 1540(a)(2)(A), the third person supplier is the retailer of the property to the taxpayer’s client and the taxable transaction is that sale.

Also, the taxpayer may act as an agent on behalf of its client in dealing with third persons in acquiring for sale or lease of any equipment, such as lights, trucks, generators, electronic equipment, etc., needed for the light show.

(2) Projected still images. Still images may be projected by a slide projector, a motion picture projector, or a computer projector.

If the taxpayer acts as a seller or produces the finished slide films in-house, the taxpayer is the photographer and sales tax applies to the sales price of the slides to the client. The sales price does not include expenses which are not a part of the gross receipts from the sale of the slides. Since the lease of the projection equipment, generators, and other tangible personal property

needed to set up and project the slides is unrelated to the production of the slides sold, these charges are excluded from the gross receipts from the sale of the slides unless the lease is required as condition of the contract of sale of the slides.

If the taxpayer acquires the finished slides from an outside photographer and acts as its client's agent, tax applies as stated in item (1) above. The reimbursement for property acquired as an agent for the client should be separately invoiced or shown separately on an invoice to the client. (Regulation 1540(a)(2)(A).)

(3) Printed image with projection motion. This display divides an outdoor display into two sections. Fifty percent of the display is a printed image, e.g., printed onto a billboard. Fifty percent of the display is a projected motion picture, e.g., projected onto the same billboard.

In this situation, the printed image portion of the display is treated separately from the projected motion portion. Regulation 1540 governs the application of tax to the printed image portion. The application of tax to the projected motion portion of the display is governed by Regulation 1529. If the projected motion meets the definition of "qualified motion picture" in Regulation 1529(b)(1), the charge for the projected motion would not be taxable. However, charges for release prints are taxable when sold to a person for exhibition or broadcast.

(4) Projected still images with printed motion. This is an outdoor display that splits the display into two sections. Fifty percent is motion picture, while fifty percent is a projected still image.

The application of tax to slide projection is covered under item (2) above. However, if the stills are projected by means of a motion picture projector, e.g., continuous loops of motion picture film or tape, the stills would then be considered the same as a motion picture and Regulation 1529 would govern the application of the tax.

(5) Interactive Motion. This method uses a computer and projection equipment to project live computer output onto an outdoor display.

See response to item (1) above with respect to custom computer programs and the sale or lease of computers, projectors, and other equipment needed for the display. 12/18/95.

[100.0034.275](#) **Paste-Up Work on Customer's Premises.** Charges by a self employed graphic artist for work on a customer's premises to paste up a catalog to make it camera-ready are included in gross receipts since a fabrication labor type of sale took place. 9/26/90.

[100.0034.310](#) **Postcard Advertising.** An advertising firm offers advertising for its clients by placing postcards in restaurants. If a restaurant agrees, a rack is installed by the advertising firm and the restaurant gets its own postcard printed free of charge to be placed in one slot in the rack. Postcards are provided free of charge to patrons. The advertising firm furnishes the postcards, places them, and refills the rack. The clients are billed monthly for the advertising. Title to the postcards remains with the advertising firm.

The advertising firm does not sell the postcards to its clients since title to the postcards remains with the advertising firm. The advertising firm provides an advertising service to its clients and places its own postcards in the restaurants for the restaurant patrons to take free of charge. The advertising firm is a consumer of the postcards and the racks in which the postcards are placed. 1/18/95.

[100.0034.360](#) **Press Check.** A graphic designer enters into a contract with a client that provides for the fabrication and sale of final art. The client enters into a separate contract with a printer

for the actual printing of the printed matter. Upon completion of the final art by the designer, the designer delivers the final art to the printer, or to the client for redelivery to the printer.

The designer also agrees to perform a service for the client it calls “press check.” This service consists of the designer approving the print run prior to the completion of the full order to insure that the final output is optimal in terms of color and shading. The designer in no way directs or supervises the manner in which the printer obtains the optimal results sought by the customer. The designer charges the client, not the printer, an hourly rate for providing this service. The press check is not a required process in the completion of the printed material and is offered as an optional service by the designer for the convenience of the client. The client may purchase the final art without also purchasing press check services.

Since the designer does not perform or supervise fabrication, its press check services do not constitute sales under subdivision (b) or (f) of section 6006. Thus, the charges for the services would generally be taxable only if the client would not purchase the final art without also purchasing the press check. Since the press check is optional and unrelated to the sale of the artwork, it is not part of the sale of the final art and the designer’s charges for the press check are not taxable. 11/5/96.

100.0034.400 Producing a Print Advertisement. A taxpayer who is a design and marketing company contracts to create and produce an advertisement for print media. The taxpayer’s concept of the advertisement is shown to the client in the form of visual presentations. The concept’s visual presentations include photographs, illustrations, and written advertising headlines. The visual presentations may be physically mounted on boards or may be in the form of “output from the computer” which includes text and graphics generated by a computer program and printed out in the form of hard copy so that the client can view it. Neither title to, nor possession of, the tangible personal property which is used in preparing or displaying the visual presentations passes to the client.

After the client selects a preferred concept, the taxpayer develops the concept further through a writing and graphic design process. Prior to production, the taxpayer prepares a final mock up for the client’s review and approval. After the client’s approval, the taxpayer produces, on a computer, camera ready artwork and type which it transmits via a computer disk to be reproduced or duplicated in-house by a photographic process. This photographic reproduction is then shipped by the taxpayer to the publication which will run the advertisement. The publication in which the ad will run is not a printed sales message as defined by Regulation 1541.5. The taxpayer is not acting as an agent on behalf of the client.

When the taxpayer produces a print advertisement for a charge, it is the seller of tangible personal property (such as photographic reproduction of the ad) sold at retail to the client. However, tax would not apply to the taxpayer’s separately stated charges for preliminary art, such as the visual presentations and/or mock-up which taxpayer shows to the client to obtain final approval for production of the final ad. Tax does apply to the total amount of the charges to the client for the production of the finished art and photographic reproduction of the ad following client approval of the preliminary art. 11/19/96.

100.0035 Service or Sale. Taxpayer produces and distributes an annual catalog of over 100,000 periodicals, newspapers, annuals, etc., to public, corporate, and academic libraries, who are the taxpayer’s potential customers. Customers desiring to buy or subscribe to publications listed in the catalog place their orders with taxpayer, who then places orders with the appropriate publishers. The merchandise is shipped directly to customers by publishers and the taxpayer is

billed by the publisher. Taxpayer bills the customers for the standard cost of the merchandise plus a service charge. Any ancillary charges or credits originating with the publishers, such as discounts or sales taxes, are passed on to the customer by the taxpayer.

Based on these facts, the transactions do not result in the performance of a service, but rather are purchases on the taxpayer's own behalf, for resale to its customers, unless it can be clearly established that it is acting as an agent of a customer in any given acquisition. To establish the existence of an agency relationship, the taxpayer must inform the publisher of the name of the client for whom the purchase is being made; must previously obtain written evidence of the agency relationship; bill the client for the same price as billed by the publisher, and may not issue a resale certificate. 12/19/91.

100.0036 Sales of Layouts. An advertising agency has entered into contracts with its clients. The contracts contain different clauses pertaining to terms of payments and termination. These clauses have a direct effect on whether there are sales of layouts to customers. The contracts fall into three groups:

(1) Clauses in these contracts state that upon termination, all property and materials in possession of the agency and paid for by the client will be transferred to the client. All rejected or unused advertising plans and ideas will remain the property of the agency.

Under contracts which contain clauses with this language, it is clear that title passes to the customer on all approved layouts and all rejected or unused plans remain the agency's property. Also, there are provisions in these contracts which state that once the property is approved and paid for the property belongs to the client. Accordingly, even though there was no transfer of possession, there was transfer of title and a sale occurs at the time of payment.

(2) Clauses in these contracts state that all work done by the agency for the client shall become the exclusive property of the client upon payment therefor. Following termination of agreement, the agency shall transfer to the client all material, etc., subject only to the client's payment to the agency therefor.

Under these types of contracts, the client has the right to all work done by the agency upon payment of the agreed upon price. All work includes preliminary layouts and thus, tax applies to charges made for layouts at the time of payment.

(3) Clauses in these contracts state that all plans for advertising, layouts, etc., shall become, from time of approval, the client's exclusive property. Title shall be contingent upon full payment by the client within the time provided in the agreement. Upon termination, the agency agrees to transfer and make available all property and materials in the agency's possession.

Under this type of contract, a sale has taken place on layouts that are approved and paid for. If the termination of the contract occurs before a layout is approved and paid for, the sale occurs on the termination date. 7/8/81.

100.0037 Sale—Transfer Via Modem. The transfer of illustrations to a client via modem for a fee licensing their use is neither a sale nor a lease as there has been no transfer of tangible personal property. The fact that the illustrations could have been transferred on disc or on paper during the illustrator's routine visits to the client is irrelevant as neither alternative was taken. 3/11/94.

100.0037.300 Transfer of Artwork by Artist via Computer. An artist prepares artwork and places it on the artist's removable computer storage media (e.g., floppy disk). The artist takes the disk to the customer's location, inserts the disk into the customer's computer, and transfers

the artwork from the artist's disk to the customer's computer. The artist removes the disk and retains it, and does not otherwise provide any tangible personal property to the customer. The transfer is not a sale of tangible personal property provided the artist retains title to and possession of the disk at all times. For example, if, after inserting the disk and prior to its removal, the artist leaves the computer and the customer uses it, the artist would be regarded as making a taxable lease of the disk. 7/22/96.

[100.0037.400](#) **Transfer of Artwork into Computer's Memory.** A graphic artist completes artwork on his computer and copies the artwork onto a digital storage file format such as "zip, syquest, floppy disc (or via internet)." The graphic artist transfers the file to the customer's premises and transfers the file of digital information into the customer's computer memory. The graphic artist then removes the original disk, which remains in his possession at all times. The copied file on the customer's computer would then become the customer's property. The customer may then manufacture tangible, hard copy prints of the file.

Where the graphic artist actually operates the customer's computer equipment to transfer the artwork into the computer's memory and maintains sole control over the customer's computer during this process, there is no transfer of tangible personal property to the customer. Therefore, the graphic artist's charge would not be subject to sales tax. However, if the graphic artist transfers the artwork to the customer in any tangible form such as printed copies or diskettes, tax applies to the charge. 5/14/97.

[100.0037.500](#) **Transfer of Photographs into External Computer Hard drive.** A commercial photography studio (Studio) downloads digital photography from the studio's computer hard drive to an external computer hard drive supplied by the studio's client or by the client's agent. The Studio performs the transfer of the photography on its own premises or at another studio that is being rented for the production of the photography. When the digital transfer of the photographs is completed, the client or its agent removes and takes possession of the computer hard drive it supplied. The Studio does not transfer any tangible personal property containing the electronic photographic imagery, such as CD-ROMs, DVDs, or other electronic media or hard copies, to the client or its agent. Does such an electronic transfer of photography qualify as a nontaxable electronic transfer of artwork?

Under Regulation 1540(b)(2)(B), a transfer of artwork electronically is not considered a transfer in tangible form if:

“ . . . the file containing the electronic artwork is transferred through remote telecommunications (such as by modem or over the Internet), or if the file is loaded into the client's computer by the advertising agency or commercial artist, and the client does not obtain title to or possession of any tangible personal property, such as electronic media or hard copy.”

In the above scenario, the photographs are transferred to an external computer hard drive that the client provides to the Studio. Once the photographs are transferred onto this external hard drive, the hard drive is returned to the client. An external hard drive is designed to store data and is not a computer. (Regulation 1502(b)(3).) An external hard drive is a form of storage media. (Regulation 1502(b)(13).) For purposes of Regulation 1540(b)(2)(B), a file is considered loaded into the client's computer when a person transfers the file directly into the permanent storage memory of the client's computer. Therefore, the above transfer would not be considered an electronic transfer under Regulation 1540(b)(2)(B). Instead, the transfer of the photography onto the external hard drive provided by the client or its agent would be considered taxable fabrication labor of the storage media. 7/21/04. (2005–2).

100.0038 Charges to Agencies. Except in the case of a “loaned employee,” freelance artists, copy writers, production supervisors, art directors, etc., who are hired by agencies to supplement the agencies’ own staff are regarded as retailers of tangible personal property which they fabricate unless the agency sells the property prior to making any use of it.

“Employee” generally means a person who is on the payroll of the agency. A “loaned” person may be regarded as an “employee” if (1) the person is an employee of a lender, (2) the borrower/customer provides the tools, equipment, raw materials, and premises at which the work is done, (3) the charge is an hourly rate, (4) the borrower has other persons who are clearly employees performing similar work or a person who is capable of giving meaningful direction to the loaned employee beyond describing the result desired, and (5) the borrower, not the lender, must supervise the loaned employee. 5/5/94.

100.0039 Fund Raising Consultant. A firm creates printed materials for use by nonprofit organizations in fund raising. It does consulting, research, copywriting, and project coordination. It subcontracts other work to graphic designers, printers, photographers, and others. All of these items are billed separately to the client.

Tax applies to the various charges as follows:

- (1) The charge for “consulting and research” is subject to tax as services that are part of the sale of the printed matter.
- (2) The charge for copywriting is subject to tax since the copy is written solely for use in the printed matter to be sold.
- (3) The charge for graphic design is subject to tax. Charges for “preliminary art” which is clearly identified on the billing are exempt if the requirements for “preliminary art” as described in Regulation 1540 are met.
- (4) Charges for writing a cover letter to be sent with the solicitation material are subject to tax.
- (5) Tax does not apply to charges for addressing envelopes. 1/10/85.

(b) DELINEATORS AND DESIGNERS

100.0054 Calligraphy, etc. Calligraphy is hand lettering and it is taxable as artwork pursuant to Regulation 1540 except when addressing for mailing. Addressing for mailing is nontaxable whether done by hand, by a calligrapher, by a typewriter, by a computer, or by a calligraphy machine. Addressing for other purposes, such as an inside address on a letter, which does not show through the window of an envelope, is taxable regardless of the method used.

One-of-a-kind art pieces created for a client, signs, and camera ready art are all taxable when sold at retail in this state. 7/1/91.

100.0060 Caricatures. Where an artist is hired by the hour by agencies for their clients, or by individual companies to draw caricatures at an event, a taxable sale of tangible personal property occurs and the entire amount paid to the artist is includable in gross receipts.

The artist transfers title and possession of the caricatures by giving them to the individuals at the events attended. Consideration received is in the form of money from the agency or firm which contracts with the artist to draw the caricatures. It is immaterial that the total consideration paid for each caricature varies, depending upon how many drawing requests the artist receives during an event. Although part of the payment received for selling caricatures may represent payment for the artist’s attendance at the event and drawing of the caricatures, the sales price includes the

full payment received by the artist, not just the value of the ink, paper, and drawing which the artist sells.

Where the artist is hired by the hour, regardless of whether a single caricature is drawn, and the artist attends an event at which a caricature is not drawn, the payment the artist receives is nontaxable. 3/15/91.

(Note: This opinion was superseded by section 6010.30, operative April 1, 2000.) (Am 2000-2).

100.0071 Comprehensive Pencil Layouts—Independent Contractor. A commercial artist prepares comprehensive pencil layouts for a telephone company's yellow pages. The artist creates penciled work sketches using paper, borders, and other fabrication materials provided by the telephone company. The artist provides her own pencils and also some supplies used on the layouts. The artist prepares the artwork at her residence and works at her convenience as long as the assigned work is completed by a stated deadline. No invoicing occurs. The work is priced by unit, and pricing is based on layout size and the estimated time required to complete a rough layout. All prices are determined by the telephone company and the artist can accept or reject any work assignment.

Under these facts, the artist is self employed and not an employee. The artist has exclusive discretion to self determine her day to day business activity and practices, and her ability to accept or decline projects. Both the artist and telephone company are free to terminate their relationship at the end of each contract.

Because the artist is an independent contractor and not an employee of the telephone company, her transactions constitute sales of tangible personal property and the amount received is taxable gross receipts. 5/22/91.

100.0073 Design Consultant. An individual, who describes his/her operation as a design consultant, provides its customers with ideas in how their products should look, feel and function. A large part of the work pertains to appearance and characteristics of the specific products. The ideas are usually conveyed through sketches, renderings or drawings. Sometimes a 3-dimensional study model is used to accurately convey the final color, finish, texture, feel or tactile quality of the concept.

Based upon the description of this business, the individual is a commercial artist or designer, not a design consultant who provides only services. Although some services are almost always necessary in the creation and manufacturer of commercial products and sales tax may be charged on the mass produced item when sold at retail, sales tax nevertheless applies to the transfer of those items which the client uses to manufacture other products. 2/13/91.

100.0074 Design Copy Furnished to Clients. A commercial artist performs design work for clients. The original art or designs are retained and copies are furnished to clients for use in newspaper advertisements. The entire charge is taxable regardless of the fact that only a copy of the artwork is furnished to the customer. 3/27/95.

100.0074.080 Design of Retail Store Interior. A design and marketing company (DMC) has a contract to design the interior layout of a store and its interior fixtures. The contract also provides that DMC will design and develop the store's display fixtures, including Point of Sale Graphics and Interior signage relating to the product that will be sold in the store.

The work DMC will perform for the client is as follows:

Step One: “Client Consultation.” Attend meetings and verbally present creative concepts to client.

Step Two: “Creative Concept.” Depict the concepts in tangible form as visual presentations mounted on boards. These include “conceptual illustrations, computer-generated visual materials incorporating typography, photography and illustrations.” These items will be presented out in the form of hard copy for client review. These designs will be rough at this point and will be modified many times. Neither title to, nor possession of, these designs will pass to the client.

Step Three: “Finished Drawings.” These will be the final drawings and/or diagrams of the interior layout of the store, and final drawings of interior store display fixtures and other interior fixtures. These drawings will be transferred to or used by the client in making the fixtures and placing them in the proper location in the store.

Step Four: “Finished mock-up and final artwork.” This will consist of final visual representations of the interior signs, including dimensions, artwork, typography, color and other details. These will serve as a guide during the making of the signs. DMC will also make example models, usually to the exact size and scale of the signage. The models will also be used as a guide during the making of the completed signs. The final artwork, embodied in a computer, will be transferred to the client.

Step Five: “Installation.” DMC is responsible for placing and, if needed, fastening and adjusting the fixtures in the store in the proper locations and configurations. No fabrication or assembly of fixtures will be performed at the store site, and the installers will be employees of DMC.

Step Six: “Training.” DMC will train employees of the client to properly set up and maintain the interior store system and plan designed by DMC. This training is not required by DMC but is an optional element which the client chose to include in the contract.

Since it is only the sale or use of tangible personal property which is subject to tax under the Sales and Use Tax Law, where there is no transfer of title or possession to tangible personal property, the transaction is not subject to tax. In Step One (“Client Consultation”) and Step Two (“Creative Concepts”) there is no transfer of title or possession of any tangible personal property from DMC to the client. Under the particular facts of this transaction, the services performed in these two steps are not considered to be a part of the sale of tangible personal property by DMC. Rather, these charges are for professional services for interior decorating. Thus, charges in Steps One and Two, including charges for travel cost, are not subject to tax. However, these charges should be separately stated in DMC’s billing to the client.

Since the final drawings of the fixture in Step Three are used as a reference or guide in making the fixture, they are final art or production drawings. Tax applies to the total charges made by DMC to the client for the finished drawings (including any related travel costs). Charges for any other final drawings provided to the client, or to a third party for the benefit of the client, are also subject to tax, excluding separately-stated charges for preliminary art as defined in Regulation 1540.

In Step Four, the final visual representations and mock-ups/example models are created to serve as a guide during the making of the completed signs by the third party vendors. Likewise, the computer disk which contains final artwork for the signs is fabricated by DMC to be used for actual reproduction in making the signs. The sales of the final visual representations, mock-ups, and computer disks by DMC to the client are retail sales of finished art which are subject to tax.

Tax applies to the total charges made by DMC for that finished art, including any charges for the cost of travel. If any preliminary art is physically incorporated into the finished art, charges for such preliminary art are subject to tax as well.

In Step Five, DMC is responsible for installing the fixtures. Charges for the labor or service of installing tangible personal property are not subject to tax. Thus, DMC's charges for installation of the client's fixture, as well as any charges for travel costs related to the installation, are not subject to tax. However, these charges should be separately stated in the contract or billing to the client.

In Step Six, the training provided by DMC as a service which is an optional part of the agreement with the client is not a part of any sale of tangible personal property by DMC to the client. Charges for that training, including any charges for travel costs are not includable in DMC's taxable gross receipts. However, these charges should be separately stated in DMC's billing to the client. 12/20/96.

100.0074.100 Design of a Television News Set. A taxpayer contracted to design a news set for a television station. Under the contract the taxpayer will perform two functions. One function is titled, "Design/Consulting Service," which includes preliminary drawings and 3-D drawings of the approved design concept. The contract provides reimbursement for per diem, mileage and other expenses associated with the completion of the contract. The other function is titled "News Set—Move to New Studio," which includes consultation to facilitate moving the news set, design consultation to select colors and wall coverings, charges for a "install tech," and per diem for the "install tech."

Under the "Design/Consulting Service" function of the contract, sales tax applies to the entire amount charged for drawings, paintings, designs or sketches transferred to the customer. Tax does not apply to charges for preliminary art if the charges are separately stated and meet the requirements of Regulation 1540(b)(4)(A). Taxable gross receipts also include charges for all expenses incurred including travel expenses and cost of blueprints used. However, a resale certificate may be issued to purchase blueprints from other vendors which are resold to the customer.

If the function titled "News Set—Move to New Studio" is optional, that is, the customer can purchase the first function which involves the sale of tangible personal property without also purchasing the second function, then the charge is not a service that is part of the sale of tangible personal property. In that case, sales tax does not apply to the taxpayer's charge for those separately stated consultation charges. 6/30/95.

100.0074.500 Designing Advertisements. Clients send the taxpayer pencil outlines of a proposed advertisement. The taxpayer buys camera work for line art and spec and typesetting. She designs the ad and sends proofs to the client. Subsequently, she buys color composite film which is sent to a magazine in which the ad will appear. Tax applies to the charge for designing and developing the ad in the form of the color composite film. Those items which are physically incorporated into the color composite film may be purchased for resale. Items such as photographs which are not physically incorporated into the color composite film cannot be purchased for resale. 5/16/88.

100.0085 Pencil Sketches. The transfer of a pencil sketch to a customer who uses it as an "idea" for a wood sign is the transfer of tangible personal property and is subject to tax. 8/1/90.

100.0100 Renderings—Unique Drawings. An artist who provides a firm with unique architectural renderings purchased for the purpose of resale must obtain a permit since ordinarily such purchases would constitute retail sales taxable to the artist. 1/4/65.

100.0103 Signs and Graphics Services. A taxpayer is a graphic design company, with a contract to provide signs and graphic services at a medical center. The taxpayer will provide graphic design (artwork) as well as architectural services. There are four phases to the contract and each phase must be completed and approved by the client before continuing to the next phase. The total fee will vary depending on the time it takes to complete each phase.

Phase I is a review of the client's design themes and to come up with conceptual ideas. Phase II is the "Preliminary Art" stage where sketches and rough design drawings are rendered. No title will pass on any work for Phase I and II.

Phase III will be for finished art. This will include the construction documents that consist of finished artwork and final blueprints. Phase IV will be for quality control supervision to observe the installation of the finished art, including the construction documents. No design or artwork is provided in Phase IV. Another company will provide the final blueprints and install the items at the site.

In Phase I and II, the taxpayer is regarded as preparing preliminary art. Tax will not apply to amounts billed under these two phases if the preliminary artwork is not physically incorporated into the finished artwork.

Phase III requires the taxpayer to provide finished artwork of the designs as well as final design drawings for use in the construction of finished signs. Under this phase, the taxpayer is providing either finished artwork and/or production drawings. As such, sales tax applies to the sale of these items.

A portion of the charges under Phase IV are regarded as attributable to the supervision and review of installation by a third party and are excludable from taxable gross receipts. However, under Phase IV, the taxpayer is also required to review and revise (as necessary) the fabricator's shop drawings. The taxpayer's charges under Phase IV, that relate to or contribute to the design or production of the finished signage, are taxable as part of the cost of producing tangible personal property sold to its clients. (Section 6012(a).) 4/14/95.

(c) PRELIMINARY AND FINISHED ART

Reproduction proofs, see Printing and Related Arts.

100.0104.800 Art Used in Packaging Containers. A company, selling computer based training materials on diskettes, contracted with a designer to create a new design for the cover of the packages in which the diskette 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 company maintains that the art design cost is part of the packaging cost of the product sold and thus should be exempt from sales tax.

The fact that the art purchased was not camera ready art does not affect the taxability of the sale. The preliminary art exclusion from sales and use tax is not applicable here because the artwork was sold to the company pursuant to the contract to deliver art work. Presumably title passed to the company upon sale, after which the company made use of the design to produce its packaging. The exemption for sales of containers also is inapplicable to this case. The design purchased by the company is not a container or a component part of a container, but rather is used in fabricating the container. 10/24/89.

100.0111 Catalog Layouts. A commercial artist designs catalog page layouts in the form of rough sketches for a client. He keeps the original and gives copies to the copywriter, typographer, photographer, and paste-up person, each of whom is under separate contract with the client. The copies are not returned to the artist. The sketches do not qualify as preliminary art because they are not prepared to demonstrate ideas to the client before the finished art is prepared. The sketches are the finished art. The transfer of possession of the copies for a consideration is a sale for sales and use tax purposes. 11/17/82.

100.0113 Charges for Ad-Prep. An advertising agency contracts to provide advertising services consisting of placement of advertising in printed media. The agency does not have an agreement with its customers authorizing the agency to purchase property as an agent on behalf of the customer.

In providing its services, the agency purchases photographs, artwork, art supplies, copywriting, typesetting supplies, and other items used to produce mechanical paste-ups. Photostats of the mechanicals are furnished to the print media. When the mechanical is of no further use, it is delivered to the client or destroyed.

The client is billed separately for placing the ad and an “ad prep” charge representing the cost of preparing the ad material (materials, outside labor and fabrication labor).

If the ad agency merely prepares and delivers the mechanical to the media on the agency’s own behalf, tax would not apply to the charge for the mechanical. The ad agency would be the consumer of tangible personal property used in preparing the mechanical. However, when the mechanical is delivered to the client or title to the mechanical passes to the client, the ad agency is the retailer and tax applies whether the charge is separately stated or not. 6/20/86.

100.0115 Charges for Graphic Design. A graphic designer is responsible for producing the layout of a newsletter for which the client contracts separately for the printing. During the course of the graphic designer’s work, meetings are held with the copywriter, printer and client to go over layout options and ideas for additional art. The printer is under contract with the client.

Tax applies to the total charge for the layout including the portion of the charge attributable to the meetings. 11/21/91.

100.0118 Computer Created Graphic Design. A taxpayer, a graphic designer, gives her client an estimate for the job, including her charge for all the time and material she needs to complete the ad layout. When the client approves the estimate, she prepares sketches, but does not show the sketches to the client; rather, she selects which sketches she will use to proceed to the next step. On her computer, she creates a page design that incorporates her ideas into two or three layouts. She laser prints the two or three layouts to present to the client. The client suggests changes which she incorporates. She then works on the original idea page to create the next step in the process, art which is presented to the client who may make additional changes. After making the changes, taxpayer prepares the final art and provides it to the client on a disk.

When the taxpayer provides the final art to the client in the form of tangible personal property in this state, whether the final art is on paper or computer disk, the charge is subject to sales tax. However, the taxpayer may exclude from the measure of tax separately stated charges for preliminary art even when it is prepared on a computer. The taxpayer’s nontaxable preliminary art charges might include charges for the sketches, the meetings attended prior to obtaining approval to proceed to finished art, the time spent on the photo shoot, and research time. Hard

copy of each of the roughs, visualizations, layouts, or comprehensives presented for client's approval should be retained for audit purposes. 6/3/97.

100.0120 Computer Created Preliminary Art. Charges for "preliminary art" created through the use of computers are not taxable provided the criteria of Regulation 1540(a)(11) are followed. The seller must retain proof of the client's ordering (or of the artist producing) the preliminary art prior to the date of the contract for finished art and the charge for preliminary art must be separately stated. Hard copy of each of the roughs, visualizations, layouts or comprehensives which are presented for the client's approval must be retained for audit purposes. 5/27/93. (Am. 2005-2).

100.0125 Concept Design of Stage Sets. A company is responsible for the concept design and follow through to the finished project of stage presentations. This includes the scenery, stage rigging, etc. The following specific sales are made by the company.

(1) The services provided by the company include conceptual design, drafting, floor plans, lighting design, and blueprints.

The charge for such design is taxable according to Sales and Use Tax Regulation 1540(c). However, tax does not apply to separate charges for preliminary art as defined in (a)(11).

(2) The company designs and produces the item designed. The charge for producing and designing the item is subject to tax.

(3) Company makes a retail sale of designs or scenery. Charges include services such as production management, site labor, site survey and miscellaneous services.

Tax applies to the entire gross receipts of the sale with no deduction for charges for the various items listed.

(4) Company constructs a "tech platform" for the client and removes the platform after production.

Tax applies to the charge for the platform. 10/23/91. (Am. 2005-2).

100.0129 Acceptance of Preliminary Art. In order to show that art qualifies as nontaxable preliminary art, it is not necessary that there be separate contracts for preliminary art and for finished art. Acceptance of preliminary art may be made either before a contract is entered into for the production of finished art or before the client (with a contract already entered into) authorizes the agency to prepare the finished art. 4/12/94.

100.0130 "Design Time." In the absence a client's purchase orders or an artist's work orders to prove that the artist's clients ordered, or the artist produced "preliminary art," the billing description "Design Time" in connection with the preparation of mechanicals and camera ready art is not sufficient to identify the time as being for preliminary art as there is no evidence that preliminary art was prepared prior to approval of the finished art. The situation is not corrected by merely relabeling the charge as preliminary art. 2/8/83.

100.0145 Mechanical Artwork. A designer is hired by a client as an independent contractor to design and produce mechanical artwork for a variety of printed materials. Their agreement includes a title clause stating that title to all items purchased is transferred to the client at the time of purchase and prior to usage by the designer.

The designer prepares two or three preliminary designs (preliminary art) for presentation. Once the client chooses a design, the client owns the design. The designer purchases items, such as photography, illustrations, etc., under his or her resale certificate, without sales tax

reimbursement, to complete the design selected. The designer then charges for these costs on the invoice to the client along with sales tax reimbursement. Under these circumstances, the designer may properly purchase the photography, illustrations, etc., under a resale certificate. When a preliminary design (preliminary art) is not chosen by the client, the designer retains title to and possession of the designs, and provides no tangible personal property to the client, then tax does not apply to the charge to the client for time spent on the project. Use tax is due from the designer on the purchase price of property used to prepare the rejected designs.

The designer may accept a resale certificate from an advertising agency or another design firm for the sale of the final product which will be sold by the ad agency or other design firm. On the other hand, the designer's sale of special) printing aids, such as photography and illustrations, generally would be a retail sale subject to sales tax regardless that the sale of the final product is a nontaxable sale or resale.

The designer may accept a resale certificate for the sale of special printing aids, only if the advertising agency or other design firm **insists** that it is purchasing the property for resale. In such case, the designer should require the purchaser to provide a resale certificate containing a statement that the specific property is being purchased for resale in the regular course of business. 6/30/92.

100.0158 Packaging Design Transfer. A taxpayer designed packaging for various types of products. By agreement with its clients, the taxpayer developed and presented to its clients a selection of preliminary package design concepts which were done at the taxpayer's expense and at no cost to the clients. Upon acceptance of the design by the client, the client obtained the exclusive right, title and ownership interest to the design concepts prepared by the taxpayer. At all times it was contemplated the taxpayer would transfer title to the design concepts to the client. The client's true object was the obtaining of the preliminary design package. The transactions were therefore retail sales of tangible personal property. Even if the design package is viewed as preliminary art, tax applies because title to the design packages was passed to the clients. 2/15/95.

100.0159 Preliminary Art. In order to avoid tax on preliminary art, the work must be ordered before there was a contract or agreement or approval to produce the finished art. Accordingly, it is necessary for the agency commercial artist or designer to establish proof of ordering or producing preliminary art prior to the date of contract or approval of the final art. The mere designation of a separate charge for "design" and a charge for "production" is not sufficient proof. 6/22/93.

100.0160 Preliminary Art. A company enters one or more concepts into a computer and gives the client a laser print proof of the layout(s). Whichever layout is chosen is refined and proofed (with laser print-outs) until it is "perfect". At that time, the company obtains signed final approval to have it printed on a high resolution printer. When a designer uses a computer to prepare art, the designer must abide by the provisions of the regulation in order to consider any part of the charge nontaxable preliminary art. The designer produces a rough design in physical form which could be identified as preliminary art when the "laser print proof" of the layout is produced. The taxpayer should have the client initial and date approval of that design or have other similar evidence to show that the proofs were produced prior to the date of the contract or approval for finished art. 12/14/92.

100.0161 Preliminary Art. A company issues separate purchase commitments for preliminary art and finished art. The company proposes an amendment to the "Additional Terms and

Conditions” of the purchase commitment. The proposed amendment states that the vendor agrees that all the materials prepared pursuant hereto shall be owned exclusively and in perpetuity by the company, and vendor hereby irrevocably assigns to the company any and all of its right, title and interest, including copyright, prior to any use by vendor in and to such materials. Exception: the above does not apply to conceptual/creative art (herein referred to as ‘Preliminary art’). . . .”

The amendment to terms and conditions is necessary for the vendor of the art to comply with the preliminary art provisions of Regulation 1540. Other criteria must also be met, i.e., the transfer of possession roughs, visualizations or other forms of preliminary art can only be temporary for review purposes only, before the vendor may exclude the charge for preliminary art from the taxable charge for final art. 11/4/92.

100.0162 Preliminary Art. A designer produces various types of artwork which include discussion of concepts, preliminary roughs, finished artwork and photo retouch. Some customers use the artwork to produce t-shirts, brochures, etc., and charge their customers for artwork, film, and the final product. The designer’s customer generally is the consumer of artwork and tax applies to the sale.

If the client’s contract with its customer provides that title to artwork passes prior to use, the designer may accept a resale certificate but should require the customer to include a statement that the specific property is being purchased for resale in the regular course of business. Provided that the resale certificate was taken in good faith, tax will not apply to the sale of the artwork. 8/31/92.

100.0163 Preliminary Art. Preliminary art is not taxable under certain conditions. One of the conditions is that title to the preliminary art must not pass to the client. If the preparer of the preliminary art gives possession of it to clients for purposes of review, the preparer must require the client to return the artwork. This is true even if the preparer intends to destroy the art immediately. 2/14/95.

100.0164 Preliminary Art. In order to avoid tax on preliminary art, it is not necessary that the specific term “preliminary art” appears on the invoice as long as the description is sufficiently clear and all of the requirements of Regulation 1540 for exclusion from tax are met. 11/3/94.

100.0168 Purchased Material Incorporated in Finished Art. As provided by Regulation 1540(a)(2)(B), advertising agencies are not agents of their clients with respect to the acquisition of materials which become physically incorporated into items of tangible personal property prepared by their own employees. Therefore, advertising agencies are retailers of purchased photographs, artwork, and typography which become physically incorporated into finished art produced by the agency’s employees.

On the other hand, they may be agents acquiring property not incorporated into the finished art if the agencies purchase the photographs, artwork, etc., as agents and use them as manufacturing aids. Charges by the advertising agency for these manufacturing aids and the related agency fees are not part of the “gross receipts” from the sale of the finished art. 5/16/77.

100.0170. Purpose of Preliminary Art. A disk containing computer generated preliminary art, after being shown to and approved by the client, is sent to the typesetter who uses the disk to drive the typesetting machine. Under these circumstances, the contents of the disk do not qualify as preliminary art as they were not created “solely for the purpose of demonstrating an idea or

message for acceptance by the client”, as required by in Regulation 1540(a)(11). 8/24/90. (Am. 2005–2).

100.0180 Rough Sketch. A preliminary sketch does not become “physically incorporated” into the finished art when the rough sketch is used to trace the outline of the art work to a separate water color board which is the finished art. The preliminary art work does not become “physically incorporated” unless it is actually touched up or finished and physically delivered to the customer as the finished art. 12/20/65.

100.0185 Sales of Illustrations Through an Agent. An illustrator obtains jobs through an artist’s representative who acts as her agent. The representative obtains jobs for the illustrator and bills the clients. The representative retains a commission out of the payments received from the clients.

If the representative acts as an agent, both in obtaining jobs and billing the clients, the illustrator is responsible for tax on the full amount paid by the clients to the agent. Since the illustrator is the retailer, she is liable for the sales tax and the representative/agent should transmit the sales tax reimbursement collected from clients to the illustrator.

The representative should not pay tax directly to the Board unless the representative has issued a resale certificate to the illustrator (i.e., the representative is not acting as an agent). 12/7/93.

100.0187 Sketches as Finished Art. A commercial artist designs catalog page layouts in the form of rough sketches for a department store. The artist keeps the original sketches and gives copies of the sketches to the copywriter, typographer, photographer, and paste-up person to use in designing and preparing the final advertisement. Each person is under separate contract with the department store. The copies are not returned to the artist.

The artist’s transfer of possession of the sketches or copies of the sketches, for a consideration, is a sale. The sketches do not qualify as preliminary art because the artist does not prepare the sketches solely to demonstrate an idea to the department store for approval before the artist prepares finished art. Rather, the sketches are the artist’s finished art. 11/17/82.

100.0190 Title Clause. An agreement between an advertising agency and its customer includes a title clause that states “all advertisements, copy, and layouts which are prepared shall become client’s property and shall be preserved for delivery to client upon request” is sufficient to include preliminary art. This is true even though preliminary art is not specifically mentioned. Under Regulation 1540(a)(11), “preliminary art” includes layouts. It is reasonable to interpret the contract as passing title to all “preliminary art,” particularly when “preliminary art” is not excluded from the title provisions any where else in the contract.

Therefore, the separately stated charges for preliminary art are subject to sales tax even though the preliminary art does not become physically incorporated into the finished art. 2/28/95. (Am. 2005–2).

100.0193 Transfers of Artwork. A commercial artist who is an independent contractor contracts with a company for purposes of preparing layouts of proposed ads. The artist will get an idea from the customer of what they would like in the ad. The artist will prepare a proposed layout for such an ad. If the customer is not happy with the ad, everything stops and no further action is taken. If the customer is satisfied, the layout is completed and put in a form acceptable for advertising. Upon acceptance by the customer, the layout is forwarded by the company to their ad agency. Upon receipt by the ad agency, they redo the mock-up and will typically use a computer for preparation of the fine artwork. At this point, the layout prepared by the artist is

simply thrown away. The question is whether these visualizations and layouts are nontaxable as “preliminary art.”

Regulation 1540 provides the basis for nontaxable preliminary art. However, it specifically limits when the tax will not apply. One such requirement is that the finished art is to be furnished by the agency, commercial artist, or designer who prepared the original art. This artist merely provides artwork but never provides any finished art. In all situations, the work done by the artist is taken by the company to its ad agency for preparation of finished art. Since the artist does not supply the finished art, the visualizations and layouts cannot meet the definition of “preliminary art,” and the artist’s gross receipts are subject to tax. 10/5/92.

100.0195 Tracing the Final Drawing. After preliminary art (sketches) has been approved by a client, a separate piece of paper is placed over the preliminary art and the final drawing is traced in ink.

Assuming that the preliminary art satisfies all of the necessary criteria and that it is truly preliminary art (i.e. is a rough or visualization and does not have the detail of finished art), the charge for preliminary art is nontaxable regardless that it is then used by placing a separate piece of paper over it to trace the final drawing in ink.

However, an artist cannot produce finished art in this fashion, without seeking an interim approval from the client, and consider only the charge for labor of tracing as subject to sales tax. In this case, the product is not “preliminary art” because it is not produced solely for the purpose of obtaining approval from the customer. 6/30/92.

100.0197 Transfer of Artwork on Disc. Computer generated preliminary art may be nontaxable if, for example, an artist created five different concepts on a disc and presented the designs to a client for approval. The client chooses one design and the artist recreates the design on another disc. If the artist follows the procedures in Regulation 1540(a)(11), the artist may consider the charge for preliminary art to be nontaxable. The artist must retain the medium containing the design as well as records to prove the client ordered, or the artist produced the preliminary art prior to the date of the contract on approval for the finished art.

The transfer of artwork on a disc is not considered to be a transfer of a custom program. The transfer of the output is subject to tax. Tax applies to the entire charge for the artwork, including any portion of the charge attributable to programming by the retailer for their use in producing the artwork. 3/17/92. (Am. 2005–2).

100.0198 Transfer of Finished Art to Third Party. Taxpayer is engaged in the graphic design business and produces finished art in the form of paste-ups for its clients. Taxpayer delivers a high quality photograph of the paste-up to a printer selected either by the taxpayer or the client. In either case, the client deals directly with the printer, and the printer’s charges are not reflected on taxpayer invoices. The printer then reproduces the item desired by the client, (e.g., advertisements and annual reports). In some cases, the taxpayer claimed to have retained title to the finished art and high quality photographs.

Regulation 1540(a)(1) specifically provides that advertising agencies are “sellers of any of the property, . . . they deliver to, or cause to be delivered to, . . . third parties for the benefit of their client.” Accordingly, taxpayer’s temporary transfer of possession to various printers of the finished art constituted taxable “sales” (leases) under section 6006(g), and taxpayer was responsible for collecting use tax from its clients measured by the lease payments, (i.e., the consideration clients paid for taxpayer’s service in the production of the finished art).

With respect to transactions in which taxpayer explicitly transferred title to its client, taxpayer was the retailer of the finished art and is liable for sales tax measured by its gross receipts. 10/11/83.

100.0200 Typography—Paste-ups. Typography expenses billed to clients of advertising agencies for reproduction proofs used in paste-ups are subject to tax. Paste-ups are finished art work produced for use of the client and are taxable. 12/21/65.

100.0220 Typography—Paste-ups. Advertising agencies and commercial artists are retailers of paste-ups which they produce and sell to others for use in the production of printed matter. When copy is produced by means of the Varityper and is physically incorporated into such a paste-up, the entire charge for the paste-up, including the portion of the charge attributable to the copy, is subject to tax. 5/11/67.

100.0250 Where Preliminary Art is Found Taxable. Company contracts to write, design and print a brochure for the State of California. Charges made to the state include “preliminary art.” Tax applies to the total sale price of the printed brochures with no deduction for the charge for preliminary art. “Preliminary Art” is taxable because it is not required to be prepared before entering into the contract or before obtaining approval of the finished art. Sales and Use Tax Regulation 1540(a)(11). 10/21/91. (Am. 2005–2).

100.0251 Preliminary Art. The requirement in Regulation 1540 that “preliminary art” must be clearly identified on the billing as preliminary art does not mean it must be designated as “preliminary.” Suitable terms such as “roughs,” “visualizations,” “layouts,” “comprehensives,” “concept art,” etc., which are descriptions of the preliminary art will suffice. 1/21/77.

(d) PROPERTY TRANSFERRED OR USED

100.0280 Advertising Agency as Consumer—Lump Sum Billings. An advertising agency is the consumer of property that it uses prior to sale to a client. For example, if the agency purchases artwork for resale, photographs the artwork, and incorporate the photograph into an assembly, the agency has made a taxable use of the artwork. In such case, tax applies to the sale of the artwork to the agency. Tax would also apply if the agency later sold the artwork to the client. The agency may not purchase such property under a resale certificate unless it sells the property to the client prior to its use of the property.

Substantiating that property was sold to a client prior to use would require an explicit written agreement with the client, prior to the agency’s use of the property, transferring title to the property to the client prior to such use. 8/28/81.

100.0292 Advertising Agency—In-House Art Department. Tax applies to charges for finished art produced by an advertising agency’s own art department, even though it has a true agency contract with the client. Charges for typography and copy written solely for inclusion in the finished art and any mark-up thereon would be included in the measure of tax. 10/14/75.

100.0300 Advertising Agency as Nonagent. An advertising agency is the seller of reproduction art work prepared by its own art department for the preparation of pamphlets, etc. Section 2295 of the Civil Code provides: “An agency is one who represents another, called the principal, in dealings with third persons.” An advertising agent in the preparation of art work for its client is not dealing with third persons and, accordingly, cannot act as an agent with respect to that activity. 3/11/58.

100.0304 Artwork. When an ad agency develops artwork for a client that will be used in reproducing the image on the packaging of software which is to be resold, the sale of the artwork is subject to sales tax. (Regulation 1540(a)(7).)

On the other hand, when the ad agency only prepares the artwork for its own use and contracts with the client only to sell the packaging, the total charge for the sale of the packaging to the client is exempt as a sale of a nonreturnable container. (Regulation 1589(b)(1)(A).) 5/27/93. (Am. 2005–2).

100.0305 Artwork Reproduced on Packaging. Artwork is sold by an advertising agency to a client and the client transfers it to a printer for use in reproducing the image on packaging. The advertising agency is making a taxable sale to the client because the sale of artwork for use by a client to advertise its product is a retail sale. 5/27/93.

100.0306 Artwork Used for Reproduction Purposes. A graphic designer who renders artwork and uses the photo mechanical transfer copy process to copy artwork for its client is making a use of the artwork. Thus, tax applies to the cost of such artwork to the graphic designer. If the graphic designer produced the artwork, tax is due only on the cost of the materials (ink, paint, illustration board, etc.,) consumed in producing the artwork.

However, such artwork would be sold prior to use if, before the graphic designer uses the artwork, the graphic designer and client enter into an explicit agreement that title to the artwork will pass to the client before such use. The intention to transfer title prior to the use of the artwork should be clearly expressed in writing constituting a part of the contract sale entered into prior to use of the artwork. 3/10/82.

100.0308 Campaign Literature. A company is in the business of handling political campaigns for candidates and issues in California election contests. A contract is signed indicating that the company is an agent in the purchase of brochures and other materials. The company provides consulting and planning services in setting up the campaign and deals with the printer in the procurement of brochures and mailing pieces. The company prepares preliminary art, some final mechanical art, and some computer design which is used in the production of brochures. When brochures are finished the company bills the candidate for the brochures separately from other consulting services, but does not usually specify on the invoice the exact printer's charge nor does it routinely show the markup separately.

The company claims that the true object of the contract is the performance of consultant services, that the value of simple artwork done by the in-house artist is minimal, and that elaborate productions are handled by outside suppliers of art and mechanicals who charge sales tax. The company also provides creative concept copyrighting and graphic design with in-house staff for other direct-mail product-only accounts and understands that there are "printed sales messages" which are exempt from tax.

Apparently the company, by signing a contract "indicating that the company is an agent", wishes to avail itself of the procedure provided in Regulation 1540(c)(1) to act as agent for the client. Since the company both marks up the cost of the brochures and does not separately invoice the reimbursement for purchasing the property, it does not acquire the brochures as an agent on behalf of the candidate. The company makes a taxable sale of the brochure and artwork to the client.

The true object of the contract is not the performance of consulting services. The artwork or brochures are custom made properties and have value as items of tangible personal property, the

sale of which is subject to sales tax. The sales of the brochures are not exempt sales of printed sales messages. “Campaign literature and other fund-raising materials” are specifically excluded from the term “printed sales messages.” 4/15/92. (Am. 2005–2).

100.0309 Concept Development. A charge for writing copy, (e.g. an outline of the points to cover in final copy, etc.) which will be incorporated as part of tangible personal property, may be excluded from the taxable measure as nontaxable author services if the advertising agency or designer follows the criteria of Regulation 1543(b)(4) which sets out the necessary terms of the contract and the standard of proof which are necessary for the exclusion to apply. 3/31/93.

100.0310 Copy Writing Solely for Media Advertising. Charges for copy written solely for media (television, radio, newspaper, etc.) advertising messages or for more than one purpose, one of which is for media advertising messages, are not taxable. Such charges must be separately stated from taxable charges. Therefore, if the agency contracts to furnish the client with both the mechanical and the placement of the advertising, the agency’s separately stated charge for writing the copy is excludable from the gross receipts of the sale of the mechanical. 3/27/87.

100.0320 Copy Writing Used in Media Advertising. If an agency only sells a mechanical to a client and does not contract to furnish the media advertising, the taxable gross receipts of the sale of the mechanical include the charge for the copy writing. In such cases, the agency’s charge is for “copy written solely for use as a part of tangible personal property as to which the agency is acting as a seller.” (Regulation 1540(b)(4)(E).) The client’s furnishing the mechanical to the media does not make the charge for the copy nontaxable. 3/27/87.

100.0328 Cutouts. Tax applies to an advertising agency’s charge for cutouts. Cutouts are a type of special order merchandise produced to the order of the advertising customer. While possession of the cutout is retained by the advertising agency, it has been concluded that they are used solely for the benefit of the advertising customer and are sold within the meaning of section 6006(f). The utilization of the cutout on behalf of the customer is considered to be comparable to drawings, lettering, special assemblies, etc., produced for clients by advertising agencies in the course of providing advertising services. Such items are classified as sales under Regulation 1540(b). Cutouts are distinguishable from sign copy because cutouts are painted and displayed on reusable panels owned and retained by the advertising agency. 8/11/71.

100.0340 Engravings for Out-of-State Periodicals. Advertising agencies are consumers of engravings produced for them for use in fulfilling advertising contracts with customers. When the advertising is to be placed in a periodical published outside California, and the contract requires the engraver to send the finished engraving directly to the publisher, the sale is in interstate commerce and exempt. The furnishing of the customary number of proofs for the purposes of inspection and approval will not affect the exemption. If a substantial number of proofs are printed pursuant to orders of the agency or the customer and are used for purposes other than inspection and approval, the charge for the engravings is subject to tax. 12/4/68.

100.0355 Mechanical Assembly Purchased from Outside Source. If an advertising agency contracts to sell printed material to a client, the agency cannot avoid paying sales tax on the sale by merely obtaining the actual assembly of the paste-up or mechanical as an agent for the client. 1/24/84.

100.0360 Modeling Fees. An advertising agency which entered into contracts with an advertiser and with a model (both independent contractors) is the retailer of the photographs which it

furnishes to its clients. The taxable retail selling price of the photographs includes the photographer's charges for taking the photographs and the model's fee. 9/22/67; 11/13/67.

100.0450 News Releases Prepared by Client. A client of an ad agency prepares its own news releases. The agency does not edit, rewrite or modify the releases. The agency submits the news release to a printer. The client is billed for the agency's services on a hourly bases and for the cost of the printing plus an agency commission.

If the ad agency establishes that it has acquired the printing as an agent for the client under the requirements of Regulation 1540, tax does not apply to the advertising agency's charges for its services. 1/9/85.

100.0660 Stock Photographs. An advertising agency obtains a license for a one-time use of a photograph. Printed material which includes copies of the photograph is sold to the client. The photograph itself may not be purchased for resale by the advertising agency since it is not physically incorporated into the product which is sold. 6/16/94.

100.0760 Transfer of Mechanical Paste-Up. A firm transfers a mechanical paste-up it produces to a client. The firm retains title to the paste-up but the client has the right to use the paste-up for reproduction purposes. The gross receipts from the transfer of possession of the paste-up are subject to tax as the sale of tangible personal property. 9/27/73.

100.0900 Writing Advertising Copy. Writing advertising copy is generally a non-taxable service. A charge for writing copy that is obtained by an advertising agency, as an agent of the client, is nontaxable. However, tangible personal property that is sold at retail is taxable and includes, in the taxable gross receipts, the charge for writing copy as part of the selling price of that property. 8/24/90.

(e) REPRODUCTION RIGHTS TRANSFERRED WITH FINISHED ART

100.1100 License to Reproduce Photographs Transferred on Disk to Client. A photographer contracted with a company to photograph the company's staff. The photographs will be used on the company's website, as well as for public relations and marketing materials. The photographs were shot with a digital camera and the photographer downloaded them into the company's computer at the end of each day. In addition, the photographer burned some of the photographs into CDs for the company. The parties signed a written contract. The photographer itemized the various costs charged to the company on the project invoices, i.e., licensing fees, digital charges, rentals, travel, etc.

Pursuant to Regulation 1540, the transfer of photographs in tangible form to the customer is a sale. However, when the photographer downloads the photographs directly into the computer of the customer and the customer does not obtain title to or possession of any tangible personal property, such as electronic media or hard copy, this constitutes an intangible transfer of the photographs. Tax does not apply to the charges for this type of transfer. The transfer to the customer of images on a disk is a transfer of tangible personal property and the charge for the images on a disk is taxable.

If there is a transfer of tangible personal property in connection with a given project, the photographer must determine whether all or only a portion of the invoice is taxable. If the sale of the photographs is pursuant to a technology transfer agreement (TTA), then the tax does not apply to the portion of the sale representing the intangible copyright interest in the photographs. Tax will apply to the charges for transfers of tangible personal property.

In order to qualify as a TTA, the agreement must be evidenced by a writing, it must assign or license a copyright interest, and the transfer must be for the purpose of reproducing and selling other property which will be subject to the copyright interest. In the instance described above, the photographer's customer uses the photographic images for its website, and for public relations and marketing materials. Because the customer is not making and selling a product subject to the photographer's copyright interest in the photographic images, the transaction does not qualify as a TTA. Therefore, all of the photographer's charges on the projects where images are transferred to the client on disk are taxable. 7/8/03. (2004-2).

ADVERTISING MATERIALS

See Gifts, Marketing Aids, Premiums and Prizes

ADVERTISING SPACE

Sale of, see Tangible and Intangible Property

AERIAL PHOTOGRAPHS AND MAPS

See Photographers, Photostat Producers, Photo Finishers and X-Ray Laboratories.

AGENCY FEE

See Advertising Agencies, Commercial Artists and Designers.

AGENTS

Forwarding, see Interstate and Foreign Commerce.